

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 808

INTRODUCER: Senator Oelrich

SUBJECT: Murder/Unlawful Distribution of Methadone

DATE: February 8, 2010

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Cannon	CJ	Favorable
2.			JU	
3.			JA	
4.				
5.				
6.				

I. Summary:

The bill provides that first degree murder, a capital felony, includes the unlawful killing of a human being which resulted from the unlawful distribution of methadone by a person 18 years of age or older, when such drug is proven to be the proximate cause of the death of the user.

This bill substantially amends section 782.04 of the Florida Statutes.

II. Present Situation:

Methadone: Properties; Scheduling; and Medical Uses

Methadone is a “synthetic narcotic analgesic (pain killer) commonly associated with [h]eroin detoxification and maintenance programs but it is also prescribed to treat severe pain. It has been increasingly prescribed in place of oxycodone for pain management.”¹ Methadone is a Schedule II controlled substance.² 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.”³

¹ *Drugs Identified in Deceased Persons by Florida Medical Examiners, 2009 Interim Report* (November 2009), Florida Medical Examiners Commission, Florida Department of Law Enforcement. See the following link: <http://www.fdle.state.fl.us/Content/getdoc/7f31b3d3-cff8-4f25-a04d-51f11b018e32/MEC-2009-Interim-Drug-Report.aspx>

This report is also cited in this analysis as *2009 MEC Interim Drug Report*.

² Section 893.03(2)(b)14., F.S.

³ Section 893.03(2), F.S.

A recent report from the United States Government Accountability Office (GAO) provides a brief profile on methadone and its properties, uses, and abuse:

Methadone has been approved by the Food and Drug Administration (FDA) for the treatment of opioid addiction and pain, and it is relatively inexpensive compared to other opioids. Methadone's unique pharmacologic properties make it different from other opioids, so it must be carefully administered. Particular vigilance is needed when starting treatment and increasing dosages, regardless of whether methadone is being used for addiction treatment or pain management. FDA reports that side effects can include slow or shallow breathing, dangerous changes in heartbeat, and death.

Until recently, methadone was primarily used in opioid treatment programs (OTP) to treat and rehabilitate people addicted to such opioids as heroin or certain prescription drugs. It works as a replacement for such drugs by preventing withdrawal symptoms. Its slow onset allows patients to be monitored as the drug takes effect, and its 24- to 36- hour duration of action suppresses opioid withdrawal symptoms with one daily dose....

Since the late 1990s, methadone has been increasingly prescribed by practitioners to treat their patients' pain. However, while a single dose suppresses opioid withdrawal symptoms for a day or more, it generally relieves pain for 4 to 8 hours despite remaining in the body much longer. Further, it may take 3 to 5 days to achieve full pain relief, so dosage increases must be done more slowly than with other opioids. As a result, patients may feel the need to take more methadone before the previous dose has left the body. However, if taken too often, in too high a dose, or with certain other medicines or supplements, it may build up in the body to a toxic level. Variability in methadone's absorption, metabolism, and relative pain relief potency among patients requires a highly individualized approach to prescribing....

Like many drugs, methadone can also be abused—that is, used for nontherapeutic purposes or for purposes other than those for which it was prescribed, and dangerous side effects or death can occur when methadone is combined with other drugs or alcohol....⁴

There are several Florida laws applicable to prescribing, administering, and dispensing Schedule II controlled substances. The prescribing of controlled substances is a privilege that is separate from the regulation of the practice of the prescribing practitioner.⁵ A practitioner, in good faith and in the course of his or her professional practice only, may prescribe, administer, dispense, mix, or otherwise prepare a controlled substance, or the practitioner may cause the same to be administered by a licensed nurse or an intern practitioner under his or her direction and supervision only.⁶

⁴ *Methadone-Associated Overdose Deaths, Factors Contributing to Increased Deaths and Efforts to Prevent Them* (March 2009), GAO-09-341, pp. 1-3 (footnotes omitted), United States Government Accountability Office. See the following link: <http://www.gao.gov/new.items/d09341.pdf> This report is also cited in this analysis as *Methadone-Associated Overdose Deaths*.

⁵ Section 893.02(20), F.S., defines practitioner as a licensed medical physician, a licensed dentist, a licensed veterinarian, a licensed osteopathic physician, a licensed naturopathic physician, or a licensed podiatrist, if such practitioner holds a valid federal controlled substance registry number.

⁶ Section 893.05(1), F.S.

A pharmacist,⁷ in good faith and in the course of professional practice only, may dispense controlled substances upon a written or oral prescription under specified conditions. The proprietor of the pharmacy in which a prescription for controlled substances is filled must retain the prescription on file for a period of 2 years. The original container in which a controlled substance is dispensed must bear a label with specified information. A prescription for a Schedule II controlled substance may be dispensed only upon a written prescription of a practitioner, except that in an emergency situation, as defined by regulation of the Department of Health, such controlled substance may be dispensed upon oral prescription but is limited to a 72-hour supply. A prescription for a Schedule II controlled substance may not be refilled.⁸

Methadone and Overdose Deaths

Methadone-associated overdose deaths “can occur in a number of ways, including intentional overdoses, or suicide, and accidental overdoses due to improper dosing levels, abuse, or patient misuse, such as by combining methadone with other drugs.”⁹ In relation to its own report findings, the GAO notes that “[d]efining methadone’s role in a death is difficult because of inconsistencies in determining and reporting causes of death, the presence of other drugs in the deceased person’s system, and a lack of information about the deceased person’s level of opioid tolerance.”¹⁰ The GAO also notes that the Center for Disease Control reports “that it has been difficult to determine the extent to which increases in methadone-associated overdose deaths have resulted from specific prescribing practices, misuse by patients, diversion of the drug such as by illegal sale, or other means.”¹¹ It is likely that state agencies reporting methadone-associated deaths would experience data-collection issues similar to those noted by the GAO.¹²

The Florida Medical Examiner’s Commission (Commission) provides data on drug-associated deaths. According to the Commission’s 2009 interim report,¹³ for the first half of 2009 (January-June), the drugs that caused the most deaths were Oxycodone (499), all Benzodiazepines (470, which includes 348 deaths caused by Alprazolam), *Methadone* (364), Ethyl Alcohol (254), Cocaine (236), and Morphine (147).

⁷ Section 893.02(17), F.S., defines “pharmacist” as a person who is licensed pursuant to ch. 465, F.S., to practice the profession of pharmacy in this state.

⁸ Section 893.04(1), F.S. A pharmacist may not dispense a Schedule I controlled substance to any patient or patient’s agent without first determining, in the exercise of his or professional judgment, that the order is valid. The pharmacist may dispense the controlled substance, in the exercise of his or professional judgment, when the pharmacist or pharmacist’s agent has obtained satisfactory patient information from the patient or the patient’s agent. Section 893.04(2)(a), F.S.

⁹ *Methadone-Associated Overdose Deaths* at p. 3,

¹⁰ *Id.*

¹¹ *Id.* The GAO notes that “[d]iversion can involve illegal sales of prescription drugs by physicians, patients, or pharmacists, as well as obtaining controlled substances from Internet pharmacies without a valid prescription. Diversion can also involve such activities as ‘doctor shopping’ by individuals who visit numerous physicians to obtain multiple prescriptions, prescription forgery, and pharmacy theft.” *Methadone-Associated Overdose Deaths* at p. 3, n. 8.

¹² The Florida Department of Law Enforcement states: “It is worth noting that the manner of death (i.e. natural, homicide, suicide, accidental, undetermined) in cases of drug overdose is very often determined by the Medical Examiner to be accidental. Methadone is a drug that has both a currently accepted medical application as well as being a drug that is often obtained through diversion. It will be difficult to discern whether a medically supervised dosage or a diverted dosage was the ultimate cause of death.” Analysis of SB 808 (February 12, 2010), Florida Department of Law Enforcement.

¹³ *2009 MEC Interim Drug Report*. All Commission information in this subsection is from this report.

For January-June 2009, there were 469 total occurrences of methadone-associated deaths. The Commission attributes methadone as a “cause” in 364 of these deaths, and “present” in the remaining 132 deaths.¹⁴ Of the 364 deaths (methadone found at lethal levels), the largest age group of decedents consists of persons 35-50 years of age (153).

A comparison of data for January-June 2009 and July-December 2008, indicates that methadone occurrences increased by 6.9 percent and deaths caused by methadone increased by 8.3 percent.¹⁵

For January – June 2009, the Commission reports 57 deaths in which the only drug present was methadone. In 36 of these deaths, methadone is identified as a cause of death. The Commission also reports 439 deaths in which a combination of drugs, including methadone, was present. In 325 of these deaths, methadone is identified as a cause of death.

The Commission reports the following percentages for manner of death in methadone-associated cases reported: accident (84 percent); natural (7 percent); suicide (6 percent); undetermined (2 percent); and homicide (1 percent).

Prosecution of Methadone-Associated Deaths

Review of Florida case law indicates that unlawful distribution of a controlled substance in which death is attributed to that distribution has been prosecuted as manslaughter¹⁶ and third degree murder.¹⁷ In all of these cases, the death is related to the unlawful distribution, though the death is not always the result of the use of the substance distributed.¹⁸ Case law does not indicate that prosecutions for manslaughter or third degree murder are precluded if the controlled substance involved in the unlawful distribution is methadone. However, the Fourth District Court of Appeals recently supported a trial court’s dismissal of a first degree murder charge for unlawful distribution of methadone. The impetus for the bill appears to be this holding.

¹⁴ Relevant to this statistical information, the Commission notes that many of the deaths were found to have several drugs contributing to the death, thus the count of specific drugs listed is greater than the number of cases.

¹⁵ For July-December 2008, there were 464 total occurrences and 357 lethal dose occurrences; for January-June 2009, there were 469 total occurrences and 364 lethal dose occurrences.

¹⁶ Manslaughter is the killing of a human being by the act, procurement, or culpable negligence of another, without lawful justification according to the provisions of ch. 776, F.S., and in cases in which such killing shall not be excusable homicide or murder, according to the provisions of ch. 782, F.S. Manslaughter (and not aggravated manslaughter) is a second degree felony. Section 782.07(1), F.S. The maximum prison sanction for a second degree felony is 15 years in state prison. Section 775.082, F.S.

¹⁷ Third degree murder is the unlawful killing of a human being, when perpetrated without any design to affect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than a felony listed in s. 782.04(4)(a)-(r), F.S. Third degree murder is a second degree felony. Section 782.04(4), F.S.

¹⁸ See e.g., *Howard v. State*, 545 So.2d 352 (Fla. 1st DCA 1989), review denied, 553 So.2d 1165 (Fla.1989) (third degree murder conviction involving lethal dose of cocaine); *Blair v. State*, 481 So.2d 1279 (Fla. 3d DCA 1986) (third degree murder conviction involving lethal dose of methadone); *State v. Amaro*, 436 So.2d 1056 (Fla. 2d DCA 1983) (third degree murder charge involving death of a police officer during cannabis raid); *Jones v. State*, 360 So.2d 1293 (Fla. 3d DCA 1978) (manslaughter conviction involving lethal dose of heroin). In *Martin v. State*, 377 So.2d 706 (Fla.1979), the Florida Supreme Court upheld a second degree murder conviction based on unlawful distribution involving a lethal dose of heroin because the appellant pled to the second degree murder charge and, therefore, admitted the facts necessary to sustain the charge. The Court held that since the facts of the case would have supported a conviction for first degree murder, the appellant’s plea to second degree murder precluded any consideration of whether the charge of second degree murder was sufficient.

Section 782.04(1)(a)3., F.S., provides that it is first degree murder, a capital felony,¹⁹ for a person 18 years of age or older to unlawfully kill a human being as a result of unlawfully distributing any substance controlled under s. 893.03(1), F.S., cocaine as described in s. 893.03(2)(a)4., F.S., or opium or any synthetic or natural salt, compound, derivative, or preparation of opium, when such drug is proven to the proximate cause of the death of the user.²⁰

The Florida Supreme Court has described this offense as “an unusual form of felony murder because the State does not need to prove that the defendant intended an act of homicide, that the defendant had knowledge of the drug overdose, or that the defendant was even present when the drug overdose occurred.”²¹

Persons have been prosecuted under s. 782.04(1)(a)3., F.S. (or earlier versions of this provision), for unlawfully distributing drugs listed in that provision.²² However, in *State v. McCartney*,²³ the Fourth District Court of Appeal upheld the dismissal of a charge of first degree murder under s. 782.04(1)(a)3., F.S., based on unlawful distribution of methadone.

The allegations supporting the charge were that the defendant sold methadone to a person whose death was attributed to the methadone. The defendant moved to dismiss, arguing that the methadone was not a Schedule I controlled substance under the reference to s. 893.03(1), F.S., in s. 782.04(1)(a)3., F.S. The State argued that methadone was a “synthetic” of opium. Testimony at an evidentiary hearing on the motion was that methadone is not a “synthetic” of opium, nor is it a synthetic salt, compound or salt, compound derivative, or preparation of opium. The State’s own expert acknowledged that information it had previously provided indicating that methadone is synthetic opium or a derivative of opium was scientifically incorrect. The trial court dismissed the charge.

The State appealed, arguing that methadone is synthetic opium. The appellate court disagreed. It noted that this argument was made in spite of the testimony of the State’s own expert to the contrary. It was also noted that that the Legislature specifically scheduled methadone as a Schedule II controlled substance, not a Schedule I controlled substances in s. 893.03(1), F.S.

III. Effect of Proposed Changes:

The bill amends s. 782.04(1)(a)3., F.S., to insert the word “methadone” into the list of drugs referenced in that provision in order to provide that first degree murder, a capital felony, includes the unlawful killing of a human being which resulted from the unlawful distribution of

¹⁹ Generally, a capital felony is punishable by a death sentence or life imprisonment (without parole). Section 775.082(1), F.S. The appropriate penalty is determined as provided in s. 921.137, F.S., s. 921.141, F.S., or s. 921.142, F.S., as applicable.

²⁰ Federal law punishes knowingly or intentionally distributing or dispensing a controlled substance. 21 U.S.C. § 841(a)(1). In the case of a Schedule II controlled substance, the penalty is a term of imprisonment of not less 20 years or more than life if death or serious bodily injury results from the use of the substance. However, if this violation was committed after a prior conviction for a felony drug offense became final, the penalty is life imprisonment. 21 U.S.C. § 841(b)(1)(C).

²¹ *Pena v. State*, 901 So.2d 781, 787 (Fla.2005), citing *Pena v. State*, 829 So.2d 289, 294 (Fla. 2d DCA 2002).

²² See *Pena v. State*, *supra* (first degree murder involving lethal doses of heroin and another drug). See also *Aumuller v. State*, 944 So.2d 1137 (Fla. 2d DCA 2006), *review denied*, 956 So.2d 455 (Fla.2007) (first degree murder conviction involving lethal dose of heroin); *State v. McCutcheon*, 428 So.2d 788 (Fla. 2d DCA 1983) (first degree murder indictment involving lethal dose of opium or a synthetic, etc.).

²³ 1 So.3d 326 (Fla. 4th DCA 2009).

methadone by a person 18 years of age or older, when such drug is proven to be the proximate cause of the death of the user.

The bill also reenacts ss. 775.0823(1) and (2), s. 782.065(1), 921.002(3)(i), and 947.146(3)(i), F.S., to incorporate the amendment to s. 782.04, F.S., in references to that section.

The effective date of the bill is October 1, 2010.

Other Potential Implications:

Section 782.04(1)(a)3., F.S., does not define “distribution” or define it by reference to a definition of that term in another statute.²⁴ It is unclear if “unlawful distribution” in s. 782.04(1)(a)3., F.S., if applied to unlawful distribution of methadone, would include unlawfully prescribing, administering, or dispensing methadone.

It is also unclear what constitutes “unlawful” distribution in the context of prescribing, administering, or dispensing methadone. Would the term “unlawful” cover only criminal acts or would it also cover, for example, acts for which s. 458.331, F.S., authorizes licensure denial or disciplinary action? For example, would it cover the doctor who is disciplined as authorized by s. 458.331(1)(q), F.S., for inappropriately and excessively prescribing methadone, or the doctor who is disciplined as authorized by s. 458.331(1)(t), F.S., for medical malpractice or gross medical malpractice based on the doctor’s prescription or administration of methadone?

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

²⁴ For example, for purposes of ch. 893, F.S., the Florida Comprehensive Drug Abuse Prevention and Control Act, s. 893.02(8), F.S., defines “distribute” to mean delivery, other than by administering or dispensing, a controlled substance. Section 893.02(6), F.S., defines “deliver” or “delivery” to mean the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship. Section 893.02(7), F.S., defines “dispense” to mean the transfer of possession of one or more doses of a medicinal drug by a pharmacist or other licensed practitioner to the ultimate consumer thereof or to one who represents that it is his or her intention not to consume or use the same but to transfer the same to the ultimate consumer or user for consumption by the ultimate consumer or user.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Criminal Justice Impact Conference (CJIC) provides the final, official estimate of the prison bed impact, if any, of legislation. The CJIC met on February 23, 2010, and projected that SB 808 will have an insignificant prison bed impact.²⁵

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.

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

²⁵ Criminal Justice Impact Conference, February 23, 2009. See the following link:
<http://edr.state.fl.us/conferences/criminaljustice/Impact/cjimpact.htm>