

**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.)

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

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BILL: SB 92

INTRODUCER: Senator Simmons

SUBJECT: Controlled Substances

DATE: January 17, 2020

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Erickson</u>	<u>Jones</u>	<u>CJ</u>	<u>Pre-meeting</u>
2.	_____	_____	<u>ACJ</u>	_____
3.	_____	_____	<u>AP</u>	_____

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**I. Summary:**

SB 92 creates s. 893.1355, F.S., which reclassifies the felony or misdemeanor degree of an offense involving the sale of, or possession with intent to sell, a controlled substance when the sale or intended sale is to a person younger than 21 years of age. The penalties imposed as a result of this reclassification are consistent with penalties currently provided for selling, or possessing with intent to sell, a controlled substance within 1,000 feet of a K-12 school or certain specified facilities or places.

The bill also amends the age elements of an offense in s. 893.13, F.S., which currently prohibits a person 18 years of age or older from delivering any controlled substance to a person younger than 18 years of age. It also prohibits using or hiring a person younger than 18 years of age as an agent or employee in the sale or delivery of such a substance or using or hiring such person to assist in avoiding detection or apprehension for a violation of ch. 893, F.S. The bill changes the age of the violator to 21 years of age or older and the age of the recipient or intended recipient of the controlled substance to younger than 21 years of age.

Finally, the bill adds vapor-generating electronic devices to the list of objects that constitute drug paraphernalia. The devices are only drug paraphernalia if they are used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing a controlled substance into the human body.

The Legislature Office of Economic and Demographic Research preliminarily estimates that the bill will have a “positive indeterminate” prison bed impact (an unquantifiable increase in prison beds).

The bill takes effect October 1, 2020.

## II. Present Situation:

### Florida's Controlled Substance Schedules

Section 893.03, F.S., classifies controlled substances into five categories or classifications, known as schedules. The schedules regulate the manufacture, distribution, preparation, and dispensing of substances listed in the schedules. The most important factors in determining which schedule may apply to a substance are the “potential for abuse”<sup>1</sup> of the substance and whether there is a currently accepted medical use for the substance. The controlled substance schedules are described 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 Schedule IV 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 IV substances.

### Selling a Controlled Substance or Possessing a Controlled Substance with Intent to Sell

Selling a controlled substance or possessing a controlled substance with intent to sell is generally punished in s. 893.13(1), F.S. The penalty assigned by s. 893.13, F.S., depends on the schedule applicable to the controlled substance that is being sold or possessed with intent to sell and, in some instances, the location in which the violation occurs. Section 893.135, F.S., which punishes drug trafficking, addresses knowingly selling specified quantities of *some* Schedule I, II, and III controlled substances.<sup>2</sup>

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

<sup>2</sup> See generally s. 893.135, F.S. Most drug trafficking offenses are first degree felonies and are subject to a mandatory minimum term of imprisonment and a mandatory fine, which is determined by the weight or quantity of the substance.

***Penalties Relating to Schedule I(a), (b), and (d) and Schedule II(a), (b), and (c)5. Controlled Substances***

Generally, it is a second degree felony<sup>3</sup> to sell or possess with intent to sell these controlled substances.<sup>4</sup> It is a first degree felony<sup>5</sup> to sell or possess with intent to sell these substances within 1,000 feet of a K-12 school or certain other specified facilities or places.<sup>6</sup> If any of these substances are covered by s. 893.135, F.S. (e.g., fentanyl, cocaine, oxycodone, hydrocodone, and heroin), and the sale meets the drug trafficking threshold, the sale is generally punished as a first degree felony.

*Examples of controlled substances in these schedules:* fentanyl; cocaine; oxycodone; hydrocodone; heroin; synthetic cannabinoids; LSD; and methamphetamine.

***Penalties Relating to Schedule I(c); Schedule II(c)1., (2)(c)2., (2)(c)3., (2)(c)6., (2)c.7., (2)(c)8., (2)(c)9., and (2)(c)10.; Schedule III; and Schedule IV Controlled Substances***

Generally, it is a third degree felony<sup>7</sup> to sell or possess with intent to sell these controlled substances.<sup>8</sup> It is a second degree felony to sell or possess with intent to sell these substances within 1,000 feet of a K-12 school or other specified facilities or places.<sup>9</sup> If any of these substances are covered by s. 893.135, F.S. (e.g., cannabis, amphetamine, and methamphetamine) and the sale meets the drug trafficking threshold, the sale is generally punished as a first degree felony.<sup>10</sup>

*Examples of controlled substances in these schedules:* cannabis; anabolic steroids; certain barbiturates; certain amphetamine derivatives; amphetamine; and methamphetamine.

***Penalties Relating to Schedule V Controlled Substances***

Generally, it is a first degree misdemeanor<sup>11</sup> to sell or possess with intent to sell these controlled substances.<sup>12</sup> There is no penalty enhancement for selling or possessing with intent to sell a Schedule V controlled substance within 1,000 feet of a K-12 school or other specified facilities or places, but there is a mandatory \$500 fine and mandatory public service (100 hours).<sup>13</sup> Section 893.135, F.S., does not apply to a Schedule V controlled substance.

<sup>3</sup> A second degree felony is punishable by up to 15 years in state prison and a fine not exceeding \$10,000. Sections 775.082 and 775.083, F.S.

<sup>4</sup> Section 893.13(1)(a)1., F.S.

<sup>5</sup> A first degree felony is generally punishable by up to 30 years in state prison and a fine not exceeding \$10,000. Sections 775.082 and 775.083. However, when specifically provided by statute, a first degree felony may be punished by imprisonment for a terms of years not exceeding life imprisonment. Section 775.082, F.S.

<sup>6</sup> Section 893.13(1)(c)1.-(f)1. and (h)1., F.S.

<sup>7</sup> A third degree felony is punishable by up to five years in state prison and a fine not exceeding \$5,000. Sections 775.082 and 775.083, F.S.

<sup>8</sup> Section 893.13(1)(a)2., F.S.

<sup>9</sup> Section 893.13(1)(c)2.-(f)2. and (h)2., F.S.

<sup>10</sup> See generally s. 893.135, F.S. Section 893.135, F.S., does not apply to a Schedule IV controlled substance.

<sup>11</sup> A first degree misdemeanor is punishable by up to a year in county jail and a fine not exceeding \$1,000. Sections 775.082 and 775.083, F.S.

<sup>12</sup> Section 893.13(1)(a)3., F.S.

<sup>13</sup> Section 893.13(1)(c)3., (f)3., and (h)3., F.S.

*Examples of controlled substances in this schedule:* certain anticonvulsant drugs and a drug product approved by the U.S. Food and Drug Administration (FDA) that contains cannabidiol and no more than 0.1 percent tetrahydrocannabinol (THC).

### **Delivery of a Controlled Substance to a Minor and Using or Hiring a Minor for Certain Prohibited Purposes Relating to a Controlled Substance**

Section 893.13(4), F.S., prohibits a person 18 years of age or older from delivering any controlled substance to a person younger than 18 years of age. It also prohibits using or hiring a person younger than 18 years of age as an agent or employee in the sale or delivery of such a substance or using or hiring such person to assist in avoiding detection or apprehension for a violation of ch. 893, F.S.<sup>14</sup>

### ***Penalties Relating to Schedule I(a), (b), and (d) and Schedule II(a), (b), and (c)5. Controlled Substances***

It is a first degree felony to commit a violation of s. 893.13(4), F.S., involving any of these substances (see description, supra, of some of the substances in these schedules).

### ***Penalties Relating to Schedule I(c); Schedule II(c)1., (2)(c)2., (2)(c)3., (2)(c)6., (2)c.7., (2)(c)8., (2)(c)9., and (2)(c)10.; Schedule III; and Schedule IV Controlled Substances***

It is a second degree felony to commit a violation of s. 893.13(4), F.S., involving any of these substances (see description, supra, of some of the substances in these schedules).

### ***Penalties Relating to “Any Other Controlled Substance” (Schedule II(d) and Schedule V Controlled Substances)***

It is a third degree felony to commit a violation of s. 893.13(4), F.S., involving “any other controlled substance, except as lawfully sold, manufactured, or delivered.” This category would include a Schedule II(d) and Schedule V controlled substance.

*Examples of controlled substances in these schedules:* Dronabinol (synthetic THC) in an oral solution in an FDA-approved drug product, anticonvulsant drugs, and an FDA-approved drug product that contains cannabidiol and no more than 0.1 percent THC.

### **Criminal Punishment Code and Ranking Reclassified Offenses**

The Criminal Punishment Code<sup>15</sup> (Code) is Florida’s primary sentencing policy. Noncapital felonies sentenced under the Code receive an offense severity level ranking (levels 1-10).<sup>16</sup> Points are assigned and accrue based upon the severity level ranking assigned to the primary offense, additional offenses, and prior offenses. Sentence points escalate as the severity level escalates. Points may also be added or multiplied for other factors such as victim injury or the

<sup>14</sup> Imposition of sentence may not be suspended or deferred, and the person so convicted may not be placed on probation. Section 893.13(4), F.S.

<sup>15</sup> 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.

<sup>16</sup> 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.

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.<sup>17</sup> Absent mitigation,<sup>18</sup> 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.<sup>19</sup>

“... [A] statute that increases ‘a criminal conviction from one degree to a higher degree’ based on certain factual requirements is a reclassification statute....”<sup>20</sup> Reclassification of the degree of a felony through application of any statute listed in s. 921.0022(2), F.S., or any other law that provides for a felony penalty enhancement to any offense listed in the Code offense severity ranking chart does not cause the offense to become unlisted and is not subject to a default ranking under s. 921.0023, F.S.<sup>21</sup> Reclassification statutes may contain directive language indicating that a felony offense that is reclassified under the statute is ranked one level above the ranking of the offense under s. 921.0022, F.S., or s. 921.0023, F.S., and a first degree misdemeanor reclassified to a third degree felony is ranked in level 2 of the Code offense severity ranking chart.<sup>22</sup>

## Vaping

### *Regulation*

During the 2019 Legislative Session, CS/SB 7012<sup>23</sup> was adopted, to implement Amendment 9 to the State Constitution, which was approved by the voters of Florida on November 6, 2018, to ban the use of vapor-generating electronic devices, such as electronic cigarettes (e-cigarettes), in enclosed indoor workplaces, as part of the Florida Clean Indoor Air Act. The use of e-cigarettes is commonly referred to as vaping.

“Vape” or “vaping” means to inhale or exhale vapor<sup>24</sup> produced by a vapor-generating electronic device or to possess a vapor-generating electronic device while that device is actively employing an electronic, a chemical, or a mechanical means designed to produce vapor or aerosol from a nicotine product or any other substance. The term does not include the mere possession of a vapor-generating electronic device.<sup>25</sup>

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<sup>17</sup> Section 921.0024, F.S. Unless otherwise noted, information on the Code is from this source.

<sup>18</sup> 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.

<sup>19</sup> 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.

<sup>20</sup> *Walsh v. State*, 198 So.3d 783, 786 (Fla. 2d DCA 2016), quoting *Pethel v. State*, 177 So.3d 631, 637 (Fla. 2d DCA 2015).

<sup>21</sup> Section 921.0022(2), F.S.

<sup>22</sup> See s. 775.0845, s. 775.0875, and s. 775.31, F.S.

<sup>23</sup> See ch. 2019-14, L.O.F. This legislation was approved by the Governor and took effect July 1, 2019.

<sup>24</sup> “Vapor” means aerosolized or vaporized nicotine or other aerosolized or vaporized substance produced by a vapor-generating electronic device or exhaled by the person using such a device. Section 386.202(14), F.S.

<sup>25</sup> Section 386.203(13), F.S.

A “vapor-generating electronic device” is any product that employs an electronic, a chemical, or a mechanical means capable of producing vapor or aerosol from a nicotine product or any other substance, including, but not limited to, an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or other similar device or product, any replacement cartridge for such device, and any other container of a solution or other substance intended to be used with or within an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or other similar device or product.<sup>26</sup>

The 2019 legislation permitted the use of vapor-generating electronic devices in the enclosed indoor workplace of a “vapor-generating device retailer” or “retail vape shop,” which is any enclosed indoor workplace dedicated to or predominantly for the retail sale of vapor-generating electronic devices and components, parts, and accessories for such products, in which the sale of other products or services is merely incidental.<sup>27</sup> The bill also permitted vaping at the same locations currently authorized to permit tobacco smoking, i.e., private residences whenever not being used for certain commercial purposes, stand-alone bars, designated rooms in hotels and other public lodging establishments, retail tobacco shops, facilities owned or leased by a membership association, smoking cessation programs, medical or scientific research, and smoking rooms in airport in-transit lounges.<sup>28</sup>

The 2019 legislation also amended the state’s preemption of tobacco smoking regulation in s. 386.209, F.S., to adopt and implement the grant of authority to local governments by Amendment 9 to adopt more restrictive local ordinances on the use of vapor-generating electronic devices. Additionally, school districts may further restrict smoking by persons on school district property.

### ***Prohibition on Minors Vaping Near Schools***

It is unlawful for any minor to smoke tobacco or vape in, on, or within 1,000 feet of the real property comprising a public or private elementary, middle, or secondary school between the hours of 6 a.m. and midnight.<sup>29</sup> A violation is punishable by civil citation. A person issued a citation is deemed to be charged with a civil infraction punishable by a maximum civil penalty not to exceed \$25, or 50 hours of community service or, where available, successful completion of a school-approved anti-tobacco or anti-vaping “alternative to suspension” program.<sup>30</sup>

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<sup>26</sup> Section 386.203(15), F.S. Electronic nicotine delivery systems (ENDS) are “noncombustible tobacco products.” “These products use an ‘e-liquid’ that may contain nicotine, as well as varying compositions of flavorings, propylene glycol, vegetable glycerin, and other ingredients. The liquid is heated to create an aerosol that the user inhales.” “ENDS may be manufactured to look like conventional cigarettes, cigars, or pipes. Some resemble pens or USB flash drives. Larger devices, such as tank systems or mods, bear little or no resemblance to cigarettes.” *Vaporizers, E-Cigarettes, and other Electronic Nicotine Delivery Systems (ENDS)*, U.S. Food and Drug Administration, available at <https://www.fda.gov/tobacco-products/products-ingredients-components/vaporizers-e-cigarettes-and-other-electronic-nicotine-delivery-systems-ends> (last visited Jan. 15, 2020).

<sup>27</sup> Section 386.203(16), F.S.

<sup>28</sup> Section 386.2045, F.S.

<sup>29</sup> Section 386.212(1), F.S. This section does not apply to any person occupying a moving vehicle or within a private residence.

<sup>30</sup> Section 386.212(3), F.S.

### ***Sale and Possession Offenses Involving a Nicotine Dispensing Device***

Florida law prohibits selling a nicotine dispensing device to a minor and prohibits a minor from possessing such device.<sup>31</sup> A “nicotine dispensing device” is any product that employs an electronic, chemical, or mechanical means to produce vapor from a nicotine product, including, but not limited to, an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or other similar device or product, any replacement cartridge for such device, and any other container of nicotine in a solution or other form intended to be used with or within an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or other similar device or product.<sup>32</sup>

A person charged with a sales violation has a complete defense if, at the time the nicotine product or nicotine dispensing device was sold, delivered, bartered, furnished, or given:

- The buyer or recipient falsely evidenced that she or he was 18 years of age or older;
- The appearance of the buyer or recipient was such that a prudent person would believe the buyer or recipient to be 18 years of age or older; and
- Such person carefully checked a driver license or an identification card issued by this state or another state of the United States, a passport, or a United States Armed Services identification card presented by the buyer or recipient and acted in good faith and in reliance upon the representation and appearance of the buyer or recipient in the belief that the buyer or recipient was 18 years of age or older.<sup>33</sup>

Selling a nicotine dispensing device to a minor is a second degree misdemeanor<sup>34</sup> for a first violation and a first degree misdemeanor for a second or subsequent violation.<sup>35</sup> Possession by a minor of a nicotine dispensing device is punishable by 16 hours of community service or, instead of community service, a \$25 fine for a first violation and a \$25 fine for a second or subsequent violation within 12 weeks after the first violation. A second or subsequent violation not within the 12-week time period after the first violation is punishable as provided for a first violation.<sup>36</sup>

### ***Rates of Youth Vaping***

Findings of recent youth tobacco use data reported by the Centers for Disease Control and Prevention (CDC) include:

In 2019, an estimated 53.3% of high school students (8.0 million) and 24.3% of middle school students (2.9 million) reported having ever tried a tobacco product. Current (past 30-day) use of a tobacco product (i.e., electronic cigarettes [e-cigarettes], cigarettes, cigars, smokeless tobacco, hookahs, pipe tobacco, and bidis [small brown cigarettes wrapped in a leaf]) was reported by 31.2% of high school students (4.7 million) and 12.5% of middle school students (1.5 million). E-cigarettes were the most commonly

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<sup>31</sup> Section 877.112(2) and (6), F.S. Unlike the retail sale of tobacco products, which is subject to regulation under ch. 569, F.S., vape product sales are only regulated under the provisions of s. 877.112, F.S.

<sup>32</sup> Section 877.112(1)(a), F.S.

<sup>33</sup> Section 877.112(5), F.S.

<sup>34</sup> A second degree misdemeanor is punishable by up to 60 days in county jail and a fine not exceeding \$500. Sections 775.082 and 775.083, F.S.

<sup>35</sup> Section 877.112(2) and (4), F.S.

<sup>36</sup> Section 877.112(6), F.S.

cited tobacco product currently used by 27.5% of high school students (4.1 million) and 10.5% of middle school students (1.2 million), followed in order by cigars, cigarettes, smokeless tobacco, hookahs, and pipe tobacco.<sup>37</sup>

The findings come a year after the U.S. Surgeon General declared the surge in youth vaping an epidemic.<sup>38</sup>

### *Health Issues Relating to Vaping*

The findings previously described come at the same time that CDC is conducting an ongoing national investigation of vaping-related lung injuries. The CDC, the FDA state and local health departments, and public health and clinical stakeholders have spent the past several months investigating and monitoring the nationwide illness outbreak. The condition has been labelled as e-cigarette, or vaping, product use-associated lung injury, or EVALI. The latest count from the CDC finds that 2,409 people have been hospitalized, and 52 people have died across 25 states and Washington, D.C., as of December 10, 2019.<sup>39</sup> Two of the deaths have occurred in Florida, and 103 cases of vaping-related illness hospitalizations have been documented in Florida as of December 3, 2019.<sup>40</sup>

### *Vaping Controlled Substances*

THC is the main psychoactive constituent of cannabis.<sup>41</sup> According to the CDC, “[a] new study, coupled with previous state based evidence, strengthens the association between EVALI and the use of tetrahydrocannabinol (THC)-containing e-cigarette, or vaping, products obtaining from informal sources.”<sup>42</sup> “[Eighty-two percent] of hospitalized patients with data on substance use reported using THC-containing products; [thirty-four percent] reported exclusive use of THC-containing products.”

A 2018 review of scientific literature and information posted on illicit drug forums found reported use of vaping devices to deliver controlled substances into the human body. Some of the controlled substances reportedly introduced into the human body by means of a vaping device

<sup>37</sup> *Tobacco Product Use and Associated Factors Among Middle and High School Students — United States, 2019*. Morbidity and Mortality Weekly Report (MMWR), Dec. 6, 2019, 68(12); 1-22, Centers for Disease Control and Prevention, available at [https://www.cdc.gov/mmwr/volumes/68/ss/ss6812a1.htm?s\\_cid=ss6812a1\\_w&deliveryName=USCDC\\_921-DM14806&utm\\_source=STAT+Newsletters&utm\\_campaign=c51db5ca59-MR\\_COPY\\_02&utm\\_medium=email&utm\\_term=0\\_8cab1d7961-c51db5ca59-151819933](https://www.cdc.gov/mmwr/volumes/68/ss/ss6812a1.htm?s_cid=ss6812a1_w&deliveryName=USCDC_921-DM14806&utm_source=STAT+Newsletters&utm_campaign=c51db5ca59-MR_COPY_02&utm_medium=email&utm_term=0_8cab1d7961-c51db5ca59-151819933) (last visited Jan. 15, 2020).

<sup>38</sup> “Surgeon General Warns Youth Vaping Is Now An ‘Epidemic’” (Dec. 18, 2018), NPR, available at <https://www.npr.org/sections/health-shots/2018/12/18/677755266/surgeon-general-warns-youth-vaping-is-now-an-epidemic> (last visited Jan. 15, 2020).

<sup>39</sup> *Characteristics of Patients Experiencing Rehospitalization or Death After Hospital Discharge in a Nationwide Outbreak of E-cigarette, or Vaping, Product Use–Associated Lung Injury — United States, 2019*. Morbidity and Mortality Weekly Report (MMWR), Jan. 3, 2020, 68(5152); 1183-1188, Centers for Disease Control and Prevention, available at [https://www.cdc.gov/mmwr/volumes/68/wr/mm685152e1.htm?s\\_cid=mm685152e1\\_w](https://www.cdc.gov/mmwr/volumes/68/wr/mm685152e1.htm?s_cid=mm685152e1_w) (last visited Jan. 15, 2020).

<sup>40</sup> “Florida reports second vaping death” (Dec. 11, 2019), NPR, available at <http://www.orlandosentinel.com/news/os-ne-florida-reports-second-vaping-death-20191211-dvz3tehxebvkvkavhe2jdiepe-story.html> (last visited Jan. 15, 2020).

<sup>41</sup> *Cannabis drug profile*, European Monitoring Centre for Drugs and Drug Addiction, available at <http://www.emcdda.europa.eu/publications/drug-profiles/cannabis> (last visited Jan. 15, 2020).

<sup>42</sup> *Smoking and Tobacco Use (For the Public)*, Centers for Disease Control and Prevention, available at [https://www.cdc.gov/tobacco/basic\\_information/e-cigarettes/severe-lung-disease/need-to-know/index.html](https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease/need-to-know/index.html) (last visited Jan. 15, 2020).



included THC, synthetic cannabinoids, MDMA (“Ecstasy” or “Molly”), synthetic cathinones, cocaine, methamphetamine, and fentanyl and its derivatives.<sup>43</sup>

### **Drug Paraphernalia Statutes**

Section 893.145, F.S., defines “drug paraphernalia” as all equipment, products, and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, transporting, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of ch. 893, F.S., or s. 877.111, F.S. (prohibiting inhaling, etc., of certain substances). For example, objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing cannabis into the human body are drug paraphernalia. Drug paraphernalia is deemed to be contraband which shall be subject to civil forfeiture.

Some of the items or objects listed in the definition of “drug paraphernalia” include:

- Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes, with or without screens, permanent screens, hashish heads, or punctured metal bowls.
- Water pipes.
- Carburetion tubes and devices.
- Smoking and carburetion masks.
- Chamber pipes.
- Carburetor pipes.
- Electric pipes.
- Air-driven pipes.
- Chillums.<sup>44</sup>
- Bongs.
- Ice pipes or chillers.

A court, jury, or other authority, when determining in a criminal case whether an object constitutes drug paraphernalia, must consider specified facts surrounding the connection between the item and the individual arrested for possessing drug paraphernalia. A court or jury is required to consider a number of factors (in addition to all other logically relevant factors) in determining whether an object is drug paraphernalia, such as proximity of the object in time and space to a controlled substance, the existence of residue of controlled substances on the object, and expert testimony concerning its use.<sup>45</sup>

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<sup>43</sup> Breitbart, A., Morgan, J., and Jones, A. *E-cigarettes—An unintended illicit drug delivery system*. Vol. 192, 1 Nov. 2018, pp. 98-111, *Drug and Alcohol Dependence*. The review is available at <https://www.sciencedirect.com/science/article/pii/S0376871618305325> (last visited Jan. 15, 2020).

<sup>44</sup> “Chillums” are “cone-shaped marijuana/hash pipes.” *Drug Paraphernalia Fact Facts*, National Drug Intelligence Center, U.S. Department of Justice, available at <https://www.justice.gov/archive/ndic/pubs6/6445/6445p.pdf> (last visited Jan. 15, 2020).

<sup>45</sup> Section 893.146, F.S.

It is a first degree misdemeanor to use, or possess with intent to use, drug paraphernalia to produce a controlled substance or introduce a controlled substance into the body,<sup>46</sup> or to advertise objects in a publication when it is known or reasonable to know that the purpose is to promote the sale of objects designed or intended for use as drug paraphernalia.<sup>47</sup>

It is unlawful to knowingly and willfully sell or offer for sale at retail certain drug paraphernalia (the pipes previously referenced as examples of drug paraphernalia). A first violation is a first degree misdemeanor; a second or subsequent violation is a third degree felony.<sup>48</sup>

It is a third degree felony to:

- Deliver, possess with intent to deliver, or manufacture with intent to deliver drug paraphernalia when it is known or reasonable to know that it will be used to produce a controlled substance or introduce a controlled substance into the body.<sup>49</sup>
- Use, possess with the intent to use, or manufacture with the intent to use drug paraphernalia when it is known or reasonable to know that it will be used to transport a controlled substance or contraband as defined in s. 932.701(2)(a)1., F.S.<sup>50</sup>

It is a second degree felony for any person 18 years of age or over to deliver drug paraphernalia to a minor when it is known or reasonable to know that it will be used to produce or introduce into the body a controlled substance.<sup>51</sup>

### III. Effect of Proposed Changes:

The bill creates s. 893.1355, F.S., which reclassifies the felony or misdemeanor degree of an offense involving the sale of, or possession with intent to sell, a controlled substance under s. 893.13(1)(a), F.S., when the sale or intended sale is to a person younger than 21 years of age. The reclassification occurs in the following manner:

- In the case of a first degree misdemeanor, the offense is reclassified as a third degree felony.
- In the case of a third degree felony, the offense is reclassified as a second degree felony.
- In the case of a second degree felony, the offense is reclassified as a first degree felony.

For purposes of sentencing under the Code, the following offense severity ranking levels apply:

- An offense that is a first degree misdemeanor and that is reclassified under this new section as a third degree felony is ranked in level 2 of the Code offense severity ranking chart.
- A felony offense that is reclassified under this new section is ranked one level above the ranking specified in s. 921.0022, F.S. (the Code offense severity ranking chart), or s. 921.0023, F.S. (default ranking for offenses not ranked in the chart), for the offense committed.

The bill makes reference to s. 893.1355, F.S., in s. 921.002(2), F.S., regarding the ranking of reclassified offenses.

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<sup>46</sup> Section 893.147(1), F.S.

<sup>47</sup> Section 893.147(5), F.S.

<sup>48</sup> Section 893.147(6), F.S.

<sup>49</sup> Section 893.147(2), F.S.

<sup>50</sup> Section 893.147(4), F.S.

<sup>51</sup> Section 893.147(3), F.S.

The penalties imposed as a result of this reclassification are consistent with penalties currently provided for selling, or possessing with intent to sell, a controlled substance within 1,000 feet of a K-12 school and certain specified facilities or places.<sup>52</sup>

The bill also amends the age elements of an offense in s. 893.13, F.S., which currently prohibits a person 18 years of age or older from delivering any controlled substance to a person younger than 18 years of age. It also prohibits using or hiring a person younger than 18 years of age as an agent or employee in the sale or delivery of such a substance or using or hiring such person to assist in avoiding detection or apprehension for a violation of ch. 893, F.S. The bill changes the age of the violator to 21 years of age or older and the age of the recipient or intended recipient of the controlled substance to younger than 21 years of age.

Finally, the bill amends s. 893.145, F.S., to add vapor-generating electronic devices to the list of objects that constitute drug paraphernalia. The devices are only drug paraphernalia if they are used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing a controlled substance into the human body.

The bill takes effect October 1, 2020.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

The bill does not appear to require cities and counties to expend funds or limit their authority to raise revenue or receive state-shared revenues as specified by Article VII, s. 18, of the State Constitution.

##### **B. Public Records/Open Meetings Issues:**

None.

##### **C. Trust Funds Restrictions:**

None.

##### **D. State Tax or Fee Increases:**

None.

##### **E. Other Constitutional Issues:**

None identified.

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<sup>52</sup> The only real difference in penalties is that the bill does not impose a 3-year mandatory minimum term which is imposed if a person sells certain controlled substances within 1,000 feet of a K-12 school, child care facility, park, community center, or publicly owned recreational facility. *See* s. 893.13(1)(c), F.S.

**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 yet reviewed the bill. The Legislature Office of Economic and Demographic Research (EDR) preliminarily estimates that the bill will have a “positive indeterminate” prison bed impact (an unquantifiable increase in prison beds).

The EDR provided the following information relevant to its preliminary estimate:

With the movement of the age threshold to 21 years old, the pool of potential offenders gets pulled in two directions, with those between 18 and 21 years old no longer getting charged under s. 893.13(4), F.S., while those 21 years and older who commit these offenses with those under 21 years old now getting charged for these offenses. Per [Department of Corrections], in FY 18-19, there were 3 new commitments to prison for offenses listed under s. 893.13(4), F.S. Additionally, 95.2% of those admitted to prison with sale/manufacturing/delivering offenses were 21 years old or older, though it is not known how many of the 2,581 admitted committed the offense while involving someone between 18 and 21 years old. Therefore, it is likely that the pull is more upward, especially with the reclassification of felonies, thus leading to an increase in both prison admissions and prison sentences. However, without knowing how many committed these offenses involving someone in the 18 to 21 age group, the impact cannot be quantified.

Also, the addition of vape devices to drug paraphernalia could lead to an increase in prison admissions. Though there is no data available for determining the extent of this impact, there were 3 new commitments for drug paraphernalia offenses in FY 18-19.<sup>53</sup>

**VI. Technical Deficiencies:**

None.

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<sup>53</sup> The EDR estimate is on file with the Senate Committee on Criminal Justice.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 893.13, 893.145, and 921.0022.

This bill creates the section 893.1355 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.