

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Criminal Justice

BILL: SB 84

INTRODUCER: Senator Joyner

SUBJECT: Controlled Substances

DATE: October 2, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Cannon	CJ	Pre-meeting
2.			ACJ	
3.			FP	
4.			RC	

I. Summary:

SB 84 authorizes a court to grant a defendant's motion to depart from a 3-year mandatory minimum term and mandatory fine for trafficking in cocaine, hydrocodone, oxycodone, opiates or opioids, phencyclidine, amphetamine, methamphetamine, flunitrazepam, phenethylamines, or lysergic acid diethylamide (LSD) if the court finds all of the following criteria are met:

- The defendant has not previously benefited by a departure from the mandatory minimum term and mandatory fine.
- The offense would be subject to a 3-year mandatory minimum term and mandatory fine absent a departure.
- The offense only involves possession of any of the noted controlled substances (or a mixture containing the substance) in a specified quantity.
- The offense does not involve use of a minor, a firearm, a deadly weapon, or use or the threat to use physical force against another person.
- The defendant does not have a previous conviction or withhold of adjudication for a drug trafficking violation, and does not have a previous conviction, adjudication of delinquency, or withhold of adjudication for a non-trafficking controlled substance violation, a specified sexual offense, or any other specified offense.
- The defendant is amenable to substance abuse treatment if the court determines that he or she is in need of such treatment.

The state attorney may object to the motion to depart.

II. Present Situation:

Drug Trafficking

Unlawful activities involving controlled substances (e.g., possession or sale of controlled substances) are punishable under s. 893.13, F.S. (prohibited acts involving controlled substances), and s. 893.135, F.S. (drug trafficking). “Drug trafficking” occurs when a person knowingly sells, purchases, manufactures, delivers, or brings into this state, or is knowingly in actual or constructive possession¹ of, certain controlled substances in a statutorily-specified quantity.²

Whether a person is charged with drug trafficking depends, in part, on the type of controlled substance possessed, sold, etc. Only a limited number of controlled substances are addressed in s. 893.135, F.S. Relevant to the bill, s. 893.135, F.S., punishes trafficking in cocaine, hydrocodone, oxycodone, opiates³ or opioids,⁴ phencyclidine, amphetamine, methamphetamine, flunitrazepam, phenethylamines,⁵ and lysergic acid diethylamide (LSD).

The quantity of a controlled substance must also meet a minimum weight threshold to constitute “trafficking” and s. 893.135, F.S., provides for escalating weight ranges. Most drug trafficking offenses are first degree felonies⁶ and subject to mandatory minimum terms.⁷ The mandatory minimum term applicable to a drug trafficking act depends upon which weight range is applicable to the quantity of the controlled substance possessed, sold, etc. In some cases, possession, sale, etc., of a relatively small quantity of a covered controlled substance will trigger drug trafficking penalties.

The shortest mandatory minimum term available under s. 893.135, F.S., is a 3-year mandatory minimum term. Provided below are the threshold weights that trigger drug trafficking penalties and the weight ranges applicable to a 3-year mandatory minimum term for each of the controlled substances or controlled substance categories addressed in the bill.

Statutory Reference	Covered Substance	Threshold Weight	Weight Range Applicable to Three-Year Mandatory Minimum Term
s. 893.135(1)(b), F.S.	Cocaine	28 grams	28 grams or more but less than 200 grams

¹ One important and unique feature of the drug trafficking statute is that the prosecutor is not required to prove that the possession of the controlled substance was with the intent to sell, deliver, manufacture, etc., the substance.

² See s. 893.135, F.S.

³ Examples of opiates are opium and morphine.

⁴ Examples of opioids are heroin, hydromorphone, oxycodone, and hydrocodone.

⁵ “Phenethylamines” is a broad category of “psychoactive substances.” Sanders, B., Lankenau, S.E., Bloom, J.J., and Hathazi, D., “Research chemicals’: Tryptamine and Phenethylamine Use Among High Risk Youth,” *Substance Use & Misuse* (2008), Vol. 43, No. 3-4, pages 389-402, available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2536767/> (last viewed on September 23, 2015).

⁶ A first degree felony is punishable by up to 30 years in state prison and a fine of up to \$10,000. Sections 775.082 and 775.083, F.S.

⁷ Most drug offenses under s. 893.13, F.S., are not subject to mandatory minimum terms.

Statutory Reference	Covered Substance	Threshold Weight	Weight Range Applicable to Three-Year Mandatory Minimum Term
s. 893.135(1)(c), F.S.	Hydrocodone, oxycodone, opiates and opioids	14 grams (hydrocodone), 7 grams (oxycodone), 4 grams opiates and opioids)	14 grams or more but less than 28 grams (hydrocodone), 7 grams or more but less than 14 grams (oxycodone), 4 grams or more but less than 14 grams (opiates and opioids)
s. 893.135(1)(d), F.S.	Phencyclidine	28 grams	28 grams or more but less than 200 grams
s. 893.135(1)(f), F.S.	Amphetamines	14 grams	14 grams or more but less than 28 grams
s. 893.135(1)(g), F.S.	Flunitrazepam	4 grams	4 grams or more but less than 14 grams
s. 893.135(1)(k), F.S.	Phenethylamines	10 grams	10 grams or more but less 200 grams
s. 893.135(1)(l), F.S.	Lysergic acid diethylamide (LSD)	1 gram	1 gram or more but less than 5 grams

The Criminal Punishment Code and Mandatory Minimum Terms

The Criminal Punishment Code (“Code”)⁸ is Florida’s framework or mechanism for determining permissible sentencing ranges for noncapital felonies. Noncapital felonies sentenced under the Code receive an offense severity level ranking (Levels 1-10). Points are assigned and accrue based upon the level ranking (sentence points escalate as the level escalates) assigned to the primary offense, additional offenses, and prior offenses. Points may be added or multiplied for other factors. For example, if the primary offense is drug trafficking, the subtotal sentence points are multiplied by 1.5, at the discretion of the court, for a Level 7 or Level 8 trafficking offense.⁹

Total sentence points are entered into a mathematical calculation (specified in statute) to determine the lowest permissible prison sentence in months. The permissible sentencing range for the primary offense is generally the lowest permissible sentence scored up to and including the maximum penalty provided under s. 775.082, F.S., for the primary offense.

The Code includes a list of mitigating factors. Generally, if a mitigating factor is found by the sentencing court, the court may sentence an offender below the lowest permissible sentence (a “downward departure”). However, a mandatory minimum term is not subject to mitigation.¹⁰

⁸ Sections 921.002-921.0027, F.S.

⁹ Section 921.0024(1)(b), F.S.

¹⁰ See *State v. Vanderhoff*, 14 So. 3d 1185 (Fla. 5th DCA 2009).

Most of the mandatory minimum terms found in Florida law involve drug trafficking offenses. Mandatory minimum terms impact Code sentencing. “If the lowest permissible sentence is less than the mandatory minimum sentence, the mandatory minimum sentence takes precedence.”¹¹

A mandatory minimum sentence may be longer than a prison sentence scored as the lowest permissible sentence under the Code. If the mandatory minimum sentence is longer than the scored lowest permissible sentence, the sentencing range is narrowed. Further, with few exceptions, the sentencing court must impose the mandatory minimum term.¹²

III. Effect of Proposed Changes:

The bill amends s. 893.135, F.S., to provide that if a defendant is convicted of a violation of this section, the defendant may make a motion to the sentencing court to depart from the 3-year mandatory minimum term of imprisonment and mandatory fine that would apply to the conviction absent a downward departure.¹³ The state attorney may file an objection to the motion.

The court may grant the motion to depart if it finds that the defendant has demonstrated by a preponderance of the evidence that all of the following criteria are met:

- The defendant has not previously moved to depart from a 3-year mandatory minimum term and mandatory fine under s. 893.135, F.S. (the drug trafficking statute).
- The defendant’s violation of s. 893.135, F.S., would be subject to a 3-year mandatory minimum term and mandatory fine absent a departure.
- The defendant’s violation of s. 893.135, F.S., involves possession of one of the following controlled substances or a mixture that contains one of the following controlled substances:
 - Not more than 34 grams of cocaine;
 - Not more than 17 grams of hydrocodone;
 - Not more than 8 grams of oxycodone;
 - Not more than 6 grams of a controlled substance opiates or opioids;
 - Not more than 34 grams of phencyclidine;
 - Not more than 17 grams of amphetamine or methamphetamine;
 - Not more than 6 grams of flunitrazepam;
 - Not more than 20 grams of a phenethylamine; or
 - Not more than 2 grams of lysergic acid diethylamide (LSD).
- The defendant did not possess the controlled substance or mixture containing the controlled substance with the intent to sell, manufacture, or deliver the substance or mixture.

¹¹ Rule 3.704(26) (“The Criminal Punishment Code”), Florida Rules of Criminal Procedure.

¹² Staff is aware of two circumstances in which a sentencing court is authorized to impose a sentence below the mandatory minimum term. The first circumstance is when the court sentences a defendant as a youthful offender. Section 958.04, F.S. See *Christian v. State*, 84 So. 3d 437 (Fla. 5th DCA 2012). The second circumstance is when the court grants a motion from the state attorney to reduce or suspend a sentence based upon substantial assistance rendered by the defendant. Section 893.135(4), F.S.

¹³ Presumably the conviction would be for a drug trafficking offense committed on or after the effective date of the bill. Article X, Section 9, of the Florida Constitution provides that “[r]epeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed.” This constitutional provision operates as a savings clause to preserve laws in effect at the time of a defendant’s crime that affect prosecution or punishment. It applies to “statutes that effect a substantive change in the law.” *Castle v. State*, 305 So.2d 794, 796 (Fla. 4th DCA 1974), *affirmed*, 330 So.2d 10 (Fla. 1976).

- The defendant did not obtain the controlled substance or mixture containing the controlled substance by using a minor to obtain the substance or mixture.
- In committing the violation of s. 893.135, F.S., the defendant did not possess or threaten to use a firearm or deadly weapon, or use or threaten to use physical force against another person.
- The defendant does not have a previous conviction or withhold of adjudication for a violation of s. 893.135, F.S.
- The defendant does not have a previous conviction, adjudication of delinquency, or withhold of adjudication for:
 - A controlled substance violation under s. 893.13, F.S., that involves sale, manufacture, or delivery of a controlled substance, or the possession with intent to sell, manufacture, or deliver a controlled substance;
 - Sexual misconduct with an individual with a developmental disability;
 - Sexual misconduct with a patient;
 - Kidnapping, false imprisonment, or luring or enticing a child (if the victim is a minor and the defendant is not the victim's parent or guardian);
 - Human trafficking involving commercial sexual activity;
 - Sexual battery;
 - Unlawful sexual activity with a 16 or 17-year-old;
 - The former offense of procuring a minor for prostitution;
 - The former offense of selling or buying a minor into prostitution;
 - A lewd or lascivious offense committed against or in the presence of persons less than 16 years of age;
 - Video voyeurism (adult-on-minor or repeat violation);
 - A lewd or lascivious offense committed against or in the presence of an elderly person or disabled person;
 - Sexual performance by a child;
 - Prohibited acts in connection with obscenity;
 - Child pornography and other prohibited acts involving sexual exploitation of minors;
 - Transmission of pornography to a minor by electronic device or equipment;
 - Transmission of material harmful to minors to a minor by electronic device or equipment;
 - Selling or buying of minors;
 - Sexual misconduct with a forensic client;
 - Sexual misconduct with a juvenile offender; or
 - Any offense similar to an offense previously described which was committed in this state and which has been redesignated from a former statute number to one of the described offenses.
- The defendant is amenable to substance abuse treatment if the court determines that he or she is in need of such treatment.

The court's decision on how to dispose of the motion is completely discretionary. Therefore, the bill does not compel the court to grant the motion to depart even if the court finds that all of the criteria are met.

The effective date of the bill is July 1, 2016.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Criminal Justice Impact Conference, which provides the final, official estimate of the prison bed impact, if any, of legislation, has not met to review bills. A preliminary estimate of SB 84 by the Legislature's Office of Economic and Demographic Research is that SB 84 would have a negative indeterminate (unquantifiable) prison bed impact. If a bill is estimated to have "negative" impact, this means that the bill may reduce the future need for prison beds.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 893.135 of the Florida Statutes.

IX. Additional Information:

- A. **Committee Substitute – Statement of Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

- B. **Amendments:**

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
