

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: SB 694

INTRODUCER: Senators Brandes and Bracy

SUBJECT: Mandatory Sentences

DATE: January 29, 2018

REVISED: 1/31/18

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Erickson</u>	<u>Jones</u>	<u>CJ</u>	Favorable
2.	<u>Stallard</u>	<u>Cibula</u>	<u>JU</u>	Favorable
3.	<u> </u>	<u> </u>	<u>ACJ</u>	<u> </u>
4.	<u> </u>	<u> </u>	<u>AP</u>	<u> </u>

I. Summary:

SB 694 authorizes a court to sentence a drug trafficker below the current law’s mandatory minimum prison term if the court finds that the person did not perform any of the following acts:

- Engage in a continuing criminal enterprise;
- Use or threaten violence or use a weapon during the commission of the crime; or
- Cause a death or serious bodily injury.

In general terms, drug trafficking involves the sale, manufacture, delivery, importation, or possession of specified large amounts of various substances, such as cocaine, marijuana, and LSD.

Under current law, every drug-trafficking offense is subject to mandatory minimum prison sentences ranging from 3 years to life. These mandatory minimum sentences vary depending on the controlled substance that a person traffics and the amount of the substance.

A court that is authorized to deviate below the mandatory minimum sentences set forth in the drug-trafficking statute is nonetheless generally constrained by the minimum sentence produced by this state’s minimum felony sentence calculation statutes. And the minimum sentence produced by these calculations may be lower or higher than the applicable mandatory minimum set forth in the drug-trafficking statute.

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:

Overview

A person who commits one of the crimes of trafficking in a controlled substance is subject to the mandatory minimum sentences set forth in the drug-trafficking statute.¹ These statutory minimum sentences are mandatory in the sense that courts generally have no authority to impose prison terms or fines that are below them. The mandatory minimum sentences vary depending on the drug trafficked and how much of it was trafficked. For instance, if a person traffics in cocaine in an amount of at least 28 grams, but less than 200 grams, he or she must be sentenced to at least 3 years in prison and must pay a fine of \$50,000.² However, for an amount of at least 400 grams, but less than 150 kilograms, a trafficker must be sentenced to at least 15 years in prison and must pay a fine of \$250,000.³

Although courts have little authority to sentence a drug trafficker below the mandatory minimums, prosecutors can effectively avoid the imposition of a particular mandatory minimum sentence by charging a person whose crime would qualify for that sentence with an offense that carries a lower minimum sentence.

Sentencing for Drug-Trafficking Crimes

A judge may sentence a drug trafficker within a range determined by the statutes. The minimum prison sentence and fine for a given drug-trafficking offense is the corresponding mandatory minimum set forth in the drug-trafficking statute. Regarding the fines, the minimums are also the maximums.⁴

As for maximum prison sentences, a drug trafficker generally may be sentenced to no more than 30 years, as set forth in the general sentencing statute. However, the minimum prison sentence for trafficking in particularly large amounts of certain controlled substances is life in prison.⁵

Courts' Limited Ability to Divert from Mandatory Minimum Sentences

There are few circumstances in which a court of its own accord may depart from a mandatory minimum term. A court may depart from a mandatory minimum term if the defendant is a youthful offender.⁶ 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), if the court “finds that a factor, consideration or circumstance clearly demonstrates that

¹ See s. 893.135, F.S.

² Section 893.135(1)(b)1.a., F.S.

³ Section 893.135(1)(b)1.c., F.S.

⁴ Section 775.083, F.S., sets forth the maximum fines for first degree felonies as a class. The maximum there set forth is \$10,000. However, this statute also states that this maximum is subject to other statutes. The drug-trafficking statute sets mandatory minimum fines for particular drug-trafficking offenses, and all of these minimums are higher than \$10,000. Moreover they are not set forth as minimums, but as *the* fine that must be paid by a person who commits the corresponding drug-trafficking offense.

⁵ Under some circumstances, trafficking is even punishable by death. See, e.g., s. 893.135(1)(b)2.-3., F.S.

⁶ Section 958.04, F.S.

imposing a mandatory minimum term of imprisonment would constitute or result in an injustice.”⁷

Prosecutorial Discretion as a Means of Avoiding Mandatory Minimum Sentences

Prosecutors have “complete discretion” in the charging decision.⁸ 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 too severe and thus decide to avoid the imposition of the sentence by charging a crime that has a lesser mandatory minimum sentence or no mandatory minimum sentence.

For example, a prosecutor could offer a plea to attempted drug trafficking or to a violation of the statute that prohibits selling non-trafficking amounts of certain controlled substances; neither of these violations 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 longer mandatory minimum term. Further, a prosecutor could move the court to reduce or suspend a sentence if the defendant renders substantial assistance.⁹

III. Effect of Proposed Changes:

The bill authorizes a court to sentence a drug trafficker below the current law’s mandatory minimum prison term if the court finds that, in relation to a trafficking offense for which the person is being sentenced, he or she did not perform any of the following acts:

- Engage in a continuing criminal enterprise;¹⁰
- Use or threaten violence or use a weapon during the commission of the crime; or
- Cause a death or serious bodily injury.

The bill applies to all drug trafficking acts (possession, sale, manufacture, delivery, and importation) and to most, if not all, drug trafficking mandatory minimum terms of imprisonment (ranging from 3 years to life).¹¹ The bill does not authorize departure from mandatory fines.

⁷ Section 316.027(2)(g), F.S.

⁸ “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).

⁹ 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 (October 2009), p. 7, Committee on Criminal Justice, The Florida Senate, http://archive.flstate.gov/data/Publications/2010/Senate/reports/interim_reports/pdf/2010-109cj.pdf.

¹⁰ Section 893.20(1), F.S., provides that any person who commits three or more felonies under ch. 893, F.S., in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management and who obtains substantial assets or resources from these acts is guilty of engaging in a continuing criminal enterprise.

¹¹ The drug-trafficking statute imposes a mandatory life sentence for trafficking in especially large amounts of certain substances. However, these mandatory life sentences are never described as a “mandatory minimum” sentences like the rest of

The bill impacts the drug-trafficking statute, which prohibits a person from knowingly selling, delivering, importing, manufacturing, or possessing specified large quantities of the following controlled substances:

- Cannabis or cannabis plants;¹²
- Cocaine;¹³
- Various opiates or opioids, such as opium, morphine, heroin, hydromorphone, codeine, hydrocodone, oxycodone, fentanyl, and carfentanil and other fentanyl derivatives;¹⁴
- Phencyclidine;¹⁵
- Methaqualone;¹⁶
- Amphetamine or methamphetamine;¹⁷
- Flunitrazepam;¹⁸
- Gamma-hydroxybutyric acid (GHB);¹⁹
- Gamma-butyrolactone (GBL);²⁰
- 1,4-Butanediol;²¹
- Specified phenethylamines and cathinones, substituted²² phenethylamines, and substituted cathinones;²³

the mandatory minimum sentences imposed by the statute. Nonetheless, the mandatory life sentence that is required for certain offenses seems to be a mandatory minimum sentence, and thus a sentence to which the bill would apply.

¹² Section 893.135(1)(a), F.S.

¹³ Section 893.135(1)(b), F.S.

¹⁴ Section 893.135(1)(c), F.S.

¹⁵ Section 893.135(1)(d), 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 Jan. 30, 2018).

¹⁶ Section 893.135(1)(e), 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 Nov. 21, 2017).

¹⁷ Section 893.135(1)(f), F.S.

¹⁸ Section 893.135(1)(g), 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. 29, 2018).

¹⁹ Section 893.135(1)(h), 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 Jan. 29, 2018). “The primary effects of GHB use are those of a CNS [central nervous system] depressant[.]” *Id.*

²⁰ Section 893.135(1)(i), 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).

²¹ Section 893.135(1)(j), F.S.

²² “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. 29, 2018).

²³ Section 893.135(1)(k), 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 Jan. 29, 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. 29, 2018).

- Lysergic acid diethylamide (LSD);²⁴
- Specified synthetic cannabinoids;²⁵ and
- N-benzyl phenethylamines.²⁶

A court that is authorized to deviate below the mandatory minimum sentences set forth in the drug-trafficking statute is nonetheless generally constrained by the minimum sentence produced by this state’s minimum sentence calculation statutes.²⁷ And the minimum sentence produced by this calculation may be lower or higher than the mandatory minimum set forth in the drug-trafficking statute.

The felony sentencing statute takes into account a host of factors to determine the minimum sentence that a court may impose on a felon. These factors include crimes for which the felon is being sentenced, prior offenses, and any injury suffered by the felon’s victim. Each of these items are assigned number values that increase as their severity increases—the more severe the offense and the more severe the injury to a victim, the more points are assessed. These numbers are then factored into a multi-step formula. The number produced by this formula determines the minimum sentence that the court may impose on the felon before it.

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

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

This bill does not require counties or municipalities to spend funds or limit their authority to raise revenue or receive state-shared revenues as specified in Article VII, s. 18 of the Florida Constitution.

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

²⁴ Section 893.135(1)(l), F.S.

²⁵ Section 893.135(1)(m), 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. 29, 2018).

²⁶ Section 893.135(1)(n), F.S.

²⁷ See ss. 921.0022-921.0024, F.S. However, there are a number of circumstances in which a court may sentence a felon to a lesser sentence than is produced by the sentence calculation statutes. See ss. 921.0024-921.0027, F.S.

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.”²⁸

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.²⁹ This prohibition applies even if the retroactive application does not disadvantage the offender.³⁰

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’s (EDR) preliminary estimates that the bill will have a “negative indeterminate” prison bed impact (an unquantifiable decrease in prison beds).³¹

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill does not explicitly state whether it applies to mandatory sentences of life imprisonment set forth in the drug-trafficking statute. The bill specifically refers to “mandatory minimum” sentences imposed under the drug-trafficking statute. The statute never uses the words “mandatory minimum” sentence to refer to sentences or life imprisonment. The Legislature may wish to amend the bill to clarify its intent.

²⁸ *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).

²⁹ 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.

³⁰ 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).

³¹ E-mail and prison bed impact analysis from EDR staff to staff of the Senate Committee on Criminal Justice, dated Nov. 20, 2017 (on file with the Senate Committee on Criminal Justice).

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.)

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.
