

**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 Criminal Justice Committee

BILL: SB 1822  
 INTRODUCER: Senator Joyner  
 SUBJECT: Trafficking in Cocaine  
 DATE: March 19, 2009      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Cannon	CJ	<b>Pre-meeting</b>
2.	_____	_____	JU	_____
3.	_____	_____	JA	_____
4.	_____	_____	WPSC	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

**I. Summary:**

Currently, s. 893.135, F.S., provides that a person who commits drug trafficking involving 28 grams or more, but less than 200 grams, of cocaine commits a first degree felony and must be sentenced to a 3-year mandatory minimum term of imprisonment. The bill amends this offense to provide that the 3-year mandatory minimum term will only apply upon a second or subsequent conviction for this offense.

This bill substantially amends section 893.13, of the Florida Statutes.

**II. Present Situation:**

**Cocaine Trafficking**

Section 893.13(1)(b)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 possession<sup>1</sup> of, 28 grams or more of cocaine, as described in s. 893.03(2)(a)4., F.S., or of any mixture containing cocaine, but less than 150 kilograms of cocaine or any such mixture, commits a first degree felony known as “trafficking in cocaine.” Generally, the maximum penalty for a first degree felony is 30-years imprisonment.

Section 893.135(1)(b)1.a., F.S., provides that a 3-year mandatory minimum term of imprisonment and a \$50,000 fine must be imposed for this offense if the quantity involved is 28

<sup>1</sup> A trafficking offense based on possession of the quantity of a controlled substance required for the trafficking offense does not require proof that the possessor intended to sell the controlled substance. *See Paey v. State*, 943 So.2d 919, 920 (Fla. 2d DCA 2006), *rev. denied*, 954 So.2d 28 (Fla.2007).

grams<sup>2</sup> or more, but less than 200 grams.<sup>3</sup> This offense is ranked in Level 7 of the offense severity ranking chart of the Criminal Punishment Code.<sup>4</sup>

### **Cocaine**

Cocaine is a schedule II controlled substance under Florida law.<sup>5</sup> A Schedule II controlled substance is a substance that “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.”<sup>6</sup> The National Institute on Drug Abuse has described cocaine as a “powerfully addictive stimulant drug.”<sup>7</sup>

According to the Office of National Drug Control Policy (ONDCP),<sup>8</sup> “[c]ocaine is the primary drug threat in Florida. Cocaine hydrochloride (HCl) is available throughout Florida from the gram to kilogram level. Additionally, drug trafficking organizations dealing in crack cocaine have been identified in Orlando, Gainesville, Fort Myers, Jacksonville, Fort Pierce and West Palm Beach, thus demonstrating the availability of crack throughout Florida.” The ONDCP notes that approximately 300,000 of Florida citizens (ages 12 or older) reported use of cocaine in the past year, according to 2005-2006 data from the National Survey on Drug Use and Health. The ONDCP further notes that “Florida is a primary area for international drug trafficking and money laundering organizations, as well as a principal thoroughfare for cocaine and heroin transiting to the northeastern United States and Canada” and that cocaine leads the type of illicit drugs seized in Florida by federal agencies (“[d]uring 2007, [f]ederal agencies seized 5,660.4 kilograms of cocaine in Florida”).

In a 2008 interim report by the Medical Examiners Commission (‘commission’) in the Florida Department of Law Enforcement,<sup>9</sup> the commission reported that for January to June of 2008, the third most frequently occurring drug found in Florida decedents was cocaine (955 or 13%). Cocaine was also listed as third in drugs that caused the most deaths (360). However, occurrences of cocaine declined by 9.5 percent and deaths caused by cocaine decreased by 10.2 percent since the last reported period. The greatest number of deaths “with cocaine” (meaning

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<sup>2</sup> A sugar or sweetener packet in a restaurant weighs approximately one gram. Twenty-eight grams is equal to 0.06172943 pounds.

<sup>3</sup> Two hundred grams is equal to 0.4409245 pounds.

<sup>4</sup> See s. 921.002(3)(g), F.S. Generally, a Level 7 offense scores a prison sentence (subtotal sentence points for a drug trafficking offense are multiplied, at the discretion of the court, by 1.5), unless the sentence is mitigated as provided in s.921.0026, F.S. Florida law also authorizes the state attorney to move the sentencing court to reduce or suspend the sentence of a person convicted of a Level 7 or Level 8 drug trafficking, if the person provides substantial assistance. See ss. 893.135(4) and 921.0024, F.S.

<sup>5</sup> See s. 893.03(2)(a)4., F.S.

<sup>6</sup> See s. 893.03(2), F.S.

<sup>7</sup> *NIDA InfoFacts: Crack and Cocaine* (August, 2008), National Institute on Drug Abuse (NIDA), National Institute of Health, U.S. Department of Health and Human Services (<http://www.nida.nih.gov/pdf/infofacts/Cocaine08.pdf>).

<sup>8</sup> *State of Florida: Profile of Drug Indicators* (May 2008), Drug Policy Information Clearinghouse, Office of National Drug Control Policy (<http://www.whitehousedrugpolicy.gov/statelocal/fl/fl.pdf>). All information in this paragraph is from this source.

<sup>9</sup> *Drugs Identified in Deceased Persons by Florida Medical Examiners: 2008 Interim Report* (November 2008), Medical Examiners Commission, Florida Department of Law Enforcement (<http://www.fdle.state.fl.us/cjst/MEC/Publications/2008%20Interim%20Report.pdf>). All information in this paragraph is from this source.

that cocaine was either present in the decedent or caused the decedent's death) occurred in Orlando and Miami (respectively, first and second).

### **Mandatory minimum sentencing**

Mandatory minimum terms of imprisonment are essentially a legislative judgment that some offenses are so serious that they warrant a uniform, minimum sentence of imprisonment. Critics of mandatory minimum sentencing argue that the facts of each case are different, and that judges are best positioned and able to determine when the facts of a case warrant a more or less severe sanction. For example, in his concurring opinion in *State v. Fulton*,<sup>10</sup> Judge Philip Padovano opined that, when a mandatory minimum term is required, “[a] defendant’s fate is often decided not with the use of critical thinking or judicial experience, but rather by the application of a one-size-fits-all statute.”<sup>11</sup> Judge Padovano believed that the facts of the case before the court were an example of a case in which the 3-year mandatory minimum term for cocaine trafficking was not warranted:

I agree that the trial judge must sentence Annette Fulton to a minimum term of three years in the Department of Corrections and that he is also required to assess a fine against her in the amount of \$50,000. However, I am compelled to say that this is not my idea of justice. To the contrary, I think that this case is an example of the kind of injustice that can be done when a judge is required to apply a rigid mandatory minimum sentencing statute that removes judgment and discretion from the judicial process.

Ms. Fulton is the single mother of six children. She is twenty-eight years old, and the crime that became the subject of the charge against her in this case was her first offense. She sold forty grams of cocaine in a desperate effort to obtain enough money to buy Christmas presents for her children. She did not expect that her motive in committing the crime would exonerate her or even that it would mitigate her punishment. Instead, she entered an unconditional plea of guilty and stood prepared to accept whatever punishment the trial judge was to impose.

During the sentencing hearing, Ms. Fulton promised the trial judge that she would never commit another crime. This is the kind of statement that is often made at sentencing hearings and often taken with a grain of salt, but the judge may have believed it in this case, given the defendant's age and her lack of any prior criminal record. He may have thought that Ms. Fulton made a tragic mistake and that her conduct was an isolated incident that would not recur. It would be logical to assume that she did not suddenly decide to embark on a life of crime at the age of twenty-eight. As all experienced trial judges know, the propensity for criminal behavior usually shows up much earlier in life.

Taking all of these facts into consideration, the trial judge decided to place Ms. Fulton on probation for a period of five years. His only error, as odd as it may seem, was that the law did not permit him to use his own judgment in deciding on the proper sentence. Section 893.135(1)(b) 1.a., Florida Statutes provides that any person who sells cocaine in

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<sup>10</sup> 878 So.2d 485 (Fla. 1st DCA 2004). Judge Padovano’s concurring opinion is at pp. 485-487.

<sup>11</sup> *Id.* at 487.

an amount more than 28 grams but less than 200 grams must be sentenced to at least three years in prison and must pay a fine of at least \$50,000.

Section 893.135(1)(b) 1.a., Florida Statutes was enacted twenty-five years ago and since then it has served as a model for many other statutes of its kind. We now have a host of mandatory minimum statutes, one for nearly every kind of crime that could be deserving of a serious punishment. See, e.g., § 775.082(9)(a) 3., Fla. Stat. (2003) (releasee reoffenders); § 775.084(4)(c) (three strikes); § 775.084(4)(d) (violent career criminals); § 775.087 (ten-twenty-life); § 790.235 (possession of firearm by violent career criminal). Even the crimes that are not subject to mandatory minimum sentencing statutes are controlled by an intricate set of restrictions imposed by the Criminal Punishment Code. See § 921.002, Fla. Stat. (2003). The time a defendant is required to serve under the Code can be determined within a fraction of a month.<sup>12</sup>

Judge Padovano questioned whether this case was really the kind of case the Legislature intended when it created the 3-year mandatory minimum term for cocaine trafficking:

I doubt that Ms. Fulton is the person the Legislature had in mind when it enacted section 893.135(1)(b) 1.a. But the statute applies to her nonetheless. The mandatory minimum sentence is required in every case, without regard for any of the factors that reasonable people would use to distinguish one case from another. The statute does not take into account the age or prior criminal record of the offender, the motive the offender had for committing the crime, the need for imprisonment, or any of the other circumstances in which the crime was committed. A hardened criminal who imports 200 grams of cocaine into the state with the intention of selling it to school children would be subject to the same mandatory minimum sentence the law requires for Ms. Fulton.

This brings me to the heart of my concern. Statutes like the one at issue here remove the human element from our system of justice, and that presents a serious danger. The Legislature cannot possibly envision every situation in which a statute will apply when it is enacted. An inflexible statute that commands a particular result regardless of the facts can easily produce an unjust result. That such a statute will be applied in a way that was not expected is only a matter of time.<sup>13</sup>

### III. Effect of Proposed Changes:

The bill amends s. 893.135, F.S., to provide that the 3-year mandatory minimum term imposed for trafficking in 28 grams or more, but less than 200 grams, must be imposed on the second or subsequent conviction for this offense. Under current law, this mandatory minimum term is applied on any conviction of this offense. The \$50,000 fine would continue to be applied on any conviction of this offense, and the bill does not amend the felony degree of the offense (first degree felony) or its Level 7 ranking in the offense severity ranking chart of the Criminal Punishment Code.

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<sup>12</sup> *Id.* at 485-486.

<sup>13</sup> *Id.* at 487.

The bill takes effect on July 1, 2009.

**Other Potential Implications:**

The 3-year mandatory minimum term for trafficking in 28 grams or more, but less than 200 grams, of cocaine was created in 1999.<sup>14</sup> Before this change, this offense was sentenced pursuant to the former sentencing guidelines.<sup>15</sup>

The bill does not repeal the 7 and 15- year mandatory minimum terms for higher-quantity cocaine trafficking offenses,<sup>16</sup> nor does it repeal the 3-year mandatory minimum terms for trafficking in specific quantities of other controlled substances specified in the drug trafficking statute.<sup>17</sup>

**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 official estimate of prison bed impact, if any, of legislation, estimates that the bill could have a potentially

<sup>14</sup> See s. 9, ch. 99-188, L.O.F.

<sup>15</sup> See s. 893.135 (1997).

<sup>16</sup> See s. 893.135(1)(b)1.b. and 1c., F.S.

<sup>17</sup> See s. 893.13(1)(a)1., F.S. (cannabis), s. 893.135 (1)(c)1.a., F.S. (morphine, opium, oxycodone, hydrocodone, and hydromorphone), s. 893.135(1)(d)1.a., F.S. (phencyclidine), s. 893.135(1)(e)1.a., F.S. (methaqualone), s. 893.135(1)(f)1.a., F.S. (amphetamine and methamphetamine), s. 893.13(1)(g)1.a, F.S. (flunitrazepam), s. 893.135(1)(h)1.a., F.S. (gamma-hydroxybutyric acid), s. 893.135(1)(i)1.a., F.S. (gamma-butyrolactone), s. 893.135(1)(j)1.a., F.S. (1,4-Butanediol), s. 893.135(1)(k)1.a., F.S. (phenethylamines), and s. 893.135(1)(l)1.a, F.S. (lysergic acid diethylamide).

significant impact on *reducing* the number of offenders coming to prison for the cocaine trafficking offense.<sup>18</sup>

According to the Office of Economic and Demographic Research (EDR), for FY 2007-08, 811 offenders were sentenced to prison for the cocaine trafficking offense (77.5% of the offenders sentenced for this offense). This estimate was obtained by using the Criminal Code Database and inflating numbers to take underreporting into account.

Based on the new commitment file the EDR prepared from monthly status files provided by the Department of Corrections (DOC), the EDR reports that:

- 71 percent of FY 2007-08 new commitments with the cocaine trafficking offense as the primary offense received the 3-year mandatory minimum term.
- 50.5 percent of those with the 3-year mandatory minimum had a 3-year sentence; the remainder (49.5%) had longer sentences.
- The average sentence length for the offenders with the 3-year mandatory minimum term was 59.01 months.

The EDR further reports:

This offense has an incarceration rate over 75 percent. The DOC data suggest[s] nearly three quarters of the offenders sentenced to prison for this offense do receive the mandatory minimum sentence. But, nearly half of those offenders who receive the mandatory have longer sentences so it is unlikely that the proposed change would greatly affect those sentences.<sup>19</sup>

[Criminal Code] ... data suggest[s] that only a very small percentage of the offenders sentenced to prison with this offense have a prior conviction for the same offense. This would mean that the proposed statutory changes could affect nearly all of the offenders who were sentenced to prison with this offense and who received the mandatory minimum. It is unknown, however, whether those offenders would receive a non-prison sanction instead of the prison sanction or if they would receive a shorter ... [sentence with the proposed changes].

The large number of offenders sentenced each year with cocaine trafficking as their primary offense suggest[s] that the proposed changes could have a potentially significant impact on REDUCING the number of offenders coming to prison with this offense.

Note: DOC staff indicated that, as the result of a lawsuit, these offenders are eligible to earn gain-time.<sup>20</sup>

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<sup>18</sup> See <http://edr.state.fl.us/conferences/criminaljustice/Impact/cjimpact.htm>

<sup>19</sup> Analysis of SB 1822 and HB 927 prepared by EDR on February 25, 2009 (on file with the Criminal Justice Committee).

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

**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.

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

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