

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 Judiciary

BILL: CS/SB 602

INTRODUCER: Criminal Justice Committee and Senator Bracy

SUBJECT: Mandatory Minimum Sentences

DATE: February 6, 2018 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Erickson</u>	<u>Jones</u>	<u>CJ</u>	Fav/CS
2.	<u>Tulloch</u>	<u>Cibula</u>	<u>JU</u>	Favorable
3.	_____	_____	<u>AP</u>	_____
4.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 602 authorizes a court to depart from the 3-year mandatory minimum term of imprisonment applicable to trafficking in various controlled substances, excluding opioids and opiates. The departure is authorized if the court makes the following written findings:

- The violation only involved possession;
- The offender did not use or threaten violence or use a weapon during the commission of the offense;
- The offense did not result in a death or serious bodily injury of a person not a party to the offense; and
- A factor, consideration, or circumstance clearly demonstrates that imposing the mandatory minimum term of imprisonment would constitute or result in an injustice.

The Legislature's Office of Economic and Demographic Research estimates that the bill will have a "negative indeterminate" prison bed impact (an unquantifiable decrease in prison beds). See Section V. Fiscal Impact Statement.

II. Present Situation:

Florida's Controlled Substance Schedules

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

Punishment of Prohibited Drug Acts

Section 893.13, F.S., in part, punishes unlawful possession, sale, purchase, manufacture, and delivery of a controlled substance. The penalty for violating s. 893.13, F.S., can depend on the act committed, the substance and quantity of the substance involved, and the location in which the violation occurred. For example, selling a controlled substance listed in s. 893.03(1)(c), F.S., which includes many synthetic controlled substances, is a third degree felony.² However, if that substance is sold within 1,000 feet of a K-12 school or other designated facility or location, the

¹ Pursuant to s. 893.035(3)(a), F.S., “potential for abuse” means a substance has properties as a central nervous system stimulant or depressant or a hallucinogen that create a substantial likelihood of the substance being: (1) used in amounts that create a hazard to the user’s health or the safety of the community; (2) diverted from legal channels and distributed through illegal channels; or (3) taken on the user’s own initiative rather than on the basis of professional medical advice.

² Section 893.13(1)(a)2., F.S. A third-degree felony is punishable by up to 5 years in state prison, a fine of up to \$5,000, or both. Sections 775.082(3)(e) and 775.083(1)(c), F.S.

violation is a second-degree felony.³ With three exceptions,⁴ s. 893.13, F.S., does *not* provide for mandatory minimum terms of imprisonment.

Drug trafficking, which is punished in s. 893.135, F.S., consists of knowingly selling, purchasing, manufacturing, delivering, or bringing into this state (importation), or knowingly being in actual or constructive possession of, certain Schedule I or Schedule II controlled substances in a statutorily-specified quantity. The statute only applies to a limited number of such controlled substances. And the controlled substances involved in the trafficking statute must meet a specified weight or quantity threshold.

Most drug trafficking offenses are first degree felonies⁵ and are subject to a mandatory minimum term⁶ and a mandatory fine, which is determined by the weight or quantity of the substance.⁷ For example, trafficking in 28 grams or more, but less than 200 grams, of cocaine, a first degree felony, is punishable by a 3-year mandatory minimum term of imprisonment and a mandatory fine of \$50,000.⁸ Trafficking in 200 grams or more, but less than 400 grams, of cocaine, a first degree felony, is punishable by a 7-year mandatory minimum term of imprisonment and a mandatory fine of \$100,000.⁹

Criminal Punishment Code

The Criminal Punishment Code¹⁰ (Code) is Florida's "primary sentencing policy."¹¹ Noncapital felonies sentenced under the Code receive an offense severity level ranking (Levels 1-10).¹² Points are assigned and accrue based upon the level ranking assigned to the primary offense, additional offenses, and prior offenses. Sentence points escalate as the level escalates. Points may also be added or multiplied for other factors such as victim injury or the 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

³ Section 893.13(1)(c)2., F.S. A second-degree felony is punishable by up to 15 years in state prison, a fine of up to \$10,000, or both. Sections 775.082(3)(d) and 775.083(1)(b), F.S.

⁴ Exceptions: s. 893.13(1)(c)1., F.S. (selling, etc., certain Schedule I and II controlled substances within 1,000 feet of a K-12 school, park, community center, or publicly owned recreational facility subject to 3-year mandatory minimum); s. 893.13(1)(g)1., F.S. (manufacturing methamphetamine or phencyclidine in a structure or conveyance where any child under 16 is present subject to 5-year mandatory minimum); and s. 893.13(1)(g)2., F.S. (manufacturing methamphetamine or phencyclidine causes a child under 16 to suffer great bodily harm subject to 10-year mandatory minimum).

⁵ A first degree felony is generally punishable by up to 30 years in state prison and a fine of up to \$10,000. However, when specifically provided by statute, a first degree felony may be punished by imprisonment for a term of years not exceeding life imprisonment. Sections 775.082(3)(b) and 775.083(1)(b), F.S.

⁶ There are currently 56 mandatory minimum terms of imprisonment in s. 893.135, F.S., which range from three years to life imprisonment.

⁷ See s. 893.135, F.S.

⁸ Section 893.135(b)(1)a., F.S.

⁹ Section 893.135(1)b.1.b., F.S.

¹⁰ 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.

¹¹ *Florida's Criminal Punishment Code: A Comparative Assessment (FY 2012-2013) Executive Summary (Offenses Committed On or After October 1, 1998)*, Florida Department of Corrections, available at http://www.dc.state.fl.us/pub/sg_annual/1213/executives.html (last visited on Jan. 31, 2018).

¹² 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.

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.¹³ Absent mitigation,¹⁴ 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.¹⁵

Mandatory Minimum Sentences and Departures

Mandatory minimum terms of imprisonment limit judicial discretion in Code sentencing: “If the lowest permissible sentence is less than the mandatory minimum sentence, the mandatory minimum sentence takes precedence.”¹⁶ As previously noted, the sentencing range under the Code is generally the scored lowest permissible sentence up to and including the statutory maximum penalty. However, if there is a mandatory minimum sentence that is longer than the scored lowest permissible sentence, the sentencing range is narrowed to the mandatory minimum sentence up to and including the statutory maximum penalty.

Prosecutors have “complete discretion” in the charging decision.¹⁷ The exercise of this discretion may determine whether or not a defendant is subject to a mandatory minimum term or a reduced mandatory minimum term. A prosecutor could determine in a particular case that mandatory minimum sentencing is inappropriate or too severe and avoid or ameliorate such sentencing. For example, the prosecutor could offer a plea to a violation of s. 893.13, F.S., or attempted drug trafficking, neither of which carries a mandatory minimum term. A prosecutor could also offer a plea to a drug trafficking violation that carries a 3-year mandatory minimum term, even though the defendant could be prosecuted for a drug trafficking violation that carries a greater mandatory minimum term. Further, a prosecutor could move the court to reduce or suspend a sentence if the defendant renders substantial assistance.¹⁸

There are few circumstances in which a court is statutorily authorized to depart from a mandatory minimum term. A court may depart from a mandatory minimum term if the defendant is determined to be a youthful offender.¹⁹ In determining youthful offender status, the defendant

¹³ Section 921.0024, F.S. Unless otherwise noted, information on the Code is from this source.

¹⁴ 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.

¹⁵ 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.

¹⁶ Fla. R. Crim. P. 3.704(d)(26).

¹⁷ “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 FLA. CONST. art. II, s. 3) (other citations omitted).

¹⁸ Sections 790.163(2), 790.164(2), 893.135(4), and 921.0024(1)(b), F.S. However, lower-level dealers or peripheral actors may have little, if any, information beneficial to prosecutors. Inmate population data reported in a 2009 Senate interim report indicated that the average sentence of inmates with a lower-level trafficking offense was above the mandatory minimum term, while the average sentence of inmates with a higher-level trafficking offense was below the mandatory minimum term. *A Policy Analysis of Minimum Mandatory Sentencing for Drug Traffickers*, Interim Report 2010-109 (Oct. 2009), p. 7, Committee on Criminal Justice, The Florida Senate, http://archive.flsenate.gov/data/Publications/2010/Senate/reports/interim_reports/pdf/2010-109cj.pdf (last visited on January 31, 2018).

¹⁹ Section 958.04, F.S.

must be given the opportunity to present facts to the court.²⁰ A court may also depart from a mandatory minimum term for a violation of s. 316.027(2)(c), F.S. (driver involved in a fatal crash fails to stop and remain at the scene of a crash), upon the defendant's motion if the court "finds that a factor, consideration or circumstance clearly demonstrates that imposing a mandatory minimum term of imprisonment would constitute or result in an injustice."²¹

III. Effect of Proposed Changes:

The bill authorizes a court to depart only from the 3-year mandatory minimum terms of imprisonment for trafficking in various controlled substances, excluding opioids and opiates.²² The departure is authorized if the court makes the following written findings:

- The violation only involved possession;
- The offender did not use or threaten violence or use a weapon during the commission of the offense;
- The offense did not result in a death or serious bodily injury of a person not a party to the offense; and
- A factor, consideration, or circumstance clearly demonstrates that imposing the mandatory minimum term of imprisonment would constitute or result in an injustice.

Because only a drug trafficking act involving possession may be considered for departure under the bill, the court may not depart from the mandatory minimum term if the drug trafficking violation involves sale, purchase, manufacture, delivery, or importation of a controlled substance.

Specifically, the bill authorizes downward departures from 3-year mandatory minimum sentences for trafficking in the smallest quantities of the following controlled substances:

- In excess of 25 pounds, but less than 2,000 pounds of cannabis, or 300 or more cannabis plants, but not more than 2,000 cannabis plants;²³
- 28 grams or more, but less than 200 grams, of cocaine;²⁴
- 28 grams or more, but less than 200 grams, of phencyclidine;²⁵
- 200 grams or more, but less than 5 kilograms, of methaqualone;²⁶
- 14 grams or more, but less than 28 grams, of amphetamine or methamphetamine;²⁷
- 4 grams or more, but less than 14 grams, of flunitrazepam;²⁸

²⁰ Section 958.07, F.S.

²¹ Section 316.027(2)(g), F.S.

²² Section 893.135(1)(c), F.S.

²³ Section 893.135(1)(a)1., F.S.

²⁴ Section 893.135(1)(b)1.a., F.S.

²⁵ Section 893.135(1)(d)1.a., F.S. Phencyclidine "is a hallucinogen formerly used as a veterinary anesthetic, and briefly as a general anesthetic for humans." "Phencyclidine," PubChem, U.S. National Library of Medicine, <https://pubchem.ncbi.nlm.nih.gov/compound/phencyclidine> (last visited on January 31, 2018).

²⁶ Section 893.135(1)(e)1.a., F.S. Methaqualone "is a quinazoline derivative with hypnotic and sedative properties." "Methaqualone," PubChem, U.S. National Library of Medicine, <https://pubchem.ncbi.nlm.nih.gov/compound/6292> (last visited on Jan. 31, 2018).

²⁷ Section 893.135(1)(f)1.a., F.S.

²⁸ Section 893.135(1)(g)1.a., F.S. "Flunitrazepam, trade name Rohypnol, is a central nervous system depressant in a class of drugs called benzodiazepines." "Flunitrazepam (Rohypnol)," Center for Substance Abuse Research, <http://www.cesar.umd.edu/cesar/drugs/rohypnol.asp> (last visited on Jan. 31, 2018).

- 1 kilogram or more, but less than 5 kilograms, of gamma-hydroxybutyric acid (GHB);²⁹
- 1 kilogram or more, but less than 5 kilograms, of gamma-butyrolactone (GBL);³⁰
- 1 kilogram or more, but less than 5 kilograms, of 1,4-Butanediol;³¹
- 10 grams or more, but less than 200 grams, of specified phenethylamines and cathinones, substituted³² phenethylamines, and substituted cathinones;³³
- 1 gram or more, but less than 5 grams, of lysergic acid diethylamide (LSD);³⁴
- 280 grams or more, but less than 500 grams, of specified synthetic cannabinoids;³⁵ and
- 14 grams or more, but less than 100 grams, of n-benzyl phenethylamines.³⁶

Except for cannabis, mixtures containing the above-referenced controlled substances are included.

Excluded from the departure provisions of the bill are trafficking in various opiates or opioids, such as opium, morphine, heroin, hydromorphone, codeine, hydrocodone, oxycodone, fentanyl, and carfentanil and other fentanyl derivatives.³⁷

The bill does not authorize departure from mandatory fines.

The effective date of the bill is July 1, 2018.

²⁹ Section 893.135(1)(h)1.a., F.S. “Gamma-hydroxybutyric acid (GHB) is a naturally occurring analog of gamma-aminobutyric acid (GABA) that has been used in research and clinical medicine for many years. GHB was used clinically as an anesthetic in the 1960s but was withdrawn due to side effects that included seizures and coma.” Kapoor P., Revati Deshmukh R., and Kukreja I., “GHB Acid: A rage or reprove” (abstract) (Oct.–Dec. 2013) 4(4): 173, *Journal of Advanced Pharmaceutical Technology and Research*, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3853692/> (last visited on January 31, 2018). “The primary effects of GHB use are those of a CNS [central nervous system] depressant[.]” *Id.* “GHB has been implicated in a number of crime types; most notably in drug-facilitated sexual assault.” *Id.* [S]exual predators . . . covertly administer the drug for its sedative and amnesic effects[.]” *Id.*

³⁰ Section 893.135(1)(i)1.a., F.S. “Analogues that are often substituted for GHB include GBL (gamma butyrolactone) and 1,4 BD (also called just “BD”), which is 1,4-butanediol.” “Drug Fact Sheet/GHB” (undated), U.S. Drug Enforcement Administration (on file with the Senate Committee on Criminal Justice).

³¹ Section 893.135(1)(j)1.a., F.S. *See* n. 36, *infra*.

³² “The term ‘substituted’ is a general term that means a portion of the chemical structure is removed and replaced with a different chemical structure.” Staff Analysis (CS/CS/CS/SB 150) (April 27, 2017), p. 11, n. 58, The Florida Senate, <http://www.flsenate.gov/Session/Bill/2017/150/Analyses/2017s00150.ap.PDF> (last visited on Jan. 31, 2018).

³³ Section 893.135(1)(k)2.a., F.S. “Phenethylamines” is a broad category of “psychoactive substances.” Sanders B., Lankenau S., Bloom J., and Hathazi D., “‘Research chemicals’: Tryptamine and Phenethylamine Use Among High Risk Youth” (2008) 43(3-4): 389, *Substance Use & Misuse*, <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2536767/> (last visited on January 31, 2018). “Cathinone . . . is a monoamine alkaloid found in the shrub *Catha edulis* (Khat)[.]” and is “[c]losely related to ephedrine, cathine and other amphetamines[.]” “Cathinone,” PubChem, U.S. National Library of Medicine, <https://pubchem.ncbi.nlm.nih.gov/compound/Cathinone#section=Top> (last visited on Jan. 31, 2018).

³⁴ Section 893.135(1)(l)1.a., F.S.

³⁵ Section 893.135(1)(m)2.a., F.S. “Synthetic [c]annabinoids are chemicals that act as cannabinoid receptor agonists. Chemically they are not similar to cannabinoids but . . . they are cannabinoid-like in their activity.” “Synthetic Cannabinoids Drug Information,” Redwood Toxicology Laboratory, https://www.redwoodtoxicology.com/resources/drug_info/synthetic_cannabinoids (last visited on Jan. 31, 2018).

³⁶ Section 893.135(1)(n)2.a., F.S. *See* n. 31, *supra*.

³⁷ These controlled substances are described in s. 893.135(1)(c), F.S.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The bill does not provide for retroactive application. Consequently, drug trafficking departures authorized by the bill would apply to applicable drug trafficking offenses committed on or after July 1, 2018, the effective date of the bill. “In Florida, without clear legislative intent to the contrary, a law is presumed to apply prospectively.”³⁸

Additionally, Article X, Section 9 of the Florida Constitution, provides that repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed.³⁹ This prohibition applies even if the retroactive application does not disadvantage the offender.⁴⁰

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’s Office of Economic and Demographic Research (EDR) preliminarily estimated that the original bill would have a “negative indeterminate” prison bed impact (an unquantifiable

³⁸ *Bates v. State*, 750 So. 2d 6, 10 (Fla. 1999) (in the absence of explicit legislative direction, the court refused to retroactively apply amendments to a sentencing statute to offenses committed before the effective date of the amendments).

³⁹ 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.

⁴⁰ See *Castle v. State*, 305 So. 2d 794, 796 (Fla. 4th DCA 1974), *affirmed*, 330 So.2d 10 (Fla. 1976) (Florida’s saving clause prohibits retroactive application of a reduced penalty for arson to a defendant sentenced under the pre-amended arson statute).

decrease in prison beds).⁴¹ CS/SB 602 includes additional findings the court must make to depart from a mandatory minimum term. However, these changes should have no impact on EDR's estimate.

Additionally, the Department of Corrections indicates that the financial impact is indeterminate.⁴²

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill does not indicate how the request for a mandatory minimum term should be raised before the court.⁴³ If adopted into law, the courts will likely require the defendant to (1) make a motion to depart from the mandatory minimum term at sentencing, and (2) prove the four requirements for departure by a preponderance of the evidence⁴⁴ in order that the court may make its written findings.

VIII. Statutes Affected:

This bill substantially amends section 893.135, Florida Statutes.

IX. Additional Information:

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

CS by Criminal Justice on December 4, 2017:

The Committee Substitute provides additional findings the court must make to depart from a mandatory minimum term: the offender did not use or threaten violence or use a weapon during the commission of the offense; and the offense did not result in a death or serious bodily injury of a person not a party to the offense.

⁴¹ E-mail from EDR staff to staff of the Senate Committee on Criminal Justice, dated Nov. 3, 2017 (on file with the Senate Committee on Criminal Justice).

⁴² Department of Corrections, *2018 Agency Legislative Bill Analysis*, S.B. 602 (Nov. 9, 2017) (on file with Senate Judiciary Committee).

⁴³ *Compare* s. 316.027(2)(g), F.S. (providing that defendant may make a motion to depart from mandatory minimum term to which state may object); s. 958.07, F.S. (requiring that defendant seeking youthful offender status have opportunity to present mitigating facts to the court that may materially affect adjudication as youthful offender).

⁴⁴ *See, e.g.*, s. 921.0026, F.S. (authorizing downward departure for sentences under criminal punishment code). Section 921.0026 does not specify who must move for departure or who has the burden. However, the courts have held that “[t]he burden rests on the defendant to ‘prove these elements, or other mitigating factors, before the trial court will depart.’” *State v. Milici*, 219 So. 3d 117, 121 (Fla. 5th DCA 2017)(quoting *Wallace v. State*, 197 So.3d 1204, 1205 (Fla. 1st DCA 2016), accord *State v. Jones*, 122 So.3d 517, 518 (Fla. 1st DCA 2013)).

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
