

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 420

INTRODUCER: Senators Sachs, Joyner, and Soto

SUBJECT: Sentencing for Controlled Substance Violations

DATE: February 25, 2013

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|----------|----------------|-----------|--------------------|
| 1. | Erickson | Cannon | CJ | Pre-meeting |
| 2. | | | JU | |
| 3. | | | ACJ | |
| 4. | | | AP | |
| 5. | | | | |
| 6. | | | | |

I. Summary:

SB 420 provides that, upon a motion from the state attorney, defendant, or defendant’s counsel, the sentencing court may depart from the mandatory minimum term of imprisonment the defendant would otherwise receive for trafficking in an illegal drug under s. 893.135(1)(c), F.S., if the trafficking violation involved possession of a prescription drug; the violation did not involve use, etc., of physical force or a firearm, deadly weapon, or dangerous instrument; the violation did not involve serious bodily injury to, or disfigurement or death of, another person; the defendant does not have a previous felony conviction; and the defendant has not previously requested such departure.

This bill substantially amends section 893.135 of the Florida Statutes.

II. Present Situation:

Drug Trafficking/Opioids

Section 893.135, F.S., punishes drug trafficking. Section 893.135(1)(c), F.S., punishes trafficking in opium, opium derivatives, opiates, various opioids,¹ and any other substances covered under this paragraph. There are four categories of violations under this paragraph:

¹ According to MedicineNet.com, an ‘opioid’ is: “1. A synthetic narcotic that resembles the naturally occurring opiates. 2. Any substance that binds to or otherwise affects the opiate receptors on the surface of the cell.” (This information is available at: <http://www.medterms.com/script/main/art.asp?articlekey=13744>.) Other definitions of the term are broader. For example, WebMD LLC defines ‘opioids’ “by their ability to bind to and influence opiate receptors on cell membranes” and states that they can be divided into 3 classes. The first class is “[n]aturally occurring opiates: The classic natural opiates are opium and morphine. Opium is extracted from the plant *Papaver somniferum* (the opium poppy), and morphine is the

- “Trafficking in illegal drugs” (first degree felony).
- “Trafficking in illegal drugs” (first degree felony punishable by life imprisonment).
- “Trafficking in illegal drugs” (capital felony).
- “Capital importation of illegal drugs” (capital felony).

“Trafficking in illegal drugs” (first degree felony)

Section 893.135(1)(c)1., F.S., provides that any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession² of, 4 grams or more of any morphine, opium, oxycodone, hydrocodone, hydromorphone, or any salt, derivative, isomer, or salt of an isomer thereof, including heroin, as described in s. 893.03(1)(b), (2)(a), (3)(c)3., or (3)(c)4., F.S., or 4 grams or more of any mixture containing any such substance, but less than 30 kilograms of such substance or mixture, commits a first degree felony.³

If a person violates s. 893.135(1)(c)1., F.S., and the quantity involved:

- Is 4 grams⁴ or more, but less than 14 grams, the person shall be sentenced to a mandatory minimum term of imprisonment of 3 years and ordered to pay a fine of \$50,000.⁵
- Is 14 grams or more, but less than 28 grams, the person shall be sentenced to a mandatory minimum term of imprisonment of 15 years and ordered to pay a fine of \$100,000.⁶
- Is 28 grams or more, but less than 30 kilograms, the person shall be sentenced to a mandatory minimum term of imprisonment of 25 calendar years and pay a fine of \$500,000.⁷

primary active component of opium. Endogenous neural polypeptides such ... [as] endorphins and enkephalins are also natural opioids.” The second class is “[s]emi-synthetic opioids: Semisynthesis is a type of chemical synthesis that uses compounds isolated from natural sources (e.g., plants) as starting materials. Semi-synthetic opioids include heroin, oxycodone, oxymorphone, and hydrocodone.” The third class is “[s]ynthetic opioids: Synthetic opioids are made using total synthesis, in which large molecules are synthesized from a stepwise combination of small and cheap (petrochemical) building blocks. Synthetic opioids include buprenorphine, methadone, fentanyl, alfentanil, levorphanol, meperidine, codeine, and propoxyphene (withdrawn from US market).” This reference further states that “[t]he terms *opiate* and *narcotic* are generally used interchangeably with the term *opioid*.” (This information is available at: <http://emedicine.medscape.com/article/287790-overview>.) For purposes of this analysis, staff generally applies the broader definition of ‘opioid.’

² 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.

³ A first degree felony is generally punishable by up to 30 years in state prison. Section 775.082, F.S. Repeat offender sanctions may be available under ss. 775.082 and 775.084, F.S. Section 921.0024(1)(b), F.S., provides that if the primary offense is drug trafficking, the subtotal sentence points are multiplied, at the discretion of the court, for a Level 7 or Level 8 offense, by 1.5.

⁴ For the purpose of comparison, the approximate weight of a U.S. currency note, regardless of denomination, is one gram. (This information is available at: <http://www.moneyfactory.gov/faqlibrary.html>.)

⁵ Section 893.135(1)(c)1.a., F.S. This offense is ranked in Level 7 of the Criminal Punishment Code offense severity ranking chart. Section 921.0022(3)(g), F.S.

⁶ Section 893.135(1)(c)1.b., F.S. This offense is ranked in Level 8 of the Criminal Punishment Code offense severity ranking chart. Section 921.0022(3)(h), F.S.

⁷ Section 893.135(1)(c)1.c., F.S. This offense is ranked in Level 9 of the Criminal Punishment Code offense severity ranking chart. Section 921.0022(3)(i), F.S.

“Trafficking in illegal drugs” (first degree felony punishable by life imprisonment)

Section 893.135(1)(c)2., F.S., provides that any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 30 kilograms or more of any morphine, opium, oxycodone, hydrocodone, hydromorphone, or any salt, derivative, isomer, or salt of an isomer thereof, including heroin, as described in s. 893.03(1)(b), (2)(a), (3)(c)3., or (3)(c)4., F.S., or 30 kilograms or more of any mixture containing any such substance, commits a first degree felony punishable by life imprisonment⁸ and is ineligible for any form of discretionary early release except pardon or executive clemency or conditional medical release under s. 947.149, F.S.

“Trafficking in illegal drugs” (capital felony)

Section 893.135(1)(c)2., F.S., also provides that a person who violates this subparagraph commits a capital felony⁹ and shall also pay a fine of \$500,000 if the court determines that, in addition to committing this violation, either of the following applies:

- The person intentionally killed an individual or counseled, commanded, induced, procured, or caused the intentional killing of an individual and such killing was the result.¹⁰
- The person’s conduct in committing that act led to a natural, though not inevitable, lethal result.¹¹

“Capital importation of illegal drugs” (capital felony)

Section 893.135(1)(c)3., F.S., provides that any person who knowingly brings into this state 60 kilograms or more of any morphine, opium, oxycodone, hydrocodone, hydromorphone, or any salt, derivative, isomer, or salt of an isomer thereof, including heroin, as described in s. 893.03(1)(b), (2)(a), (3)(c)3., or (3)(c)4., F.S., or 60 kilograms or more of any mixture containing any such substance, and who knows that the probable result of such importation would be the death of any person, commits a capital felony and shall also pay a fine of \$500,000.

Prescription Medications and Drug Trafficking

There are numerous prescription medications that are within the ambit of s. 893.135(1)(c), F.S., including medications that contain morphine, oxycodone, hydrocodone, hydromorphone, methadone, and fentanyl. A person who unlawfully possesses, purchases, sells, etc., these prescription medications in a trafficking weight may be subject to prosecution for drug trafficking under s. 893.135(1)(c), F.S.

Trafficking weight involving pills or tablets is determined by the total weight of each pill or tablet multiplied by the number of pills or tablets possessed, etc. The total weight of a pill or tablet includes the weight of the controlled substance in the pill or tablet (e.g., hydrocodone) and the weight of noncontrolled substances or matter in the pill or tablet, such as coating, binders,

⁸ As previously indicated, in general, a first degree felony is punishable by up to 30 years in state prison under s. 775.082, F.S. However, this section also provides that a first degree felony may be punished by a term of years not exceeding life imprisonment when specifically provided by statute.

⁹ A capital felony is punishable by life imprisonment or death. Section 775.082, F.S. See s. 921.142, F.S. (further proceedings to determine sentence for capital trafficking felonies).

¹⁰ Section 893.135(1)(c)2.a., F.S.

¹¹ Section 893.135(1)(c)2.b., F.S.

and nonprescription drugs (e.g., acetaminophen).¹² A relatively small number of pills or tablets may meet the 4 gram threshold for trafficking. In a 2012 report, the Office of Program Policy Analysis and Government Accountability (OPPAGA) cited the example of a pill that had a weight of 0.65 grams with 10 mg. of hydrocodone: "... [I]t takes 7 pills of 10 milligram hydrocodone, which are large pills with 325 to 750 milligrams of acetaminophen, to reach the threshold of 4 grams for a minimum mandatory prison sentence of three years."¹³ Based upon this medication, the OPPAGA found that 22 pills would meet the 14 gram threshold (15-year mandatory minimum term) and 44 pills would meet the 28 gram threshold (25-year mandatory minimum term).¹⁴

Due to the different compositions of prescription opioids, noncontrolled substances may add significantly to the total weight of the pill or tablet as, for example, is the case with medication that contains hydrocodone and acetaminophen. When comparing this medication to a sample medication containing oxycodone (sans acetaminophen), the OPPAGA found: "... [I]t takes approximately 31 pills of 30 milligram oxycodone to reach the threshold of 4 grams since this type of oxycodone is a smaller pill and does not include acetaminophen. Thus, it takes more oxycodone pills than hydrocodone pills to trigger a minimum mandatory sentence, even though oxycodone is more potent and likely to lead to adverse outcomes, such as addiction and overdose."¹⁵ Based upon this oxycodone medication, the OPPAGA found that 108 pills would meet the 14 gram threshold (15-year mandatory minimum term) and 215 pills would meet the 28 gram threshold (25-year mandatory minimum term).¹⁶

OPPAGA Report: Sample Information Regarding Prescription Opioid Offenders

The OPPAGA analyzed arrest reports for a sample of 194 offenders admitted to prison in Fiscal Year 2010-11 for opioid trafficking and determined that "almost all (93%) were convicted of trafficking in prescription painkillers.... [A]rrests most commonly involved oxycodone (73%) or hydrocodone (28%). In comparison, 6% of the offenders were convicted of trafficking in heroin."¹⁷

The OPPAGA provided the following information regarding how most of these arrests occurred:

Most offenders in our sample (62%) were arrested for selling prescription painkillers to an undercover law enforcement officer or confidential informant.... In these cases, officers worked undercover to buy drugs from known dealers or monitored confidential informants during meetings they arranged to make purchases. In other cases, offenders were arrested for trafficking after a traffic stop or other law enforcement contact, or after being reported by a pharmacist for possible prescription fraud.¹⁸

¹² See ss. 893.02(16) and 893.135(6), F.S.

¹³ *Opinions Are Mixed About Sentencing Laws for Painkiller Trafficking*, Report No. 12-02 (January 2012), at p. 5, Office of Program Policy Analysis and Government Accountability (<http://www.oppaga.state.fl.us/Summary.aspx?reportNum=12-02>). This report is further cited as "OPPAGA Report."

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ OPPAGA Report, at p. 3.

¹⁸ *Id.*

The majority of the offenders in the OPPAGA's sample illegally possessed or sold 30 to 90 pills:

For most of the offenders convicted of trafficking in oxycodone or hydrocodone, their convictions were based on the illegal possession or sale of a number of pills equivalent to one or two prescriptions. For those offenders sentenced for trafficking in hydrocodone, 50% were arrested for possessing or selling fewer than 30 pills and 25% were arrested for fewer than 15 pills. For offenders sentenced for trafficking in oxycodone, offenders possessed or sold a median number of 91 pills at the time of their arrests.

Following accepted medical practice, physicians may prescribe 30 or more prescription painkillers for patients with chronic pain¹⁹ or recovering from surgery. For example, a patient recovering from surgery may receive a one-time prescription of 30 to 60 hydrocodone or oxycodone pills, often in forms that also contain acetaminophen. Illegal possession of such an amount could trigger a minimum mandatory sentence.²⁰

Most of the offenders in the OPPAGA sample did not have a prior drug trafficking record and were determined by prison staff to need substance abuse treatment:

Our analysis of Department of Corrections data on the 1,200 offenders admitted to prison for opioid trafficking in Fiscal Year 2010-11 found that 74% had not previously been admitted to prison.... Half had either never been on probation or had been on probation solely for drug possession, and 81% did not have a prior history of offenses involving selling or trafficking drugs. Most (84%) had no current or past violent offenses.

These offenders tended to have substance abuse problems and were at low risk for recidivism. Prison staff assessments determined that 65% of these offenders needed substance abuse treatment and 61% were at low risk for recidivism.²¹

Mandatory Minimum Terms of Imprisonment

The Criminal Punishment Code (Code)²² is Florida's framework or mechanism for determining permissible sentencing ranges for noncapital felonies. Noncapital felonies sentenced under the

¹⁹ Drug trafficking penalties (including mandatory minimum terms) may influence whether a "dose tolerant" chronic pain management patient continues to receive a prescription opioid. "Medical information indicates that chronic pain management patients are rarely addicted to the opioid analgesics prescribed them for pain but over time may develop a tolerance to and physical dependence upon opioid analgesics that may be misperceived as addiction rather than the 'normal consequences of sustained opioid use.' Some practitioners may be reluctant to treat chronic management cases for fear that regulatory and law enforcement agencies may not understand or appreciate this distinction." *A Policy Analysis of Minimum Mandatory Sentencing for Drug Trafficking*, Interim Report 2010-109 (October 2009), at p. 9 (footnotes omitted), Committee on Criminal Justice, The Florida Senate, quoting June L. Dahl, "How to Reduce Fears of Legal/Regulatory Scrutiny in Managing Pain in Cancer Patients," 3 *Journal of Supportive Oncology* 5 (September – October 2005), at p. 386. This report is further cited as "Senate Interim Report 2010-09."

²⁰ OPPAGA Report, at p. 4. In a footnote (n. 7, at p. 4) at the end of the second paragraph of this quote, the OPPAGA noted: "Law enforcement and other stakeholders reported that pain clinics they would consider as being 'pill mills' routinely prescribe much higher amounts of prescription painkillers, such as 180 oxycodone pills per month."

²¹ *Id.* In a footnote (n. 8, at p. 4) at the end of the second paragraph of this quote, the OPPAGA noted: "Prison staff assessed offenders' risk of recidivism using the risk assessment instrument developed by the Department of Corrections. Recidivism is defined as return to prison within three years of release."

²² Sections 921.002 - 921.0027, F.S.

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. Typically, trafficking offenses are first degree felonies but levels assigned to these trafficking offenses vary depending on the offense. Points may also accrue for other factors like victim injury.

Total sentence points are entered into a mathematical calculation to determine the lowest permissible sentence. The permissible sentencing range 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 and any additional offenses before the court for sentencing. The court is permitted to impose sentences concurrently or consecutively. “If the lowest permissible sentence is less than the mandatory minimum sentence, the mandatory minimum sentence takes precedence. If the lowest permissible sentence exceeds the mandatory sentence, the requirements of the ... Code and any mandatory minimum penalties apply.”²³

The Code includes a list of ‘mitigating’ factors. If a mitigating factor is found by the sentencing court, the court may decrease an offender’s sentence below the lowest permissible sentence (a “downward departure”). A mandatory minimum term is not subject to these mitigating factors.²⁴

Mandatory minimum terms are often longer than a prison sentence scored as the lowest permissible sentence, so the sentencing range is narrowed. Further, with few exceptions, the sentencing court must impose the mandatory minimum term; therefore, mandatory minimum terms limit judicial discretion in sentencing. Staff found only two circumstances in which a sentencing court is authorized by law to impose a sentence below the mandatory minimum term: when the court sentences a defendant as a youthful offender;²⁵ and when the court grants a motion from the state attorney to reduce or suspend a sentence based upon substantial assistance rendered by the defendant.²⁶

While a mandatory minimum term limits judicial discretion in sentencing, it does not limit the prosecutorial discretion to charge or not charge drug trafficking,²⁷ even when the trafficking weight threshold is met. For example, a state attorney could charge a violation of s. 893.13, F.S.,

²³ Rule 3.704(26) (“The Criminal Punishment Code”), Florida Rules of Criminal Procedure. A trafficking mandatory minimum term is a minimum sentencing ‘floor’ for the court and there is no prohibition to gain-time. If the court only sentences the defendant to the mandatory term specified by statute, the Department of Corrections (DOC) establishes an 85% minimum service date on the term and the offender is subject to s. 944.275(4)(b)3., F.S., which does not allow release prior to serving a minimum of 85% of the sentence. If the court imposes a sentence that exceeds the mandatory term specified by statute, the DOC establishes an 85% minimum service date on the sentence. *See Mastay v. McDonough*, 928 So.2d 512 (Fla. 1st DCA 2006) (Section 893.135, F.S., does not preclude earning gain-time during the mandatory term as long as it does not result in the prisoner’s release prior to serving a minimum of 85% of the sentence).

²⁴ *See State v. Vanderhoff*, 14 So.3d 1185 (Fla. 5th DCA 2009).

²⁵ Section 958.04, F.S. *See Christian v. State*, 84 So.3d 437 (Fla. 5th DCA 2012).

²⁶ Section 893.135(4), F.S., authorizes a state attorney to move the sentencing court to reduce or suspend the sentence of any person who is convicted of a violation of s. 893.135, F.S., and who provides substantial assistance in the identification, arrest, or conviction of any of that person’s accomplices, accessories, coconspirators, or principals or of any other person engaged in trafficking in controlled substances.

²⁷ “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 Article II, Section 3, of the Florida Constitution (other citations omitted).

or attempted drug trafficking based upon a lesser drug trafficking weight.²⁸ Further, for first degree felony drug trafficking that involves a defendant with a substance abuse problem, pretrial intervention may be an option.²⁹

Because s. 893.135(1)(c), F.S., punishes both trafficking in certain ‘street’ opioids, like heroin, and trafficking in prescription opioids, it is not possible to precisely determine the number of prescription opioid trafficking arrests, prosecutions, convictions, and prison admissions, or the disposition of cases in which drug trafficking was charged based upon unlawful possession, purchase, sale, etc., of a prescription opioid.³⁰

Typically there are three weight ranges for each first degree felony trafficking provision. Weight thresholds applicable to each range can be significantly greater, and mandatory minimum terms applicable to those ranges can be significantly longer, for trafficking under s. 893.135(1)(c), F.S., than for trafficking under some other trafficking provisions. For example, the following table compares trafficking in illegal drugs with some other trafficking provisions.

| Trafficking Provision | First Weight Range | Second Weight Range | Third Weight Range |
|---|---|--|---|
| Trafficking in illegal drugs (includes prescription opioids) (s. 893.135(1)(c)1., F.S.) | 3-year mandatory minimum term (4 grams to less than 14 grams) | 15-year mandatory minimum term (14 grams to less than 28 grams) | 25-year mandatory minimum term (28 grams to less than 30 kilograms) |
| Trafficking in cocaine (s. 893.135(1)(b)1., F.S.) | 3-year mandatory minimum term (28 grams to less than 200 grams) | 7-year mandatory minimum term (200 grams to less than 400 grams) | 15-year mandatory minimum term (400 grams to less than 150 kilograms) |
| Trafficking in phencyclidine (s. 893.135(1)(d)1., F.S.) | 3-year mandatory minimum term (28 grams to less than 200 grams) | 7-year mandatory minimum term (200 grams to less than 400 grams) | 15-year mandatory minimum term (400 grams or more) |

²⁸ Section 893.13, F.S., does not contain any mandatory minimum terms, except for certain drug offenses committed within 1,000 feet of the real property of a K-12 school and other specified facility, s. 893.13(1)(c)1., F.S., and certain drug offenses involving manufacture of methamphetamine or phencyclidine or possession of specified listed chemicals with the intent to manufacture methamphetamine or phencyclidine, s. 893.13(1)(g), F.S. Attempted trafficking does not call for a mandatory sentence, though conspiracy to traffic does. *See* ss. 777.04 and 893.135(5), F.S., and *Suarez v. State*, 635 So.2d 154 (Fla. 2d DCA 1994).

²⁹ Section 948.08(6)(a), F.S., provides, in part, that a person who is charged with a nonviolent felony and is identified as having a substance abuse problem is eligible for voluntary admission into a pretrial substance abuse education and treatment intervention program, including a treatment-based drug court program established pursuant to s. 397.334, F.S., approved by the chief judge of the circuit, for a period of not less than 1 year in duration, upon motion of either party or the court’s own motion, subject to the requirements and exceptions contained in subsection (6). A “nonviolent felony” includes any felony offense that is not a forcible felony as defined in s. 776.08, F.S. *Id.*

³⁰ “Department of Corrections data shows that prison admissions for trafficking in opioids have more than quadrupled over the past five years, from 262 admissions in Fiscal Year 2006-07 to 1,200 in Fiscal Year 2010-11. ... This data does not distinguish among the types of opioids, and as a result, offenses involving heroin are grouped with those involving prescription painkillers. This is because these two controlled substances are addressed in the same section of the drug trafficking statute, and thus subject to the same weight thresholds and minimum mandatory sentences.” OPPAGA Report, at p. 2 (footnote omitted).

| Trafficking Provision | First Weight Range | Second Weight Range | Third Weight Range |
|--|--|---|---|
| Trafficking in methaqualone (s. 893.135(1)(e)1., F.S.) | 3-year mandatory minimum term (200 grams to less than 5 kilograms) | 7-year mandatory minimum term (5 kilograms to less than 25 kilograms) | 15-year mandatory minimum term (25 kilograms or more) |
| Trafficking in amphetamine or methamphetamine (s. 893.135(1)(f)1., F.S.) | 3-year mandatory minimum term (14 grams to less than 28 grams) | 7-year mandatory minimum term (28 grams to less than 200 grams) | 15-year mandatory minimum term (200 grams or more) |

In a 2009 interim report by the Senate Committee on Criminal Justice, staff reported findings of a survey of prosecutors and public defenders regarding drug trafficking mandatory minimum terms:

Typically, prosecutors prefer trafficking mandatories and public defenders and judges do not prefer them. Responses to a survey of prosecutors and defenders prepared as background information for this report generally followed this typical division. However, concerns about mandatories were raised by some prosecutors. Two prosecutors’ offices indicated some concern about the trafficking provision relating to painkillers. One prosecutor’s office indicated that the “threshold amount for some mandatories is comparatively small” and also indicated that “the application of mandatories based on presumptive trafficking because of the amount involved rather than evidence of actual dealing can pose ethical concerns.”³¹

III. Effect of Proposed Changes:

The bill amends s. 893.135, F.S., the drug trafficking statute. It does not repeal or reduce the length of any mandatory minimum term applicable to drug trafficking offenses in that section. The bill provides that, notwithstanding any other provision of law, if a defendant has been convicted of a violation of s. 893.135(1)(c), F.S., which involves possession of a mixture that is a prescription drug as defined in s. 499.003, F.S.,³² the state attorney, defendant, or counsel representing the defendant may move the sentencing court to depart from the mandatory minimum term of imprisonment applicable to that violation.

The sentencing court may grant this motion if the court finds that all of the following criteria are met:³³

³¹ Senate Interim Report 2010-09, at p. 3 (footnote omitted).

³² Section 499.003(43), F.S., defines a “prescription drug” as being a prescription, medicinal, or legend drug, including, but not limited to, finished dosage forms or active pharmaceutical ingredients subject to, defined by, or described by s. 503(b) of the Federal Food, Drug, and Cosmetic Act or s. 465.003(8), F.S., s. 499.007(13), F.S., or s. 499.003(11), (46), or (53), F.S., except that an active pharmaceutical ingredient is a prescription drug only if substantially all finished dosage forms in which it may be lawfully dispensed or administered in this state are also prescription drugs. Staff notes that the bill does not contain any cap on the weight of the prescription drug possessed.

³³ Presumably the level of proof would be the same as required for a departure sentence under the Criminal Punishment Code. Section 921.002(1)(f), F.S., provides, in part: “The level of proof necessary to establish facts that support a departure from the lowest permissible sentence is a preponderance of the evidence.”

- The defendant's violation of s. 893.135(1)(c), F.S., did not involve the use, attempted use, or threatened use of physical force against another person.
- The defendant's violation of s. 893.135(1)(c), F.S., did not result in serious bodily injury to another person or the disfigurement or death of another person.
- In the commission of the offense in violation of s. 893.135(1)(c), F.S., the defendant was not armed with, did not threaten to use or display, and did not represent by word or conduct that he or she possessed a firearm, deadly weapon, or dangerous instrument.
- The defendant has not previously been convicted of a felony.
- The defendant has not previously invoked this sentencing departure provision.

When departing from the mandatory minimum term of imprisonment, the sentencing court may consider any facts that the court considers relevant, including, but not limited to:

- The criteria for eligibility for consideration for departure.
- The sentencing report and any evidence admitted in a previous sentencing proceeding.
- The defendant's record of arrests.
- Any other evidence of allegations of unlawful conduct or the use of violence by the defendant.
- The defendant's family ties, length of residence in the community, employment history, and mental condition.
- The likelihood that an alternative sentence will produce the same deterrent effect, rehabilitate the defendant, and prevent or delay recidivism to an equal or greater extent than the imposition of the mandatory minimum term of imprisonment.
- The likelihood that the defendant will engage again in a criminal course of conduct.

If the sentencing court grants this motion, the court must state in open court at the time of sentencing the specific reasons for imposing the sentence and for not imposing the mandatory minimum term of imprisonment.

The effective date of the bill is July 1, 2013. The bill should only apply to offenses committed on or after July 1, 2013, because 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 of the defendant for that crime. The provision applies to "statutes that effect a substantive change in the law," not to statutes that "are merely procedural or remedial."³⁴ A retroactive penalty enhancement or reduction is a savings clause violation because it affects punishment of crimes previously committed.³⁵

³⁴ *Grice v. State*, 967 So.2d 957, 960 (Fla.1st DCA 2007) (citations omitted), *review denied*, 980 So.2d 489 (Fla. 2008).

³⁵ *See Castle v. State*, 305 So.2d 794 (Fla. 4th DCA 1974), *affirmed*, 330 So.2d 10 (Fla. 1976) (Florida's savings clause prohibited retroactive application of reduced penalty for arson to reduce the sentence of a defendant sentenced under the prior arson statute).

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 (CJIC), which provides the final, official estimate of the prison bed impact, if any, has determined that the bill has an indeterminate but negative prison bed impact (i.e., the bill will not increase the number of prison beds but the CJIC cannot determine to what extent the bill may reduce prison bed impact).

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial 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.
