

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 1614

SPONSOR: Criminal Justice Committee and Senator Brown-Waite

SUBJECT: Sentencing

DATE: April 10, 1999 REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|-----------------|----------------|-----------|---------------------|
| 1. | <u>Erickson</u> | <u>Cannon</u> | <u>CJ</u> | <u>Favorable/CS</u> |
| 2. | <u>Mannelli</u> | <u>Hadi</u> | <u>FP</u> | <u>Favorable</u> |
| 3. | _____ | _____ | _____ | _____ |
| 4. | _____ | _____ | _____ | _____ |
| 5. | _____ | _____ | _____ | _____ |

I. Summary:

Committee Substitute for Senate Bill 1614 amends. s. 893.135, F.S., Florida's drug trafficking statute. The CS:

- Restores the 3-year mandatory minimum terms for trafficking in cannabis, cocaine, "illegal drugs," methaqualone, and amphetamines and methamphetamines which were eliminated in 1994;
- Lowers the threshold for trafficking in cannabis from 50 pounds to 25 pounds;
- Restores the 5-year mandatory minimum terms for trafficking in cannabis, cocaine, and "illegal drugs," which were eliminated in 1994, but provides for 7-year mandatory minimum terms for trafficking in cannabis, cocaine, methaqualone, and amphetamines and methamphetamines, and a 15-year mandatory minimum term for trafficking in illegal drugs, rather than the old 5-year mandatory minimum terms;
- Provides for 3-year and 5-year mandatory minimum terms for trafficking in phencyclidine and flunitrazepam;
- Removes the upper caps for weight ranges applicable to higher-weight, first degree felony trafficking offenses;
- Provides that sentencing can be based upon the number of cannabis plants, regardless of weight, which is conceptually similar to a former federal sentencing scheme;
- Defines "cannabis plant" and directs how a court shall sentence cannabis trafficking offenses based upon weight and number;

- Provides that a person shall not be eligible for any form of gain-time under s. 944.275, F.S., if the person is convicted of offenses relating to trafficking in cocaine, illegal drugs, and flunitrazepam or any mixture containing flunitrazepam, which are first degree felonies for which a sentence of life imprisonment must be imposed; and
- Provides that a current sentencing multiplier for certain drug trafficking offenses must be applied to all drug trafficking offenses and authorizes state attorneys to move to reduce or suspend a sentence for any trafficking offense if the offender provides substantial assistance.

This CS substantially amends s. 893.135, F.S., and s. 921.0024, F.S., and reenacts for the purpose of incorporating the amendments to s. 893.35, F.S., in references, the following sections of the Florida Statutes: 397.451(7); 782.04(4)(a); 893.1351(1); 903.133; 907.041(4)(b); 921.0022(3)(g), (h), and (i); 921.142(2); 943.0585; and 943.059.

II. Present Situation:

A. Florida's Drug Trafficking Laws and Sentencing for Drug Traffickers

Section 893.135, F.S., provides for and punishes various drug trafficking offenses. Penalties for trafficking offenses graduate upward depending upon the weight of the drugs which are trafficked. Prior to 1994, s. 895.135, F.S., provided for 3-year and 5-year mandatory minimum terms for lower-weight trafficking in cannabis, cocaine, "illegal drugs" (a category that includes heroin), methaqualone, and amphetamines and methamphetamines.

In 1994, these mandatory minimum terms were eliminated and replaced by a discretionary 1.5 multiplier of total sentence points under the sentencing guidelines for drug trafficking offenses ranked in levels 7 or 8 of the offense severity ranking chart. *See* ch. 93-406, L.O.F. Level 9 and higher drug trafficking offenses continued to provide for mandatory minimum sentences of 15-years, 25-years, life, and death. Subsequent to 1994, offenses for trafficking in phencyclidine and flunitrazepam were added to the statute.

The multiplier has been retained under the current sentencing code and the mandatory minimum terms for level 9 offenses have also been retained. These lower-weight trafficking offenses are sentenced pursuant to the sentencing code and there is a mandatory fine. Under the current sentencing code, the court is free to impose a sentence from the lowest permissible sentence to the maximum felony degree of the offense. The described trafficking offenses are first degree felonies. The maximum penalty for a first degree felony is a term of imprisonment not exceeding 30 years unless imprisonment for a term of years not exceeding life is specified. s. 775.082, F.S. The lowest permissible sentence for a level 7 trafficking offense with no 1.5 multiplier is 1.75 years; it is 2.3 years if the multiplier is included. The lowest permissible sentence for a level 8 offense is 2.9 years; it is 3.6 years if the multiplier is included.

Under current law, a state attorney may move the sentencing court to reduce or suspend the sentence of a person convicted of a level 7 or 8 trafficking offense if the offender provides substantial assistance.

Provided is a brief summary of the lower-weight drug trafficking offenses:

➤ **Trafficking in Cannabis**

- In excess of 50 pounds, but less than 2,000 pounds: Scored as a level 7 offense under the sentencing code, including a \$25,000 fine.
- 2,000 pounds or more, but less than 10,000 pounds: Scored as a level 8 offense, including a \$50,000 fine.

➤ **Trafficking in Cocaine**

- 28 grams or more, but less than 200 grams: Scored as a level 7 offense under the sentencing code, including a \$50,000 fine.
- 200 grams or more, but less than 400 grams: Scored as a level 8 offense, including a \$100,000 fine.

➤ **Trafficking in Illegal Drugs (Morphine, Opium, Heroin and Other Drugs)**

- 4 grams or more, but less than 14 grams: Scored as a level 7 offense under the sentencing code, including a \$50,000 fine.
- 14 grams or more, but less than 28 grams: Scored as a level 8 offense, including a \$100,000 fine.

➤ **Trafficking in Phencyclidine**

- 28 grams or more, but less than 200 grams: Scored as a level 7 offense under the sentencing code, including a \$50,000 fine.
- 200 grams or more, but less than 400 grams: Scored as a level 8 offense, including a \$100,000 fine.

➤ **Trafficking in Methaqualone**

- 200 grams or more, but less than 5 kilograms: Scored as a level 7 offense under the sentencing code, including a \$50,000 fine.
- 5 kilograms or more, but less than 50 kilograms: Scored as a level 8 offense, including a \$100,000 fine.

➤ **Trafficking in Amphetamines/Methamphetamines**

- 14 grams or more, but less than 28 grams: Scored as a level 7 offense under the sentencing code, including a \$50,000 fine.

- 28 grams or more, but less than 200 grams: Scored as a level 8 offense, including a \$100,000 fine.

➤ **Trafficking in Flunitrazepam**

- 2 grams or more, but less than 14 grams: Scored as a level 7 offense under the sentencing code, including a \$50,000 fine.
- 14 grams or more, but less than 28 grams: Scored as a level 8 offense, including a \$100,000 fine.

The sentence applicable to a particular trafficking offense is based on the weight of the amount of drugs that are trafficked. There are weight ranges, for example, trafficking in flunitrazepam of 28 grams or more but less than 30 kilograms results in a mandatory minimum term of imprisonment of 25 years.

Currently, first degree felony trafficking offenses have weight ranges. These are the most serious trafficking offenses, absent a death occurring. Because the ranges are not open-ended, e.g., “400 grams *or more*” but rather capped, e.g., “400 grams or more, but less than 800 grams,” prosecutors cannot charge actual weight of the drugs if such weight exceeds the cap. If the actual weight is much greater than this could be relevant in terms of securing a longer sentence.

B. Former Federal Law Relating to the “Counting” of “Marijuana Plants”

Federal law once provided for punishing manufacturers of marijuana based on the weight of the drug or upon the number of marijuana plants. When Congress changed the law so that counting the number of plants was as relevant as weight in terms of sentencing, the change reflected Congress’ intent to punish growers of marijuana by the scale or potential of their operation and not just by the weight of the plants seized at a given moment. Congress must have found a defendant who is growing 100 newly planted marijuana plants to be as culpable as one who successfully grows 100 kilograms of marijuana. *United States v. Fitol*, 733 F.Supp. 1312 (D.Minn. 1990).

A body of federal case law developed around defining a “marijuana plant” which was not found in the federal sentencing law, even though “marijuana plants” (the federal government reference is to “marijuana”; the Florida reference is to “cannabis”) were being counted for the purpose of federal sentencing.

The federal appellate courts which addressed the issue of what constitutes a “marijuana plant” applied a test, the origin of which “appears to be the practice of law enforcement authorities.” *United States v. Delaporte*, 42 F.3d 1118, 1120 (7th Cir. 1994). Often the marijuana seized by law enforcement authorities consisted in large part of cuttings from a mature marijuana plant. There was essentially no debate that a mature marijuana plant constituted a “marijuana plant” for the purpose of sentencing under federal law. The problem was whether the cuttings applied, and law enforcement authorities began to cull from the cuttings those cuttings that showed evidence of root formation. That practical focus on root formation became the basis for the development of

the “root test” that all federal circuits have applied to the issue of whether a plant is a “marijuana plant.”

The “root test,” simply stated, is that the plant must have some readily observable evidence of root formation, such as root hairs. *See United States v. Burke*, 999 F.2d 596 (1st Cir. 1993); *United States v. Edge*, 989 F.2d 871 (6th Cir. 1993); *Delaporte, supra*; *United States v. Bechtol*, 939 F.2d 603 (8th Cir. 1991); *United States v. Robinson*, 35 F.3d 442, 447 (9th Cir. 1994); *United States v. Eves*, 932 F.2d 856 (10th Cir. 1991), *cert. denied*, 502 U.S. 884 (1991); and *United States v. Foree*, 43 F.3d 1572 (11th Cir. 1995).

Callous tissue, which is formed after a cutting takes place, was determined not to be a root formation but rather is an “organized tissue mass” that “covers the newly exposed surface, or ‘wound’.” It is “a marker of the beginning of the development of [a] root.” *United States v. Edge*, 989 F.2d, at 879, quoting the record (emphasis supplied by the court).

Numerous other issues were debated in the federal courts surrounding marijuana plants. Some issues are particularly important in determining what constituted a marijuana plant. For example, issues have been raised as to whether a plant must be “viable” and whether it must be a “female” plant, which is virtually the whole source of tetrahydrocannabinols or “THC,” to be defined as a “marijuana plant” for purposes of including them in the count of marijuana plants. *See, e.g. Delaporte, supra*. Other issues have arisen in the context of interpreting former sentencing laws. For example, the case of *U.S. v. Shields*, 49 F.3d 707 (11th Cir. 1995), which addressed the counting of dead harvested plants in the context of a particular federal weight-per-plant ratio in the former sentencing law. This, among other related issues not mentioned here, may assist in developing a definition of a “marijuana plant” for the purpose of crafting a sentencing scheme that counts marijuana plants regardless of the plant’s weight.

III. Effect of Proposed Changes:

Committee Substitute for Senate Bill 1614 amends s. 893.135, F.S., Florida’s drug trafficking statute. The CS:

- Restores the 3-year mandatory minimum terms for trafficking in cannabis, cocaine, “illegal drugs,” methaqualone, amphetamines and methamphetamines which were eliminated in 1994;
- Lowers the threshold for trafficking in cannabis from 50 pounds to 25 pounds;
- Restores the 5-year mandatory minimum terms for trafficking in cannabis, cocaine, and “illegal drugs,” which were eliminated in 1994, but provides for 7-year mandatory minimum terms for cannabis and cocaine trafficking and a 15-year mandatory minimum term for illegal drugs, rather than the old 5-year mandatory minimum terms;
- Provides for 3-year and 5-year mandatory minimum terms for trafficking in phencyclidine and flunitrazepam;
- Removes the upper caps for weight ranges applicable to high-weight, first degree felony trafficking offenses;

- Provides that sentencing can be based upon the number of cannabis plants, regardless of weight, which is conceptually similar to the former federal sentencing scheme;
- Defines “cannabis plant” and provides for how a court shall sentence cannabis trafficking offenses based upon weight and number;
- Provides that a person shall not be eligible for statutory gain-time under s. 944.275, F.S., if the person is convicted of “trafficking in cocaine” (involving 150 kilograms or more, but less than 300 kilograms), “trafficking in illegal drugs” (involving 30 kilograms or more, but less than 60 kilograms), or “trafficking in flunitrazepam” (involving 30 kilograms or more of flunitrazepam or any mixture containing flunitrazepam), which are first degree felonies for which a sentence of life imprisonment must be imposed; and
- Provides that a current sentencing multiplier for certain drug trafficking offenses must be applied to all drug trafficking offenses and authorizes state attorneys to move to reduce or suspend a sentence for any trafficking offense, if the offender provides substantial assistance.

Based upon these described changes to the law, the following changes (in bold) would be made to the offenses of trafficking in cannabis, trafficking in cocaine, and trafficking in illegal drugs, trafficking in phencyclidine, trafficking in methaqualone; trafficking in amphetamines and methamphetamines, and trafficking in flunitrazepam:

➤ **Trafficking in Cannabis**

- In excess of 50 pounds, but less than 2,000 pounds, **or in excess of 300 cannabis plants, but not more than 2,000 cannabis plants.** Level 7 offense under the sentencing code, including a \$25,000 fine. **3-year mandatory minimum term.**
- 2,000 pounds or more, but less than 10,000 pounds, **or in excess of 2,000 cannabis plants, but not more than 10,000 cannabis plants.** Level 8 offense, including a \$50,000 fine. **5-year mandatory minimum term.**
- 10,000 pounds or more, **or is in excess of 10,000 cannabis plants.** Level 9 offense, including a \$200,000 fine. 15-year mandatory minimum term.
- **“For the purpose of this paragraph, a plant, including, but not limited to, a seedling or cutting, is a “cannabis plant” if it has some readily observable evidence of root formation, such as root hairs. To determine if a piece or part of a cannabis plant severed from the cannabis plant is itself a cannabis plant, the severed piece or part must have some readily observable evidence of root formation, such as root hairs. Callous tissue is not readily observable evidence of root formation. The viability and sex of a plant and the fact that the plant may or may not be a dead harvested plant, are not relevant in determining if the plant is a “cannabis plant” or in the charging of an offense under this paragraph. Upon conviction, the**

court shall impose the greatest term of imprisonment provided for in this paragraph.”

This definition employs the “root test” and anticipates issues that have been raised in federal courts regarding what constitutes a “marijuana plant.” The sentencing provision also anticipates the case in which the weight of the cannabis falls into the weight range in which a 3-year mandatory minimum term applies but the number of cannabis plants falls within the range of the number of cannabis plants in which a 7-year or 15-year mandatory minimum term applies. In that case, the court sentences the defendant to the 7-year or 15-year mandatory minimum term, whichever is applicable.

➤ **Trafficking in Cocaine**

- **28 grams or more, but less than 200 grams.** Level 7 offense under the sentencing code, including a \$50,000 fine. **3-year mandatory minimum term.**
- **200 grams or more, but less than 400 grams.** Level 8 offense, including a \$100,000 fine. **5-year mandatory minimum term.**

➤ **Trafficking in Illegal Drugs (Morphine, Opium, Heroin and Other Drugs)**

- **4 grams or more, but less than 14 grams.** Level 7 offense under the sentencing code, including a \$50,000 fine. **3-year mandatory minimum term.**
- **14 grams or more, but less than 28 grams.** Level 8 offense, including a \$100,000 fine. **15-year mandatory minimum term.**

➤ **Trafficking in Phencyclidine**

- **28 grams or more, but less than 200 grams.** Level 7 offense under the sentencing code, including a \$50,000 fine. **3-year mandatory minimum term.**
- **200 grams or more, but less than 400 grams.** Level 8 offense, including a \$100,000 fine. **5-year mandatory minimum term.**

➤ **Trafficking in Methaqualone**

- **200 grams or more, but less than 5 kilograms.** Level 7 offense under the sentencing code, including a \$50,000 fine. **3-year mandatory minimum term.**
- **5 kilograms or more, but less than 50 kilograms.** Level 8 offense, including a \$100,000 fine. **5-year mandatory minimum term.**

➤ **Trafficking in Amphetamines/Methamphetamines**

- 14 grams or more, but less than 28 grams. Level 7 offense under the sentencing code, including a \$50,000 fine. **3-year mandatory minimum term.**
- 28 grams or more, but less than 200 grams. Level 8 offense, including a \$100,000 fine. **5-year mandatory minimum term.**

► **Trafficking in Flunitrazepam**

- 2 grams or more, but less than 14 grams. Level 7 offense under the sentencing code, including a \$50,000 fine. **3-year mandatory minimum term.**
- 14 grams or more, but less than 28 grams. Level 8 offense, including a \$100,000 fine. **5-year mandatory minimum term.**

The CS reenacts for the purpose of incorporating the amendments to s. 893.35, F.S., in references, the following sections of the Florida Statutes: 397.451(7); 782.04(4)(a); 893.1351(1); 903.133; 907.041(4)(b); 921.0022(3)(g), (h), and (i); 921.142(2); 943.0585; and 943.059.

The CS takes effect on July 1, 1999.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Criminal Justice Estimating Conference (CJEC) reviewed CS/SB 1614 and forecast a cumulative five-year fiscal impact on the Department of Corrections of approximately \$22.7 million (\$8.4 operating and \$14.3 construction), with a Fiscal Year 1999-2000 cost of approximately \$300,000 for construction. Since there is currently sufficient constructed bed capacity, it will not be necessary to appropriate funds for construction at this time.

The forecast assumes that offenders eligible for the drug trafficking provisions of this CS who currently are receiving a non-prison sentence will continue to receive a non-prison sentence. This assumption is based on empirical data (both nation-wide and in Florida) which indicate that whenever sentencing structures are radically changed, the participants will attempt to maintain their prior sentencing practices. The extent to which this initial resistance is mitigated over time is unknown. However, it should be noted in this regard that the CS maintains the provision allowing the state attorney to move the sentencing court to reduce or suspend the sentence of any person who is convicted of a violation of the drug trafficking laws who provides “substantial assistance” to law enforcement.

The average sentence length of offenders currently sentenced to prison for drug trafficking offenses is approximately five years. Consequently, it is likely that the fiscal impact of this bill will accelerate in the years beyond the five-year window of the CJEC forecast as the lengthier terms mandated by this bill become manifest.

The effect of CS/SB 1614 on the judicial system is indeterminate, although it is likely that trials, hearings, and other judicial involvement will increase to some extent. The Office of the State Courts Administrator does not believe that this bill *by itself* will have a significant adverse fiscal impact on the courts. Likewise, the Public Defenders’ Association indicated that this bill would have an insignificant fiscal impact.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The fact that the CS provides for a 15-year mandatory minimum term for trafficking in “illegal drugs” rather than the 7-year mandatory terms for cannabis and cocaine may be related to the resurgence in Florida of trafficking in heroin which falls under the provision for trafficking in “illegal drugs.”

VIII. Amendments:

None.

