

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 963 Controlled Substances

**SPONSOR(S):** Criminal Justice Subcommittee; Burgess, Jr. and others

**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 1188

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	11 Y, 2 N, As CS	Cox	Cunningham
2) Justice Appropriations Subcommittee			
3) Judiciary Committee			

### SUMMARY ANALYSIS

Chapter 893, F.S., sets forth the Florida Comprehensive Drug Abuse Prevention and Control Act and classifies controlled substances into five categories, known as schedules. These schedules are used to regulate the manufacture, distribution, preparation and dispensing of the substances listed therein.

In recent years, synthetic drugs have become a problem in Florida. Synthetic drugs, such as cannabinoids, are industrial grade chemicals mixed to produce a “high” similar to what would be experienced when using illegal drugs such as marijuana. Each year since 2011, the Florida Legislature has added numerous synthetic cannabinoids to Schedule I of Florida’s controlled substances schedules.

Section 893.135, F.S., creates a variety of first degree felony drug trafficking offenses that are subject to mandatory minimum terms of imprisonment. The mandatory minimum sentence required to be imposed depends on the type and quantity of drug trafficked. Currently, Florida law does not specifically prohibit trafficking in synthetic drugs.

The bill amends s. 893.135, F.S., to create a new offense entitled “trafficking in synthetic drugs.” The substances enumerated in this new offense include 51 variations of synthetic cannabinoid compounds. A person who commits “trafficking in synthetic drugs” and the quantity of the synthetic cannabinoids involved is:

- More than 250 grams, but less than 500 grams - 3 year mandatory minimum and a fine of \$25,000.
- 500 grams or more, but less than 1,000 grams - 7 year mandatory minimum and a fine of \$50,000.
- 1,000 grams or more, but less than 30 kilograms - 15 year mandatory minimum and a fine of \$200,000.
- 30 kilograms or more – 25 year mandatory minimum and pay a fine of \$750,000.

The bill also establishes several capital felony offenses related to trafficking in synthetic drugs.

Section 893.13(1)(a)1., F.S., makes it a second degree felony for a person to sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a variety of Schedule I and II controlled substances. Currently, minimum mandatory sentences are not required to be imposed for a violation of this offense.

The bill amends s. 893.13(1)(a)1. F.S., to require the court to impose a mandatory minimum term of imprisonment of 3 years if the sale, manufacture, etc. of specified controlled substances occurs in a dwelling.

On March 11, 2015, the Criminal Justice Impact Conference determined that the bill as originally filed will have a positive indeterminate impact on state prison beds (i.e. an unquantifiable increase of prison beds). CJIC has not heard the bill as amended, but the changes will likely result in an additional increase of prison beds. See fiscal section.

The bill is effective on October 1, 2015.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Synthetic Drug Abuse**

##### *Background*

Chapter 893, F.S., sets forth the Florida Comprehensive Drug Abuse Prevention and Control Act and classifies controlled substances into five categories, known as schedules. These schedules are used to regulate the manufacture, distribution, preparation and dispensing of the substances listed therein. The distinguishing factors between the different drug schedules are the “potential for abuse”<sup>1</sup> of the substance listed therein and whether there is a currently accepted medical use for the substance.<sup>2</sup> Schedule I substances have a high potential for abuse and have no currently accepted medical use in the United States.<sup>3</sup> Cannabis and heroin are examples of Schedule I drugs.<sup>4</sup>

Chapter 893, F.S., contains a variety of provisions criminalizing behavior related to controlled substances. Most of these provisions are found in s. 893.13, F.S., which criminalizes the possession, sale, purchase, manufacture, and delivery of controlled substances. The penalty for violating these provisions depends largely on the schedule in which the substance is listed.<sup>5</sup> Other factors, such as the quantity of controlled substance involved in a crime, can also affect the penalties for violating the criminal provisions of ch. 893, F.S.

In recent years, synthetic drugs have emerged in Florida. Synthetic drugs, such as cannabinoids and cathinones, are industrial grade chemicals mixed to produce a “high” similar to what would be experienced when using illegal drugs such as marijuana or methamphetamine.<sup>6</sup> According to the United States Drug Enforcement Administration, these substances have not been approved for human consumption by the United States Food and Drug Administration (FDA).<sup>7</sup>

##### *Synthetic Cannabinoids*

Synthetic cannabinoids (also known as “K2” or “Spice”) are chemically engineered substances that, when smoked or ingested, can produce a high similar to marijuana, without the delta-tetrahydrocannabinol (THC).<sup>8</sup> The chemicals are a white powder that is often applied to a plant material to mimic marijuana.<sup>9</sup> Synthetic cannabinoids have been developed over the last 30 years for research purposes to investigate the cannabinoid system.<sup>10</sup> No legitimate non-research uses have been identified for synthetic cannabinoids and they have not been approved by the FDA for human consumption.<sup>11</sup>

##### *Synthetic Drug Abuse*

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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 its 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, s. 893.03, F.S.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> See, e.g., s. 893.13(1)(a) and (c), F.S.

<sup>6</sup> OFFICE OF NATIONAL DRUG CONTROL POLICY, *Synthetic Drugs (a.k.a. K2, Spice, Bath Salts, etc.)*, <https://www.whitehouse.gov/ondcp/ondcp-fact-sheets/synthetic-drugs-k2-spice-bath-salts> (last visited March 12, 2015).

<sup>7</sup> UNITED STATES DRUG ENFORCEMENT ADMINISTRATION, *Chemicals Used in “Spice” and K2” Type Products Now under Federal Control and Regulation*, <http://www.dea.gov/pubs/pressrel/pr030111.html> (last visited March 12, 2015).

<sup>8</sup> OFFICE OF NATIONAL DRUG CONTROL POLICY, *Synthetic Drugs (a.k.a. K2, Spice, Bath Salts, etc.)*, <http://www.whitehouse.gov/ondcp/ondcp-fact-sheets/synthetic-drugs-k2-spice-bath-salts> (last visited March 12, 2015).

<sup>9</sup> *Id.*

<sup>10</sup> *Schedules of Controlled Substances: Temporary Placement of Four Synthetic Cannabinoids Into Schedule I*, Federal Register, The Daily Journal of the United States Government, February 10, 2014, <https://www.federalregister.gov/articles/2014/02/10/2014-02848/schedules-of-controlled-substances-temporary-placement-of-four-synthetic-cannabinoids-into-schedule> (last visited on March 12, 2015).

<sup>11</sup> *Id.*

Despite being labeled “not for human consumption,” synthetic cannabinoids and other synthetic drugs are used as recreational drugs and have been marketed as legal and safer alternatives to illegal methods of getting “high.”<sup>12</sup> They can be found on the Internet, specialty smoke shops, and convenience stores.<sup>13</sup> These substances are predominately being used by individuals between the ages of 16 and 30. The effects of ingesting synthetic cannabinoids can be very serious, and may include seizures, hallucinations, paranoia, anxiety, and tachycardia (racing heartbeat), among others.<sup>14</sup>

### *Recent Legislation*

Every year since 2011, the Florida Legislature has added numerous synthetic cannabinoids to Schedule I of Florida’s controlled substances schedules.<sup>15</sup> As a result, the criminal penalties relating to the possession, sale, manufacture, and delivery of controlled substances now apply to these synthetic substances.

### **Drug Trafficking – Generally**

Section 893.135, F.S., creates a variety of drug trafficking offenses. Drug trafficking occurs when a person knowingly sells, purchases, manufactures, delivers, or brings into this state; or is knowingly in actual or constructive possession of, a specified quantity of a controlled substance.<sup>16</sup> Section 893.135, F.S., categorizes drug trafficking offenses by drug type as follows:

- Paragraph (1)(a) establishes the offense of “trafficking in cannabis;”
- Paragraph (1)(b) establishes the offense of “trafficking in cocaine;”
- Paragraph (1)(c)1. establishes the offense of “trafficking in illegal drugs;”
- Paragraph (1)(c)2. establishes the offense of “trafficking in hydrocodone;”
- Paragraph (1)(c)3. establishes the offense of “trafficking in oxycodone;”
- Paragraph (1)(d) establishes the offense of “trafficking in phencyclidine;”
- Paragraph (1)(e) establishes the offense of “trafficking in methaqualone;”
- Paragraph (1)(f) establishes the offense of “trafficking in amphetamine;”
- Paragraph (1)(g) establishes the offense of “trafficking in flunitrazepam;”
- Paragraph (1)(h) establishes the offense of “trafficking in GHB;”
- Paragraph (1)(i) establishes the offense of “trafficking in GBL;”
- Paragraph (1)(j) establishes the offense of “trafficking in 1,4-butanediol;”
- Paragraph (1)(k) establishes the offense of “trafficking in phenethylamines;” and
- Paragraph (1)(l) establishes the offense of “trafficking in LSD.”

Generally, drug trafficking offenses are first degree felonies<sup>17</sup> that are subject to mandatory minimum terms of imprisonment.<sup>18</sup> The mandatory minimum sentence applicable to a drug trafficking offense depends on the type and quantity of drug trafficked. A sentencing judge has no discretion to sentence a person below the mandatory minimum sentences outlined in statute, regardless of any mitigating testimony provided to the court.<sup>19</sup> Only the state attorney has the discretion to waive the mandatory minimum sentence for trafficking offenses.<sup>20</sup>

Currently, Florida law does not establish a specific offense within the trafficking statute prohibiting trafficking in synthetic drugs.

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<sup>12</sup> *Bath Salts” Receive Emergency Drug Scheduling*, Brief # 10-194, Public Florida Fusion Center, Unit Reporting: Office of Statewide Intelligence, January 26, 2011, [http://www.fdle.state.fl.us/Content/BathSalts/FDLEBrief10\\_194BathSaltsPublic.pdf](http://www.fdle.state.fl.us/Content/BathSalts/FDLEBrief10_194BathSaltsPublic.pdf) (last visited on March 21, 2014); FDLE HB 697 Analysis (on file with the Criminal Justice Subcommittee).

<sup>13</sup> *Id.*

<sup>14</sup> Schedules of Controlled Substances: Temporary Placement of Five Synthetic Cannabinoids Into Schedule I, 76 Fed. Reg. 11,075-78 (March 1, 2011) (supplementary information) *also available at* [http://www.deadiversion.usdoj.gov/fed\\_regs/rules/2011/fr0301.htm](http://www.deadiversion.usdoj.gov/fed_regs/rules/2011/fr0301.htm).

<sup>15</sup> Chs. 14-159, 13-29, 12-23, 11-73, 11-90, Laws of Fla.

<sup>16</sup> *See* s. 893.135(1)(a)-(l), F.S.

<sup>17</sup> A first degree felony is punishable by up to 30 years imprisonment and a \$10,000 fine. Sections 775.082 and 775.083, F.S.

<sup>18</sup> Section 893.135, F.S., provides for more severe penalties in certain situations. For example, drug trafficking is a capital felony if, during the commission of the offense, the defendant intentionally killed a person; counseled, commanded, induced, procured, or caused the intentional killing of an individual; or the trafficking led to a natural, though not inevitable, lethal result to another person.

<sup>19</sup> 16 Fla. Prac., Sentencing s. 6:69 (2012-2013 ed.).

<sup>20</sup> *Id.*

### Effect of the Bill

The bill amends s. 893.135(1), F.S., to create a new offense entitled “trafficking in synthetic drugs.” The new offense provides:

Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, in excess of 250 grams of a controlled substance described in s. 893.03(1)(c)46.-50., 114.-142., 151.-159., or 166.-173., or any mixture containing those substances, commits a felony of the first degree, which felony shall be known as “trafficking in synthetic drugs.”

The substances enumerated in the new offense of “trafficking in synthetic drugs” include 51 variations of synthetic cannabinoid compounds (e.g., JWH-019 (Naphthalen-1-yl-(1-hexylindol-3-yl)methanone) and JWH-020 (1-heptyl-3-(1-naphthoyl)indole)).<sup>21</sup>

The bill provides that a person who commits “trafficking in synthetic drugs” and the quantity involved:

- Is more than 250 grams, but less than 500 grams, must be sentenced to a mandatory minimum term of imprisonment of 3 years and ordered to pay a fine of \$25,000.
- Is 500 grams or more, but less than 1,000 grams, must be sentenced to a mandatory minimum term of imprisonment of 7 years and ordered to pay a fine of \$50,000.
- Is 1,000 grams or more, but less than 30 kilograms, must be sentenced to a mandatory minimum term of imprisonment of 15 years, and ordered to pay a fine of \$200,000.
- Is 30 kilograms or more, must be sentenced to a mandatory minimum term of imprisonment of 25 years, and ordered to pay a fine of \$750,000.

The bill also provides that a person convicted of trafficking in synthetic drugs in an amount of 30 kg or more must be punished by life and is not eligible for any form of discretionary early release except pardon, executive clemency, or conditional medical release under s. 947.149, F.S.

Additionally, a defendant commits the capital felony of trafficking in synthetic drugs<sup>22</sup> if the court determines that in addition to violating any of the trafficking in synthetic drugs provisions, the:

- Defendant also intentionally killed an individual or counseled, commanded, induced, procured, or caused the intentional killing of an individual and such killing was the result of the trafficking; or
- Defendant’s conduct in committing the act of trafficking led to a natural, though not inevitable, lethal result.

The bill makes it a capital felony, known as capital importation of synthetic drugs, for a person to knowingly bring 60 kilograms or more of one of the enumerated controlled substances into Florida with the knowledge that the probable result of such importation would be the death of a person.

The bill amends s. 921.0022., F.S., adding the various provisions of “trafficking in synthetic drugs” and “trafficking in LSD” to the offense severity ranking chart.

### **Sale, Manufacture, or Delivery, or Possession with Intent of a Controlled Substance**

Section 893.13(1)(a)1., F.S., makes it a second degree felony<sup>23</sup> for a person to sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, the following controlled substances:

- Schedule I substances listed in s. 893.03(1)(a), F.S.;
- Schedule I substances listed in s. 893.03(1)(b), F.S.;
- Schedule I substances listed in s. 893.03(1)(d), F.S.;
- Schedule II<sup>24</sup> substances listed in s. 893.03(2)(a), F.S.;

<sup>21</sup> The bill prohibits the trafficking of any material, compound, mixture, or preparation that contains any quantity of the enumerated chemical substances.

<sup>22</sup> Punishable as provided in ss. 775.082 and 921.142, F.S.

<sup>23</sup> A second degree felony is punishable by up to 15 years imprisonment and a \$10,000 fine. ss. 775.082 and 775.083, F.S.

- Schedule II substances listed in s. 893.03(2)(b), F.S.; or
- Schedule II substances listed in s. 893.03(2)(c)4., F.S.

Currently, minimum mandatory sentences are not required to be imposed for violations of the above-described offense.

#### Effect of the Bill

The bill amends s. 893.13(1)(a)1., F.S., to require the court to impose a mandatory minimum term of imprisonment of 3 years if the sale, manufacture, etc. of any of the above-listed Schedule I and II substances occurs in a dwelling as defined in s. 810.011, F.S.<sup>25</sup>

#### B. SECTION DIRECTORY:

Section 1. Amends s. 893.13, F.S., relating to prohibited acts; penalties.

Section 2. Amends s. 893.135, F.S., relating to trafficking; mandatory sentences; suspension or reduction of sentences; conspiracy to engage in trafficking.

Section 3. Amends s. 921.0022, F.S., relating to Criminal Punishment Code; offense severity ranking chart.

Section 4. Provides an effective date of October 1, 2015.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

The bill does not appear to have an impact on state revenues.

##### 2. Expenditures:

On March 11, 2015, the Criminal Justice Impact Conference (CJIC) determined that the bill as originally drafted will have a positive indeterminate impact on state prison beds (i.e. an unquantifiable increase of prison beds). The bill as amended in committee adds several capital offenses, ranks provisions of trafficking in synthetic drugs and trafficking in LSD in the offense severity ranking chart, and removes the requirement to impose a 3-year mandatory minimum for committing the third degree felony of sell, manufacture, etc. controlled substances in a dwelling. CJIC has not heard the bill as amended, however, the above-described changes will likely result in an additional increase in prison beds.

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

##### 1. Revenues:

The bill does not appear to have an impact on local government revenues.

##### 2. Expenditures:

The bill does not appear to have an impact on local government expenditures.

#### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

<sup>24</sup> A substance in Schedule II has a high potential for abuse and has a currently accepted but severely restricted medical use in treatment in the United States, and abuse of the substance may lead to severe psychological or physical dependence. s. 893.03(2), F.S.

<sup>25</sup> Section 810.011, F.S., defines a “dwelling” to mean “a building or conveyance of any kind, including any attached porch, whether such building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it and is designed to be occupied by people lodging therein at night, together with the curtilage thereof.”

None.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill appears to be exempt from the requirements of article VII, section 18 of the Florida Constitution because it is a criminal law.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

As currently drafted, trafficking in synthetic drugs in the amount of 30kg or more has two conflicting penalties, a mandatory minimum of 25 years and life imprisonment.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 16, 2015, the Criminal Justice Subcommittee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The strike-all amendment:

- Limits the application of the 3 year mandatory minimum term of imprisonment to persons who sell, manufacture, etc. specified Schedule I and II controlled substances in a dwelling in violation of s. 893.13(1)(a)1., F.S.;
- Ensures the new trafficking offense mirrors other trafficking provisions by including the capital offenses included in other trafficking provisions (capital importation of synthetic drugs – 60 kg or more and trafficking in synthetic drugs and a finding that the defendant intentionally killed an individual or caused the killing of an individual or the defendant's conduct resulted in the death of a person); and
- Includes trafficking in synthetic drugs and trafficking in LSD on the offense severity ranking chart.

This bill analysis is drafted to the committee substitute as passed by the Criminal Justice Subcommittee.