

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 Appropriations Subcommittee on Criminal and Civil Justice

BILL: PCS/SB 464 (402202)

INTRODUCER: Appropriations Subcommittee Criminal and Civil Justice; and Senator Joyner

SUBJECT: Controlled Substances

DATE: April 10, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Erickson</u>	<u>Cannon</u>	<u>CJ</u>	Favorable
2.	<u>Harkness</u>	<u>Sadberry</u>	<u>ACJ</u>	Recommend: Fav/CS
3.	_____	_____	<u>FP</u>	_____
4.	_____	_____	<u>RC</u>	_____

I. Summary:

PCS/SB 464 authorizes a court to grant a defendant's motion to depart from a three-year mandatory minimum term and mandatory fine for trafficking in cocaine, hydrocodone, oxycodone, opiates or opioids, phencyclidine, amphetamine, methamphetamine, flunitrazepam, phenethylamines, or lysergic acid diethylamide (LSD) if the court finds all of the following criteria are met:

- The defendant has not previously moved for a departure.
- The offense would be subject to a three-year mandatory minimum term absent the departure.
- The offense involves simple possession of any of the noted controlled substances (or a mixture containing the substance) in a specified quantity.
- The offense does not involve use of a minor, a firearm, a deadly weapon, or the threat to use or use of physical force.
- The defendant does not have a previous conviction, adjudication of delinquency, or withhold or adjudication of guilt for drug trafficking or any other offense specified in the bill.
- The defendant is amenable to substance abuse treatment if the court determines that he or she is in need of such treatment.

The state attorney may object to the motion to depart.

The bill has a positive fiscal impact on general revenue because it reduces the future need for state prison beds.

The bill has an effective date of July 1, 2015.

II. Present Situation:

Drug Trafficking

Unlawful activities involving controlled substances (e.g., possession or sale of controlled substances) are punishable under s. 893.13, F.S. (prohibited acts involving controlled substances), and s. 893.135, F.S. (drug trafficking). “Drug trafficking” consists of knowingly selling, purchasing, manufacturing, delivering, or bringing into this state, or knowingly being in actual or constructive possession¹ of, certain controlled substances in a statutorily-specified quantity.

Whether a person is charged with drug trafficking depends, in part, on the type of controlled substance possessed, sold, etc. Only a limited number of controlled substances are covered under s. 893.135, F.S. Relevant to the bill, s. 893.135, F.S., covers cocaine, hydrocodone, oxycodone, opiates² or opioids,³ phencyclidine, amphetamine, methamphetamine, flunitrazepam, phenethylamines,⁴ and lysergic acid diethylamide (LSD).

The quantity of a covered controlled substance must also meet a minimum weight threshold prescribed in s. 893.135, F.S. Most drug trafficking offenses are first degree felonies⁵ and are subject to mandatory minimum terms.⁶ Section 893.135, F.S., establishes escalating weight ranges. The mandatory minimum term applicable to a drug trafficking act depends upon which weight range is applicable to the quantity of the controlled substance possessed, sold, etc. In some cases, possession, sale, etc., of a relatively small quantity of a covered controlled substance will trigger drug trafficking penalties.

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

Statutory Reference	Covered Substance	Threshold Weight	Weight Range Applicable to Three-Year Mandatory Minimum Term
s. 893.13(1)(b), F.S.	Cocaine	28 grams	28 grams or more but less than 200 grams

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

² Examples of opiates are opium and morphine.

³ Examples of opioids are heroin, oxycodone, hydrocodone, and hydromorphone.

⁴ “Phenethylamines” is a broad category of “psychoactive substances.” Sanders B., Lankenau S.E., Bloom J.J., Hathazi D. “‘Research chemicals’: Tryptamine and Phenethylamine Use Among High Risk Youth,” *Substance Use & Misuse* (2008), Vol. 43, No. 3-4, Pages 389-402, available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2536767/> (last viewed on March 26, 2015).

⁵ A first degree felony is generally punishable by up to 30 years in state prison, a fine of up to \$10,000, or both. Sections 775.082 and 775.083, F.S.

⁶ Most drug offenses under s. 893.13, F.S., are not subject to mandatory minimum terms.

Statutory Reference	Covered Substance	Threshold Weight	Weight Range Applicable to Three-Year Mandatory Minimum Term
s. 893.13(1)(c), F.S.	Hydrocodone, oxycodone, opiates and opioids	14 grams (hydrocodone), 7 grams (oxycodone), 4 grams opiates and opioids)	14 grams or more but less than 28 grams (hydrocodone), 7 grams or more but less than 14 grams (oxycodone), 4 grams or more but less than 14 grams (opiates and opioids)
s. 893.13(1)(d), F.S.	Phencyclidine	28 grams	28 grams or more but less than 200 grams
s. 893.13(1)(f), F.S.	Amphetamines	14 grams	14 grams or more but less than 28 grams
s. 893.13(1)(g), F.S.	Flunitrazepam	4 grams	4 grams or more but less than 14 grams
s. 893.13(1)(k), F.S.	Phenethylamines	10 grams	10 grams or more but less than 200 grams
s. 893.13(1)(l), F.S.	Lysergic acid diethylamide (LSD)	1 gram	1 gram or more but less than 5 grams

The Criminal Punishment Code and Mandatory Minimum Terms

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

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

⁷Sections 921.002-921.0027, F.S.

⁸ Section 921.0024(1)(b), F.S.

The Code includes a list of mitigating factors. Generally, 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"). However, a mandatory minimum term is not subject to mitigation.⁹

Most of the mandatory minimum terms found in Florida law involve drug trafficking offenses. Mandatory minimum terms impact Code sentencing. "If the lowest permissible sentence is less than the mandatory minimum sentence, the mandatory minimum sentence takes precedence."¹⁰

A mandatory minimum sentence is often longer than a prison sentence scored as the lowest permissible sentence under the Code, so the sentencing range is narrowed. Further, with few exceptions, the sentencing court must impose the mandatory minimum term.¹¹

III. Effect of Proposed Changes:

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

The court may grant the motion if the court finds that the defendant has demonstrated by a preponderance of the evidence¹² that all of the following criteria are met:

- The defendant has not previously moved to depart from a three-year mandatory minimum term and mandatory fine.
- The defendant's violation of s. 893.135, F.S., would be subject to a three-year mandatory minimum term and mandatory fine absent a departure.
- The defendant's violation of s. 893.135, F.S., involves possession of one of the following controlled substances (or a mixture that contains the substance) and of the quantity specified:
 - Not more than 34 grams of cocaine;
 - Not more than 17 grams of hydrocodone;
 - Not more than eight grams of oxycodone;
 - Not more than six grams of a controlled substance described in s. 893.135(1)(c), F.S. (opiates and opioids);¹³

⁹ See *State v. Vanderhoff*, 14 So.3d 1185 (Fla. 5th DCA 2009).

¹⁰ Rule 3.704(26) ("The Criminal Punishment Code"), Florida Rules of Criminal Procedure.

¹¹ Staff is aware of two circumstances in which a sentencing court is authorized to impose a sentence below the mandatory minimum term. The first circumstance is when the court sentences a defendant as a youthful offender. Section 958.04, F.S. See *Christian v. State*, 84 So.3d 437 (Fla. 5th DCA 2012). The second circumstance is when the court grants a motion from the state attorney to reduce or suspend a sentence based upon substantial assistance rendered by the defendant. Section 893.135(4), F.S.

¹² "Preponderance of the evidence" is the same level of proof necessary to establish facts supporting the mitigation of a sentence under the Criminal Punishment Code. Section 921.002(1)(f), F.S. Similarly, each of the findings required as the basis for a habitual offender sentence must be found to exist by a preponderance of the evidence. Section 775.084(3)(a)4., F.S.

¹³ Hydrocodone and oxycodone are also described in s. 893.135(1)(c), F.S. However, because different quantities are specified for these substance; the specific quantities for these substances would presumably control over the quantity specified for the category of opiates and opioids in s. 893.135(1)(c), F.S. See "Technical Deficiencies" section of this analysis.

- Not more than 34 grams of phencyclidine;
- Not more than 17 grams of amphetamine or methamphetamine;
- Not more than six grams of flunitrazepam;
- Not more than 20 grams of a phenethylamine described in s. 893.135(1)(k)1., F.S.; or
- Not more than two grams of lysergic acid diethylamide (LSD).
- The defendant did not possess the controlled substance or mixture containing the controlled substance with the intent to sell, manufacture, or deliver the substance or mixture.
- The defendant did not obtain the controlled substance or mixture containing the controlled substance by using a minor to obtain the substance or mixture.
- In committing the violation of s. 893.135, F.S., the defendant did not possess or threaten to use a firearm or deadly weapon, or threaten to use or use physical force against another person.
- The defendant does not have a previous conviction, adjudication of delinquency, or withhold of adjudication of guilt for:
 - Drug trafficking;
 - Sale, manufacture, or delivery of a controlled substance, or the possession with intent to sell, manufacture, or deliver a controlled substance;
 - Sexual misconduct with an individual with a developmental disability;
 - Sexual misconduct with a patient;
 - Kidnapping, false imprisonment, or luring, if the victim is a minor and the defendant is not the victim's parent or guardian;
 - Human trafficking;
 - Sexual battery;
 - The former offense of procuring a minor for prostitution;
 - The former offense of selling or buying a minor into prostitution;
 - Unlawful sexual activity with a 16 or 17-year-old;
 - A lewd offense committed against certain minors;
 - Video voyeurism;
 - A lewd offense committed against an elderly person or disabled person;
 - An unlawful act relating to sexual performance by a child;
 - An unlawful act relating to providing obscene materials to a minor;
 - An unlawful act relating to computer pornography;
 - Electronic transmission of child pornography;
 - Electronic transmission of materials harmful to a minor;
 - Selling or buying of a minor to promote, etc., sexually explicit conduct by the minor;
 - Sexual misconduct with a forensic client;
 - Sexual misconduct with a juvenile offender; or
 - Any offense similar to an offense previously described which was committed in this state and which has been redesignated from a former statute number to one of the described offenses.
- The defendant is amenable to substance abuse treatment if the court determines that he or she is in need of such treatment.

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

The bill takes effect on July 1, 2015.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Criminal Justice Impact Conference, which provides the final, official estimate of the prison bed impact, if any, of legislation, estimates that PCS/SB 464 will have a negative indeterminate (unquantifiable) prison bed impact, meaning the bill will reduce the future need for prison beds.

VI. Technical Deficiencies:

The bill provides that if the drug trafficking offense is trafficking in hydrocodone, the hydrocodone possessed cannot be more than 17 grams. If the drug trafficking offense is trafficking in oxycodone, the oxycodone possessed cannot be more than eight grams. If the drug trafficking offense is trafficking in a controlled substance described in s. 893.135(1)(c), F.S. (opiates and opioids), the substance possessed cannot be more than six grams.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 893.135 of the Florida Statutes.

IX. Additional Information:

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

**Recommended CS by Appropriations Subcommittee on Criminal and Civil Justice
on April 7, 2015:**

The committee substitute makes technical and clarifying changes to the bill.

- B. **Amendments:**

None.