

**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 1334

INTRODUCER: Senator Bogdanoff

SUBJECT: Sentencing of Inmates

DATE: March 23, 2011

REVISED: \_\_\_\_\_

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

**I. Summary:**

This bill removes the mandatory minimum terms of imprisonment related to all drug trafficking provisions listed in s. 893.135, F.S. It also creates a new section of statute to authorize the Department of Corrections (department) to develop and administer a nonviolent offender re-entry program. This program is intended to divert nonviolent offenders from long periods of incarceration when a reduced period of incarceration followed by intensive substance abuse treatment may have the same effect, rehabilitate the offender, and reduce recidivism.

This bill substantially amends section 893.135 of the Florida Statutes and creates a new section of statute.

**II. Present Situation:**

**Sentencing and Minimum Mandatory Sentences**

***Criminal Punishment Code***

The Criminal Punishment Code (Code)<sup>1</sup> is Florida’s framework for determining permissible sentencing ranges for noncapital felonies. Non-capital felonies sentenced under the Code receive an offense severity level ranking from Level 1 to Level 10. Points are assigned and accrue based upon the level assigned. Points may also be assigned and accrue for other factors, and there may also be multiplying factors. Total sentence points are entered into a mathematical calculation to determine the lowest permissible sentence. The permissible sentencing range is generally the lowest permissible sentence scored up to and including the maximum penalty provided under

<sup>1</sup> Sections 921.002 - 921.0027, F.S.

s. 775.082, F.S., for the primary offense and any additional offenses before the court for sentencing. The court is permitted to impose sentences concurrently or consecutively. The Code requires a minimum mandatory sentence to be imposed, unless the lowest permissible sentence scored is greater than the mandatory.

The Code includes a list of ‘mitigating’ factors. If a mitigating factor is found by the sentencing court, the court may decrease an offender’s sentence below the lowest permissible sentence. A minimum mandatory sentence is not subject to these mitigating factors.<sup>2</sup>

***Drug Trafficking Mandatory Minimum Sentences***

Florida’s drug trafficking laws, found in s. 893.135, F.S., contain minimum mandatory terms of imprisonment. Each controlled substance has a different threshold to trigger felony trafficking charges, and requires increasingly significant sentences for a greater volume of drug.

The trafficking offenses involve the knowing possession, purchase, sale, manufacture, delivery, or importation into Florida of certain controlled substances within specified weight ranges. A notable feature is that prosecutors are only required to prove knowing possession, not possession with intent to sell, etc.

The table below lists the controlled substances in s. 893.135, F.S., along with their associated minimum mandatory sentences for particular amounts.<sup>3</sup>

<b>CANNABIS</b>		
<i>Amount</i>	<i>Mandatory Prison Term</i>	<i>Mandatory Fine</i>
>25 and < 2000 pounds or ≥300 and ≥ 2000 plants	3 years	\$25,000
≥2000 and < 10,000 pounds or ≥ 2000 and ≤10,000 plants	7 years	\$50,000
≥10,000 pounds or ≥ 10,000 plants	15 years	\$200,000
<b>COCAINE</b>		
<i>Amount</i>	<i>Mandatory Prison Term</i>	<i>Mandatory Fine</i>
≥28 and < 200 grams	3 years	\$50,000
≥200 and < 400 grams	7 years	\$100,000
≥400 grams and <150 kilograms	15 years	\$250,000
≥150 kilograms	Life	

<sup>2</sup> See e.g., *State v. Vanderhoff*, --- So.3d ----, 2009 WL 1703267 (Fla. 5th DCA 2009).

<sup>3</sup> If the controlled substance appears in a mixture, the mixture is weighed and treated as the weight of the controlled substance. For example, “street cocaine” is frequently adulterated (cut) with other agents, which increases the quantity of cocaine available for sale and the seller’s profits. In the case of painkillers for which trafficking is proscribed, like hydrocodone, the weight of the tablets/pills containing the hydrocodone, etc., is the total weight of a tablet/pill (which includes everything that makes up the tablet/pill) multiplied by the number of tablets/pills possessed.<sup>3</sup>

<b>MORPHINE, OPIUM, OXYCODONE, HYDROCODONE, HYDROMORPHONE, HEROIN and FLUNITRAZEPAM</b>		
<i>Amount</i>	<i>Mandatory Prison Term</i>	<i>Mandatory Fine</i>
≥4 and <14 grams	3 years	\$50,000
≥14 and <28 grams	15 years	\$100,000
≥28 grams and <30 kilograms	25 years	\$500,000
≥30 kilograms	Life	
<b>PHENCYCLIDINE</b>		
<i>Amount</i>	<i>Mandatory Prison Term</i>	<i>Mandatory Fine</i>
≥28 and <200 grams	3 years	\$50,000
≥200 and <400 grams	7 years	\$100,000
≥400 grams	15 years	\$250,000
<b>METHAQUALONE</b>		
<i>Amount</i>	<i>Mandatory Prison Term</i>	<i>Mandatory Fine</i>
≥200 and <5 kilograms	3 years	\$50,000
≥5 and <25 kilograms	7 years	\$100,000
≥25 kilograms	15 years	\$250,000
<b>AMPHETAMINE AND METHAMPHETAMINE</b>		
<i>Amount</i>	<i>Mandatory Prison Term</i>	<i>Mandatory Fine</i>
≥14 and <28 grams	3 years	\$50,000
≥28 and <200 grams	7 years	\$100,000
≥200 grams	15 years	\$250,000
<b>GAMMA-HYDROXYBUTYRIC ACID (GHB), GAMMA-BUTYROLACTONE (GBL) and 1,4-BUTANEDIOL</b>		
<i>Amount</i>	<i>Mandatory Prison Term</i>	<i>Mandatory Fine</i>
≥1 and <5 kilograms	3 years	\$50,000
≥5 and <10 kilograms	7 years	\$100,000
≥10 kilograms	15 years	\$250,000
<b>PHENETHYLAMINES<sup>4</sup></b>		
<i>Amount</i>	<i>Mandatory Prison Term</i>	<i>Mandatory Fine</i>
≥10 and <200 grams	3 years	\$50,000
≥200 and <400 grams	7 years	\$100,000
≥400 grams	15 years	\$250,000
<b>LYSERGIC ACID DIETHYLAMIDE (LSD)<sup>5</sup></b>		
<i>Amount</i>	<i>Mandatory Prison Term</i>	<i>Mandatory Fine</i>
≥1 and <5 grams	3 years	\$50,000
≥5 and <7 grams	7 years	\$100,000
≥ 7 grams	15 years	\$500,000

<sup>4</sup> These are described in s. 893.03(1)(a) or (c), F.S.

<sup>5</sup> Section 893.03(1)(c), F.S., lists LSD as a Schedule I drug.

Florida law authorizes a sentence below the mandatory in two instances: the defendant is sentenced as a youthful offender;<sup>6</sup> or the primary offense is a Level 7 or Level 8 trafficking offense and the judge approves the State’s motion to reduce or suspend the defendant’s sentence based upon the defendant providing substantial assistance.<sup>7</sup>

Convictions for a violation of s. 893.135, F.S., are almost always the result of a plea rather than a trial. Although a prosecutor may charge a trafficking offense, the case may be dropped or the original trafficking charge may be dropped or dropped in exchange for a plea to a trafficking charge with a lesser mandatory, a non-mandatory drug charge (attempted trafficking<sup>8</sup> or some other non-mandatory drug charge), or another non-mandatory charge.

A person sentenced to a mandatory minimum term of imprisonment under s. 893.135, F.S., is not eligible for any form of discretionary early release, except pardon or executive clemency or conditional medical release under s. 947.149, F.S., prior to serving the mandatory minimum term of imprisonment.<sup>9</sup>

The following chart reflects the admissions to prison for the past two fiscal years where the primary offense of the inmate consists of a drug trafficking mandatory sentence.<sup>10</sup>

<b>Table of Admission Year by Mandatory Minimum Period</b>						
<i>Admission Year</i>	<i>Mandatory Minimum (Years)</i>					<i>Total</i>
	<i>3</i>	<i>7</i>	<i>15</i>	<i>25</i>	<i>Life</i>	
<i>FY 2008-09</i>	<i>1395</i>	<i>130</i>	<i>232</i>	<i>105</i>	<i>1</i>	<i>1863</i>
<i>FY 2009-10</i>	<i>1485</i>	<i>100</i>	<i>313</i>	<i>140</i>	<i>3</i>	<i>2041</i>
<i>Total</i>	<i>2880</i>	<i>230</i>	<i>545</i>	<i>245</i>	<i>4</i>	<i>3904</i>

***The Policy Debate Over Minimum Mandatory Sentencing for Drug Trafficking***

Much attention has been given to the policy and societal implication of minimum mandatory sentences for certain drug offenses. There seem to be two primary concerns: (1) a concern about the policy of restricting judicial discretion in sentencing, with specific attention focused on particular cases in which application of a minimum mandatory has led to unjust results; and (2) a concern that unlawful possession or purchase of relatively small numbers of tablets/pills containing certain painkillers, like hydrocodone, may result in trafficking penalties, including mandatorics. A thorough discussion of these and other issues relating to minimum mandatorics for drug offenses is found in Florida Senate Interim Report 2010-109, “A Policy Analysis of Minimum Mandatory Sentencing for Drug Traffickers.”<sup>11</sup>

<sup>6</sup> Section 958.04, F.S. See *State v. Dishman*, 5 So.3d 773 (Fla. 4th DCA 2009) and *Inman v. State*, 842 So.2d 862 (Fla. 2d DCA 2003).

<sup>7</sup> Section 893.135(4), F.S. This mitigation cannot occur without the State’s motion. *State v. Agerton*, 523 So.2d 1241 (Fla. 5th DCA 1988), *rev. den.*, 531 So.2d 1352 (Fla.1988).

<sup>8</sup> Attempted trafficking does not call for a mandatory sentence, though conspiracy to traffic does. ss. 777.04 and 893.135(5), F.S. See *Suarez v. State*, 635 So. 2d 154 (Fla. 2d DCA 1994) and *Chudeausz v. State*, 508 So.2d 418 (Fla. 5th DCA 1987).

<sup>9</sup> Section 893.135(3), F.S.

<sup>10</sup> Department of Corrections Analysis of Senate Bill 1334, p. 1.

<sup>11</sup> The interim project report is available at [http://archive.flsenate.gov/data/Publications/2010/Senate/reports/interim\\_reports/pdf/2010-109cj.pdf](http://archive.flsenate.gov/data/Publications/2010/Senate/reports/interim_reports/pdf/2010-109cj.pdf), last viewed on March 24, 2011.

## Reentry Programs for Nonviolent Offenders

The department reports that 26.5 percent of the inmates admitted to prison during Fiscal Year 2009-2010 had been convicted of a drug crime.<sup>12</sup> Almost two-thirds of Florida inmates who enter prison for any crime also have a substance abuse problem, and more than 80 percent of those who could benefit from treatment are released without it.<sup>13</sup> The lack of treatment is largely due to funding constraints.

The Florida TaxWatch Government Cost Savings Task Force found that “significant savings could be achieved if certain offenders were allowed to receive treatment outside of the confines of prison during the last portion of their prison sentence” and observed that “research shows that programs in the community produce twice the impact on recidivism as the same program behind the walls.”<sup>14</sup>

The department currently provides the following re-entry programming to inmates:

- Substance abuse treatment;
- Educational and academic programs;
- Career and technical education; and
- Faith and character-based programs.<sup>15</sup>

### *Correctional Integrated Needs Assessment System*

The department assesses inmates and places them into programs using the Correctional Integrated Needs Assessment System (CINAS), which is based on the “Risk-Needs-Responsivity (RNR)” principle. The RNR principle refers to predicting which inmates have a higher probability of recidivating, and providing appropriate programming and services to higher risk inmates based on their level of need. The services would be focused on “criminogenic needs,” which are factors associated with recidivism that can be changed such as lack of education, substance abuse, criminal thinking, and lack of marketable job skills. High risk offenders have multiple risk factors, and the department provides a range of services and interventions to target the specific crime producing needs.<sup>16</sup>

The department reports that CINAS allows it to develop and implement programs that increase the likelihood of successful reentry. It also reports that use of the RNR principle and CINAS “avoids focusing resources on individuals ill-equipped to handle specific behavior problems, and

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<sup>12</sup> Department of Corrections’ 2009-2010 Agency Statistics, [http://www.dc.state.fl.us/pub/annual/0910/stats/im\\_admis.html](http://www.dc.state.fl.us/pub/annual/0910/stats/im_admis.html), last viewed on March 24, 2011.

<sup>13</sup> “Corrections Rehabilitative Programs Effective, But Serve Only a Portion of the Eligible Population,” Office of Program Policy Analysis and Governmental Accountability (OPPAGA) Report No. 07-14 (February 2007), p. 6.

<sup>14</sup> Report and Recommendation of the Florida TaxWatch Government Cost Savings Task Force for Fiscal Year 2011-12 (December 2010), <http://www.floridataxwatch.org/resources/pdf/12082010GCTSF.pdf>, (last viewed on March 24, 2011).

<sup>15</sup> “Recidivism Reduction Strategic Plan.” Fiscal Year 2009-2014. Department of Corrections. <http://www.dc.state.fl.us/orginfo/FinalRecidivismReductionPlan.pdf> (Last accessed on March 18, 2011).

<sup>16</sup> Department of Corrections Analysis of Senate Bill 1334, p. 2.

ensures the most appropriate treatment-setting possible is being assigned, based on an inmate's characteristics."<sup>17</sup>

CINAS is administered to an inmate when he or she is received at the initial parent institution and again after 42 months, with updates conducted every 6 months thereafter to evaluate the inmate's progress and ensure enrollment in needed programs.<sup>18</sup>

### ***Required Transition Training Program***

In addition to other programming, the department must provide a 100-Hour Transition Training Program to inmates who are within 12 months of their release.<sup>19</sup> This program offers inmates training in the following:

- Job readiness and life management skills, including goal setting;
- Problem solving and decision making;
- Communication;
- Values clarification;
- Living a healthy lifestyle;
- Family issues;
- Seeking and keeping a job;
- Continuing education;
- Community reentry; and
- Legal responsibilities.<sup>20</sup>

An issue brief prepared by the Senate Criminal Justice Committee in 2008 observed that due to funding constraints, in most cases the transition course was viewed by the inmates on video along with self-study from a textbook. This was less effective than the former method in which the course was taught by an instructor who engaged in interaction with the inmates in a classroom setting, particularly since many inmates had minimal reading skills. At the time of the brief, the department was attempting to reduce the deficiency by developing a workbook designed for self-study and written at a lower reading level.<sup>21</sup>

### **Drug Offender Probation**

The department is also required to develop and administer a drug offender probation program that emphasizes a combination of treatment and intensive community supervision approaches and provides for supervision of offenders in accordance with a specific treatment plan.<sup>22</sup> This program generally uses graduated sanctions when offenders violate program requirements by actions such as testing positive on drug tests, missing treatment sessions, or failing to report to court.<sup>23</sup> These sanctions can include mandatory community service, extended probation, or jail

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Section 944.7065, F.S.

<sup>20</sup> *Supra* "Recidivism Reduction Strategic Plan."

<sup>21</sup> "Breaking The Cycle Of Crime: The Department Of Corrections And Re-Entry Programming," Issue Brief 2009-313 (October 2008), p. 2.

<sup>22</sup> Section 948.20(2), F.S.

<sup>23</sup> Section 948.20(1), F.S.

stays. Probationers in this program are subject to probation revocation if they violate any conditions of their probation. This can result in an imposition of any sentence that may have originally been imposed before the offender was placed on probation.<sup>24</sup> In FY 2009-10, 9,928 offenders were on drug offender probation.<sup>25</sup>

### III. Effect of Proposed Changes:

#### Minimum Mandatory Sentences

Section 1 of the bill removes the minimum mandatory sentence requirements for trafficking of controlled substances listed above. The penalty for trafficking in each substance will still remain a first degree felony, which is punishable by up to 30 years in prison and up to a \$10,000 fine, in addition to the fines associated with the differing thresholds of drug volume.

The bill also amends s. 893.135(3), F.S., to remove language that prohibits a person convicted of a drug trafficking offense from being eligible for any form of discretionary early release, except pardon or executive clemency or conditional medical release under s. 947.149, F.S., prior to serving the mandatory minimum term of imprisonment.

In addition, the bill allows a judge (upon motion of the state attorney) to defer a sentence or withhold the sentence or adjudication of guilt of a person convicted of a drug trafficking offense if the judge finds the defendant rendered substantial assistance.

#### Non-Violent Offender Reentry Program

Section 2 of the bill authorizes the department to develop and administer a nonviolent offender reentry program in a secure area within an institution or adjacent to an adult institution. This program is intended to divert nonviolent offenders<sup>26</sup> from long periods of incarceration when a reduced period of incarceration followed by intensive substance abuse treatment may have the same effect, rehabilitate the offender, and reduce recidivism.

The department reports that 2,100 inmates meet the eligibility criteria for the program. However, available program space and taking rehabilitative benefit into consideration would currently limit the program to 534 inmates. An additional 1,251 inmates from the current inmate population will meet the eligibility criteria once they have completed 50 percent of their sentence.<sup>27</sup>

The bill requires the non-violent offender reentry program to include:

- Prison-based substance abuse treatment
- General education development and adult basic education courses

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<sup>24</sup> Section 948.06 (2)(e), F.S.

<sup>25</sup> Department of Corrections, Community Supervision Admissions, 2008-2009 Agency Statistics, [http://www.dc.state.fl.us/pub/annual/0809/stats/csa\\_prior.html](http://www.dc.state.fl.us/pub/annual/0809/stats/csa_prior.html) (Last accessed on March 18, 2011).

<sup>26</sup> A “nonviolent offender” is defined in the bill as an offender who has been convicted of a third-degree felony offense that is not a forcible felony as defined in s. 776.08, F.S., and who has not been convicted of any offense that requires a person to register as a sexual offender pursuant to s. 943.0435, F.S.

<sup>27</sup> Department of Corrections Analysis of Senate Bill 1334, p. 3.

- Vocational training
- Training in decision-making and personal development, and
- Other rehabilitation programs.

The bill requires that the nonviolent offender serve at least 120 days in the reentry program. Any portion of his or her sentence served before placement in the reentry program does not count as progress toward program completion.

The bill requires the department to screen potential reentry program participants for eligibility criteria to participate in the program. In order to participate, a nonviolent offender must have:

- Served at least one-half of his or her original sentence, and
- Been identified as having a need for substance abuse treatment.

During the screening process, the bill requires the department to consider the offender's criminal history and the possible rehabilitative benefits that substance abuse treatment, educational programming, vocational training, and other rehabilitative programming might have on the offender.

If a nonviolent offender is selected to participate in the program and if space is available in the reentry program, the department must request the sentencing court to approve the offender's participation in the reentry program.

The department must also notify the state attorney that the offender is being considered for placement in the reentry program. The notice must:

- Explain to the state attorney that a proposed reduced period of incarceration, followed by participation in substance abuse treatment and other rehabilitative programming, could produce the same deterrent effect otherwise expected from a lengthy incarceration.
- State that the state attorney may notify the sentencing court in writing of any objection he or she might have if the nonviolent offender is placed in the reentry program.<sup>28</sup>

The bill requires the sentencing court to notify the department in writing of the court's decision to approve or disapprove the requested placement of the nonviolent offender into the re-entry program no later than 28 days after the court receives the department's request to place the offender in the reentry program.<sup>29</sup>

The bill requires a nonviolent offender who had been admitted to the re-entry program to:

- Undergo a full substance abuse assessment to determine his or her substance abuse treatment needs.

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<sup>28</sup> The bill requires that the state attorney must notify the sentencing court of his or her objections within 14 days after receiving the notice.

<sup>29</sup> The bill states that the court's failure to notify DOC of the decision within the 28-day period constitutes approval to place the offender into the reentry program.

- Have an educational assessment, using the Test of Adult Basic Education or any other testing instrument approved by the Department of Education.
- Obtain a high school diploma if one has not already been obtained.

The bill requires that assessments of the offender's vocational skills and future career education be provided to the offender as needed and that a periodic reevaluation be made in order to assess the progress of each offender.

If a nonviolent offender becomes unmanageable, the bill authorizes the department to revoke the offender's gain-time and place the offender in disciplinary confinement in accordance with department rule. The offender can be readmitted to the reentry program after completing the ordered discipline<sup>30</sup> unless:

- The offender commits or threatens to commit a violent act;
- The department determines that the offender is unable to participate in the reentry program due to the offender's medical condition;
- The offender's sentence is modified or expires;
- The department reassigns the offender's classification status; or
- The department determines that removing the offender from the reentry program is in the best interest of the offender or the security of the institution.

The bill requires the department to submit a report to the court at least 30 days before the nonviolent offender is scheduled to complete the reentry program. The report must describe the offender's performance in the reentry program. If the performance is satisfactory, the bill requires the court to issue an order modifying the sentence imposed and place the offender on drug offender probation<sup>31</sup> subject to the offender's successful completion of the remainder of the reentry program.<sup>32</sup> If the nonviolent offender violates the conditions of drug offender probation, the bill authorizes the court to revoke probation and impose any sentence that it might have originally imposed.

The bill also authorizes the department to:

- Implement the reentry program to the fullest extent feasible within available resources.
- Submit an annual report to the Governor, the President of the Senate, and the Speaker of the House of Representatives detailing the extent of implementation of the reentry program and outlining future goals and any recommendation the department has for future legislative action.
- Enter into performance-based contracts with qualified individuals, agencies, or corporations for the provision of any or all of the services for the reentry program.

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<sup>30</sup> The bill specifies that any period of time during which the offender is unable to participate in the reentry program shall be excluded from the specified time requirements in the reentry program.

<sup>31</sup> The bill provides that if an offender being released intends to reside in a county that has established a postadjudicatory drug court program as described in s. 397.334, F.S., the sentencing court may require the offender to successfully complete the postadjudicatory drug court program as a condition of drug offender probation.

<sup>32</sup> The bill provides that the term of drug offender probation may include placement in a community residential or nonresidential substance abuse treatment facility under the jurisdiction of the department or the Department of Children and Family Services or any public or private entity providing such services.

- Establish a system of incentives within the reentry program which the department may use to promote participation in rehabilitative programs and the orderly operation of institutions and facilities.
- Develop a system for tracking recidivism, including, but not limited to, rearrests and recommitment of nonviolent offenders who successfully complete the reentry program, and shall report the recidivism rate in its annual report of the program.
- Adopt rules pursuant to ss. 120.536(1) and 120.54, F.S., to administer the reentry program.

#### **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 has not met to discuss the impact of the bill. The department reports that the removal of the mandatory minimum sentences for defendants trafficking in controlled substances will likely have an overall positive fiscal impact on the department.<sup>33</sup>

Because participation in the bill's nonviolent offender re-entry program hinges on an offender being eligible, the department's selection, and judicial approval, the precise impact of the bill is unknown. However, the bill will likely result in cost savings to the state.

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<sup>33</sup> The Department of Corrections 2011 Analysis of HB 917.

**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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