

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 Appropriations

BILL: PCS/SB 694 (960376)

INTRODUCER: Appropriations Committee (Recommended by Appropriations Subcommittee on Criminal and Civil Justice); and Senators Brandes and Bracy

SUBJECT: Mandatory Sentences

DATE: February 21, 2018

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Erickson</u>	<u>Jones</u>	<u>CJ</u>	Favorable
2.	<u>Stallard</u>	<u>Cibula</u>	<u>JU</u>	Favorable
3.	<u>Forbes</u>	<u>Sadberry</u>	<u>ACJ</u>	Recommend: Fav/CS
4.	<u>Forbes</u>	<u>Hansen</u>	<u>AP</u>	Pre-meeting

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

PCS/SB 694 authorizes a court to impose a sentence for a drug trafficking offense less than the mandatory minimum term of imprisonment and mandatory fine applicable to that offense if the court finds, in relation to that offense, that the offender did not:

- Engage in a continuing criminal enterprise;
- Use or threaten violence or use a weapon during the commission of the crime; or
- Cause a death or serious bodily injury.

The bill is expected to reduce the need for prison beds by a significant amount. See Section V. Fiscal Impact Statement.

II. Present Situation:

Florida's Controlled Substance Schedules

Section 893.03, F.S., classifies controlled substances into five categories, known as schedules. These schedules regulate the manufacture, distribution, preparation, and dispensing of the substances listed in the schedules. The most important factors in determining which schedule

may apply to a substance are the “potential for abuse”¹ of the substance and whether there is a currently accepted medical use for the substance. The controlled substance schedules are as follows:

- Schedule I substances (s. 893.03(1), F.S.) have a high potential for abuse and no currently accepted medical use in treatment in the United States. Use of these substances under medical supervision does not meet accepted safety standards.
- Schedule II substances (s. 893.03(2), F.S.) have a high potential for abuse and a currently accepted but severely restricted medical use in treatment in the United States. Abuse of these substances may lead to severe psychological or physical dependence.
- Schedule III substances (s. 893.03(3), F.S.) have a potential for abuse less than the Schedule I and Schedule II substances and a currently accepted medical use in treatment in the United States. Abuse of these substances may lead to moderate or low physical dependence or high psychological dependence. Abuse of anabolic steroids may lead to physical damage.
- Schedule IV substances (s. 893.03(4), F.S.) have a low potential for abuse relative to Schedule III substances and a currently accepted medical use in treatment in the United States. Abuse of these substances may lead to limited physical or psychological dependence relative to Schedule III substances.
- Schedule V substances (s. 893.03(5), F.S.) have a low potential for abuse relative to the substances in Schedule IV and a currently accepted medical use in treatment in the United States. Abuse of these substances may lead to limited physical or psychological dependence relative to Schedule IV substances.

Punishment of Prohibited Drug Acts

Section 893.13, F.S., in part, punishes unlawful possession, sale, purchase, manufacture, and delivery of a controlled substance. The penalty for violating s. 893.13, F.S., can depend on the act committed, the substance and quantity of the substance involved, and the location in which the violation occurred. For example, selling a controlled substance listed in s. 893.03(1)(c), F.S., which includes many synthetic controlled substances, is a third degree felony.² However, if that substance is sold within 1,000 feet of a K-12 school or other designated facility or location, the violation is a second-degree felony.³ With three exceptions,⁴ s. 893.13, F.S., does *not* provide for mandatory minimum terms of imprisonment.

Drug trafficking, which is punished in s. 893.135, F.S., consists of knowingly selling, purchasing, manufacturing, delivering, or bringing into this state (importation), or knowingly

¹ Pursuant to s. 893.035(3)(a), F.S., “potential for abuse” means a substance has properties as a central nervous system stimulant or depressant or a hallucinogen that create a substantial likelihood of the substance being: (1) used in amounts that create a hazard to the user’s health or the safety of the community; (2) diverted from legal channels and distributed through illegal channels; or (3) taken on the user’s own initiative rather than on the basis of professional medical advice.

² Section 893.13(1)(a)2., F.S. A third-degree felony is punishable by up to 5 years in state prison, a fine of up to \$5,000, or both. Sections 775.082(3)(e) and 775.083(1)(c), F.S.

³ Section 893.13(1)(c)2., F.S. A second-degree felony is punishable by up to 15 years in state prison, a fine of up to \$10,000, or both. Sections 775.082(3)(d) and 775.083(1)(b), F.S.

⁴ Exceptions: s. 893.13(1)(c)1., F.S. (selling, etc., certain Schedule I and II controlled substances within 1,000 feet of a K-12 school, park, community center, or publicly owned recreational facility subject to 3-year mandatory minimum); s. 893.13(1)(g)1., F.S. (manufacturing methamphetamine or phencyclidine in a structure or conveyance where any child under 16 is present subject to 5-year mandatory minimum); and s. 893.13(1)(g)2., F.S. (manufacturing methamphetamine or phencyclidine causes a child under 16 to suffer great bodily harm subject to 10-year mandatory minimum).

being in actual or constructive possession of, certain Schedule I or Schedule II controlled substances in a statutorily-specified quantity. The statute only applies to a limited number of such controlled substances. And the controlled substances involved in the trafficking statute must meet a specified weight or quantity threshold.

Most drug trafficking offenses are first degree felonies⁵ and are subject to a mandatory minimum term⁶ and a mandatory fine, which is determined by the weight or quantity of the substance.⁷ For example, trafficking in 28 grams or more, but less than 200 grams, of cocaine, a first degree felony, is punishable by a 3-year mandatory minimum term of imprisonment and a mandatory fine of \$50,000.⁸ Trafficking in 200 grams or more, but less than 400 grams, of cocaine, a first degree felony, is punishable by a 7-year mandatory minimum term of imprisonment and a mandatory fine of \$100,000.⁹

Criminal Punishment Code

The Criminal Punishment Code¹⁰ (Code) is Florida's "primary sentencing policy."¹¹ Noncapital felonies sentenced under the Code receive an offense severity level ranking (Levels 1-10).¹² Points are assigned and accrue based upon the level ranking assigned to the primary offense, additional offenses, and prior offenses. Sentence points escalate as the level escalates. Points may also be added or multiplied for other factors such as victim injury or the commission of certain offenses like a Level 7 or 8 drug trafficking offense. The lowest permissible sentence is any nonstate prison sanction in which total sentence points equal or are less than 44 points, unless the court determines that a prison sentence is appropriate. If total sentence points exceed 44 points, the lowest permissible sentence in prison months is calculated by subtracting 28 points from the total sentence points and decreasing the remaining total by 25 percent.¹³ Absent mitigation,¹⁴ the permissible sentencing range under the Code is generally the lowest permissible sentence scored up to and including the maximum penalty provided under s. 775.082, F.S.¹⁵

⁵ A first degree felony is generally punishable by up to 30 years in state prison and a fine of up to \$10,000. However, when specifically provided by statute, a first degree felony may be punished by imprisonment for a term of years not exceeding life imprisonment. Sections 775.082(3)(b) and 775.083(1)(b), F.S.

⁶ There are currently 56 mandatory minimum terms of imprisonment in s. 893.135, F.S., which range from three years to life imprisonment.

⁷ See s. 893.135, F.S.

⁸ Section 893.135(1)(b)1.a., F.S.

⁹ Section 893.135(1)(b)1.b., F.S.

¹⁰ Sections 921.002-921.0027, F.S. See chs. 97-194 and 98-204, L.O.F. The Code is effective for offenses committed on or after October 1, 1998.

¹¹ *Florida's Criminal Punishment Code: A Comparative Assessment (FY 2012-2013)* Executive Summary (Offenses Committed On or After October 1, 1998), Florida Department of Corrections, available at http://www.dc.state.fl.us/pub/sg_annual/1213/executives.html (last visited on Feb. 14, 2018).

¹² Offenses are either ranked in the offense severity level ranking chart in s. 921.0022, F.S., or are ranked by default based on a ranking assigned to the felony degree of the offense as provided in s. 921.0023, F.S.

¹³ Section 921.0024, F.S. Unless otherwise noted, information on the Code is from this source.

¹⁴ The court may "mitigate" or "depart downward" from the scored lowest permissible sentence if the court finds a mitigating circumstance. Section 921.0026, F.S., provides a list of mitigating circumstances.

¹⁵ If the scored lowest permissible sentence exceeds the maximum penalty in s. 775.082, F.S., the sentence required by the Code must be imposed. If total sentence points are greater than or equal to 363 points, the court may sentence the offender to life imprisonment. Section 921.0024(2), F.S.

Mandatory Minimum Sentences and Departures

Mandatory minimum terms of imprisonment limit judicial discretion in Code sentencing: “If the lowest permissible sentence is less than the mandatory minimum sentence, the mandatory minimum sentence takes precedence.”¹⁶ As previously noted, the sentencing range under the Code is generally the scored lowest permissible sentence up to and including the statutory maximum penalty. However, if there is a mandatory minimum sentence that is longer than the scored lowest permissible sentence, the sentencing range is narrowed to the mandatory minimum sentence up to and including the statutory maximum penalty.

Prosecutors have “complete discretion” in the charging decision.¹⁷ The exercise of this discretion may determine whether or not a defendant is subject to a mandatory minimum term or a reduced mandatory minimum term. A prosecutor could determine in a particular case that mandatory minimum sentencing is inappropriate or too severe and avoid or ameliorate such sentencing. For example, the prosecutor could offer a plea to a violation of s. 893.13, F.S., or attempted drug trafficking, neither of which carries a mandatory minimum term. A prosecutor could also offer a plea to a drug trafficking violation that carries a 3-year mandatory minimum term, even though the defendant could be prosecuted for a drug trafficking violation that carries a greater mandatory minimum term. Further, a prosecutor could move the court to reduce or suspend a sentence if the defendant renders substantial assistance.¹⁸

There are few circumstances in which a court is statutorily authorized to depart from a mandatory minimum term. A court may depart from a mandatory minimum term if the defendant is determined to be a youthful offender.¹⁹ In determining youthful offender status, the defendant must be given the opportunity to present facts to the court.²⁰ A court may also depart from a mandatory minimum term for a violation of s. 316.027(2)(c), F.S. (driver involved in a fatal crash fails to stop and remain at the scene of a crash), upon the defendant’s motion if the court “finds that a factor, consideration or circumstance clearly demonstrates that imposing a mandatory minimum term of imprisonment would constitute or result in an injustice.”²¹

¹⁶ Fla. R. Crim. P. 3.704(d)(26).

¹⁷ “Under Florida’s constitution, the decision to charge and prosecute is an executive responsibility, and the state attorney has complete discretion in deciding whether and how to prosecute.” *State v. Bloom*, 497 So. 2d 2, 3 (Fla. 1986) (citing FLA. CONST. art. II, s. 3) (other citations omitted).

¹⁸ Sections 790.163(2), 790.164(2), 893.135(4), and 921.0024(1)(b), F.S. However, lower-level dealers or peripheral actors may have little, if any, information beneficial to prosecutors. Inmate population data reported in a 2009 Senate interim report indicated that the average sentence of inmates with a lower-level trafficking offense was above the mandatory minimum term, while the average sentence of inmates with a higher-level trafficking offense was below the mandatory minimum term. *A Policy Analysis of Minimum Mandatory Sentencing for Drug Traffickers*, Interim Report 2010-109 (Oct. 2009), p. 7, Committee on Criminal Justice, The Florida Senate, http://archive.flsenate.gov/data/Publications/2010/Senate/reports/interim_reports/pdf/2010-109cj.pdf (last visited on Feb. 14, 2018).

¹⁹ Section 958.04, F.S.

²⁰ Section 958.0407, F.S.

²¹ Section 316.027(2)(g), F.S.

III. Effect of Proposed Changes:

The bill authorizes a court to impose a sentence for a drug trafficking offense less than the mandatory minimum term of imprisonment and mandatory fine applicable to that offense if the court finds, in relation to that offense, that the offender did not:

- Engage in a continuing criminal enterprise;²²
- Use or threaten violence or use a weapon during the commission of the crime; or
- Cause a death or serious bodily injury.

The bill applies to all drug trafficking acts (possession, sale, manufacture, delivery, and importation) and to most, if not all, drug trafficking mandatory minimum terms of imprisonment (ranging from 3 years to life).²³

The drug-trafficking statute prohibits a person from knowingly selling, delivering, importing, manufacturing, or possessing specified large quantities of the following controlled substances:

- Cannabis or cannabis plants;²⁴
- Cocaine;²⁵
- Various opiates or opioids, such as opium, morphine, heroin, hydromorphone, codeine, hydrocodone, oxycodone, fentanyl, and carfentanil and other fentanyl derivatives;²⁶
- Phencyclidine;²⁷
- Methaqualone;²⁸
- Amphetamine or methamphetamine;²⁹
- Flunitrazepam;³⁰
- Gamma-hydroxybutyric acid (GHB);³¹

²² Section 893.20(1), F.S., provides that any person who commits three or more felonies under ch. 893, F.S., in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management and who obtains substantial assets or resources from these acts is guilty of engaging in a continuing criminal enterprise.

²³ The drug-trafficking statute imposes a mandatory life sentence for trafficking in especially large amounts of certain substances. However, these mandatory life sentence are never described as a “mandatory minimum” sentences like the rest of the mandatory minimum sentences imposed by the statute. Nonetheless, the mandatory life sentence that is required for certain offenses seems to be a mandatory minimum sentence, and thus a sentence to which the bill would apply.

²⁴ Section 893.135(1)(a), F.S.

²⁵ Section 893.135(1)(b), F.S.

²⁶ Section 893.135(1)(c), F.S.

²⁷ Section 893.135(1)(d), F.S. Phencyclidine “is a hallucinogen formerly used as a veterinary anesthetic, and briefly as a general anesthetic for humans.” “Phencyclidine,” PubChem, U.S. National Library of Medicine, <https://pubchem.ncbi.nlm.nih.gov/compound/phencyclidine> (last visited on Feb. 14, 2018).

²⁸ Section 893.135(1)(e), F.S. Methaqualone “is a quinazoline derivative with hypnotic and sedative properties.” “Methaqualone,” PubChem, U.S. National Library of Medicine, <https://pubchem.ncbi.nlm.nih.gov/compound/6292> (last visited on Feb. 14, 2018).

²⁹ Section 893.135(1)(f), F.S.

³⁰ Section 893.135(1)(g), F.S. “Flunitrazepam, trade name Rohypnol, is a central nervous system depressant in a class of drugs called benzodiazepines.” “Flunitrazepam (Rohypnol),” Center for Substance Abuse Research, <http://www.cesar.umd.edu/cesar/drugs/rohypnol.asp> (last visited on Feb. 14, 2018).

³¹ Section 893.135(1)(h), F.S. “Gamma-hydroxybutyric acid (GHB) is a naturally occurring analog of gamma-aminobutyric acid (GABA) that has been used in research and clinical medicine for many years. GHB was used clinically as an anesthetic in the 1960s but was withdrawn due to side effects that included seizures and coma.” Kapoor P., Revati Deshmukh R., and Kukreja I., “GHB Acid: A rage or reprove” (abstract) (Oct.–Dec. 2013) 4(4): 173, *Journal of Advanced Pharmaceutical*

- Gamma-butyrolactone (GBL);³²
- 1,4-Butanediol;³³
- Specified phenethylamines and cathinones, substituted³⁴ phenethylamines, and substituted cathinones;³⁵
- Lysergic acid diethylamide (LSD);³⁶
- Specified synthetic cannabinoids;³⁷ and
- N-benzyl phenethylamines.³⁸

A court that is authorized to deviate below the mandatory minimum sentences set forth in the drug-trafficking statute is nonetheless generally constrained by the minimum sentence produced by this state’s minimum sentence calculation statutes.³⁹ And the minimum sentence produced by this calculation may be lower or higher than the mandatory minimum set forth in the drug-trafficking statute.

The felony sentencing statute takes into account a host of factors to determine the minimum sentence that a court may impose on a felon. These factors include crimes for which the felon is being sentenced, prior offenses, and any injury suffered by the felon’s victim. Each of these items are assigned number values that increase as their severity increases—the more severe the offense and the more severe the injury to a victim, the more points are assessed. These numbers are then factored into a multi-step formula. The number produced by this formula determines the minimum sentence that the court may impose on the felon before it.

A court that is authorized to deviate below the mandatory minimum sentences set forth in the drug-trafficking statute is nonetheless generally constrained by the minimum sentence produced by this state’s minimum felony sentence calculation statutes. And the minimum sentence produced by these calculations may be lower or higher than the applicable mandatory minimum set forth in the drug-trafficking statute.

Technology and Research, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3853692/> (last visited on Feb. 14, 2018). “The primary effects of GHB use are those of a CNS [central nervous system] depressant[.]” *Id.*

³² Section 893.135(1)(i), F.S. “Analogues that are often substituted for GHB include GBL (gamma butyrolactone) and 1,4 BD (also called just “BD”), which is 1,4-butanediol.” “Drug Fact Sheet/GHB” (undated), U.S. Drug Enforcement Administration (on file with the Senate Committee on Criminal Justice).

³³ Section 893.135(1)(j), F.S.

³⁴ “The term ‘substituted’ is a general term that means a portion of the chemical structure is removed and replaced with a different chemical structure.” Staff Analysis (CS/CS/CS/SB 150) (April 27, 2017), p. 11, n. 58, The Florida Senate, <http://www.flsenate.gov/Session/Bill/2017/150/Analyses/2017s00150.ap.PDF> (last visited on Feb. 14, 2018).

³⁵ Section 893.135(1)(k), F.S. “Phenethylamines” is a broad category of “psychoactive substances.” Sanders B., Lankenau S., Bloom J., and Hathazi D., “‘Research chemicals’: Tryptamine and Phenethylamine Use Among High Risk Youth” (2008) 43(3-4): 389, *Substance Use & Misuse*, <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2536767/> (last visited on Jan. 29, 2018). “Cathinone ... is a monoamine alkaloid found in the shrub *Catha edulis* (Khat)[.]” and is “[c]losely related to ephedrine, cathine and other amphetamines[.]” “Cathinone,” PubChem, U.S. National Library of Medicine, <https://pubchem.ncbi.nlm.nih.gov/compound/Cathinone#section=Top> (last visited on Feb. 14, 2018).

³⁶ Section 893.135(1)(l), F.S.

³⁷ Section 893.135(1)(m), F.S. “Synthetic [c]annabinoids are chemicals that act as cannabinoid receptor agonists. Chemically they are not similar to cannabinoids but ... they are cannabinoid-like in their activity.” “Synthetic Cannabinoids Drug Information,” Redwood Toxicology Laboratory, https://www.redwoodtoxicology.com/resources/drug_info/synthetic_cannabinoids (last visited on Feb. 14, 2018).

³⁸ Section 893.135(1)(n), F.S.

³⁹ See ss. 921.0022-921.0024, F.S. However, there are a number of circumstances in which a court may sentence a felon to a lesser sentence than is produced by the sentence calculation statutes. See ss. 921.0024-921.0027, F.S.

The effective date of the bill is July 1, 2018.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

This bill does not require counties or municipalities to spend funds or limit their authority to raise revenue or receive state-shared revenues as specified in Article VII, s. 18 of the Florida Constitution.

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 estimates that the bill will have a “negative significant” prison bed impact (a decrease of more than 25 prison beds).⁴⁰

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill does not explicitly state whether it applies to mandatory sentences of life imprisonment set forth in the drug-trafficking statute. The bill specifically refers to “mandatory minimum” sentences imposed under the drug-trafficking statute. The statute never uses the words “mandatory minimum” sentence to refer to sentences or life imprisonment. The Legislature may wish to amend the bill to clarify its intent.

⁴⁰ 2018 Conference Results (through February 12, 2018), Criminal Justice Impact Conference, available at <http://edr.state.fl.us/Content/conferences/criminaljusticeimpact/CJIC18.xls> (last visited on Feb. 14, 2018).

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.)

Recommend CS by Appropriations Subcommittee on Criminal and Civil Justice on February 14, 2018:

The committee substitute authorizes a court to impose a sentence for a drug trafficking offense other than the mandatory minimum term of imprisonment and mandatory fine applicable to that offense if the court finds, in relation to that offense, that the offender did not commit specified acts. The original bill did not authorize a departure from a drug trafficking mandatory fine.

- B. **Amendments:**

None.