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 Judiciary Committee

BILL:	CS/CS/SB 732
INTRODUCER:	Judiciary Committee and Criminal Justice Committee and Senators Bogdanoff and Joyner
SUBJECT:	Sentences of Inmates
DATE:	February 20, 2012 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Cannon	CJ	**Fav/CS**
2.	Irwin	Cibula	JU	**Fav/CS**
3.			BC	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

The bill makes a number of changes to ch. 893, F.S., relating to controlled substances. Specifically, the bill:

- Requires that prosecutors prove "intent to sell, purchase, manufacture or deliver" for various trafficking offenses if the trafficking charge is based on knowing possession of a relevant controlled substance in a trafficking quantity.
- Increases minimum weight thresholds and weight ranges for the imposition of a minimum mandatory sentence for various trafficking offenses involving morphine, opium, oxycodone, hydrocodone and hydromorphone.
- Specifies that if a mixture is a prescription drug and the weight of the controlled substance in the mixture can be identified using the national drug code, the weight of the controlled substance is the weight identified in the National Drug Code (NDC).
- Provides that a judge hearing a motion from the state attorney to reduce or suspend a sentence for substantial assistance rendered, may reduce or suspend, defer, or withhold, the

sentence or adjudication of guilt (current law authorizes the judge to reduce or suspend the sentence).
- Deletes legislative findings regarding cases relevant to construction of controlled substance scheduling language in relation to drug trafficking weight thresholds.

This bill substantially amends ss. 893.135 and 921.0022, F.S., and reenacts ss. 775.087(2)(a) and 782.04(1)(a), (3), and (4), F.S.

II. Present Situation:

The Drug Trafficking Statute (s. 893.135, F.S.) and Sentencing

Section 893.135, F.S., provides sanctions for drug trafficking, which is generally the knowing sale, purchase, manufacture, delivery, or bringing into this state, or the knowing actual or constructive possession of, certain controlled substances (such as cocaine, cannabis, methamphetamine, hydrocodone, and oxycodone) which meet a specified minimum weight threshold or fall within a specified weight range. Section 893.13, F.S., does not require proof of possession with the intent to sell, etc.

In addition to covering specified controlled substances, s. 893.135, F.S., covers any salt, derivative, isomer, or salt of an isomer of the controlled substance, and any mixture containing the substance or its salt, derivative, etc.

There is a minimum weight threshold for trafficking in each relevant controlled substance or mixture. There are also escalating weight ranges. A mandatory minimum term and fine apply to each trafficking offense. As weight ranges escalate, so do mandatory minimum terms and fines. For example, knowing possession of less than 4 grams of oxycodone is not a trafficking offense (4 grams is the minimum weight threshold for oxycodone trafficking).[1] There is a 3-year mandatory minimum term and $50,000 fine for knowing possession of 4 grams or more, but less than 14 grams of oxycodone.[2] Mandatory minimum terms and fines increase to a 15-year mandatory minimum term and $100,000 fine for 14 grams or more,[3] but less than 28 grams of oxycodone, and a 25-year mandatory minimum term and $500,000 fine for 28 grams or more, but less than 30 kilograms of oxycodone.[4]

If the controlled substance appears in a mixture, the total weight of the mixture is treated as the weight of the controlled substance.[5] 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 opioid mixtures, these often involve pharmaceutical medications that have been unlawfully obtained. These mixtures, typically in tablet or pill form, contain the controlled substance (e.g., hydrocodone) and other constituents of the tablet/pill that are not controlled substances. The total weight of the tablets/pills is treated as the weight of the controlled substance.

[1] Section 893.135(1)(c)1., F.S.
[2] Section 893.135(1)(c)1.a., F.S.
[3] Section 893.135(1)(c)1.b., F.S.
[4] Section 893.135(1)(c)1.c., F.S.
[5] Section 893.135(6), F.S.

The Criminal Punishment Code[6] (Code) is Florida's general framework or mechanism for determining permissible sentencing ranges for noncapital felonies. Non-capital felonies sentenced under the Code receive an offense severity level ranking (Levels 1-10).[7] Points are assigned and accrue based upon the level assigned (sentence points escalate as the level escalates).[8] Level rankings and points are assigned to the primary offense, additional offenses, and prior offenses.[9] Points may also accrue based upon other factors specified in the law.[10] These points are entered into a mathematical calculation to determine the lowest permissible sentence.[11] Absent a permissible mitigating factor, the lowest permissible sentence is the "floor" for sentencing (a mandatory minimum term effectively becomes the floor if it exceeds the scored lowest permissible sentence). The "ceiling" is generally the statutory maximum penalty for the degree of the felony as provided in s. 775.082, F.S. The court may impose any sentence within this range (floor to ceiling).

Typically, trafficking offenses are first-degree felonies but levels assigned to these trafficking offenses vary depending on the offense. For example, trafficking in 4 grams or more, but less than 14 grams of oxycodone is a Level 7 offense,[12] but trafficking in 14 grams or more, but less than 28 grams of oxycodone is a Level 8 offense.[13] Additionally, the Code authorizes the sentencing court to multiply subtotal sentence points by 1.5 for a Level 7 or Level 8 trafficking primary offense.[14]

Even if a person knowingly possesses, sells, etc., a relevant controlled substance in a trafficking quantity, a mandatory minimum term may be avoided in some instances through the charging decision or plea agreement. In some instances, the person is charged with or offered a plea to attempted trafficking or another controlled substance offense in which there is no mandatory minimum term (the prosecutor could charge a non-trafficking quantity in the information).

However, once a person is convicted of a drug trafficking offense, it appears the sentencing court has little discretion to elect not to impose the mandatory minimum term. To staff's knowledge, this discretion may only be exercised in instances in which the defendant is a youthful offender[15] or when the court grants a motion from the State to reduce or suspend a sentence based on substantial assistance rendered.[16]

[6] Section 775.011(1), F.S.
[7] Section 921.0022(2), F.S.
[8] Section 921.0024(1)(a), F.S.
[9] *Id.*
[10] Section 921.0024(1)(b), F.S.
[11] Section 921.0024(2), F.S.
[12] Section 921.0022(3)(g), F.S.
[13] Section 921.0022(3)(h), F.S.
[14] Section 921.0024(1)(b)2.b., F.S.
[15] *See* Section 958.04, F.S.; *State v. Dishman*, 5 So. 3d 773 (Fla. 4th DCA 2009); *Inman v. State*, 842 So. 2d 862 (Fla. 2d DCA 2003).
[16] *See* s. 893.135(4), F.S. (stating 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).

Knowledge of the Illicit Nature of a Controlled Substance

Although the bill does not amend or repeal s. 893.101, F.S. (discussed below), there are currently state and federal court proceedings regarding this statute in relation to provisions of the Florida Comprehensive Drug Abuse Prevention and Control Act (ch. 893, F.S.), the resolution of which may substantially impact prosecutions of some offenses under the Act. Therefore, this statute and these proceedings are discussed for informational purposes.

In 2002, the Legislature enacted s. 893.101, F.S.[17] The statute provides that the "[l]ack of knowledge of the illicit nature of a controlled substance is an affirmative defense"[18] to the crime of possession of a controlled substance. If a defendant raises this affirmative defense, the trial court must instruct the jury that "possession of a controlled substance, whether actual or constructive, shall give rise to a permissive presumption that the possessor knew of the illicit nature of the substance."[19]

Section 893.101, F.S., was intended to legislatively supersede *Chicone v. State,*[20] in which the Florida Supreme Court held that knowledge of the illicit nature of a substance is an element of the crime of possession even though not explicitly stated in the law. Stated another way, *Chicone* (and other later cases) "stand for the proposition that 'guilty knowledge' is an element of the offense of possession and must be proven beyond a reasonable doubt."[21]

On July 21, 2011, Judge Mary Scriven, who presides over the U.S. District Court, Middle District of Florida, Orlando Division, found s. 893.13, F.S., "to be unconstitutional on substantive due process grounds."[22] This case was *Shelton v. Secretary, Department of Corrections.*[23]

> In *Shelton*, the court concluded that Florida Statute § 893.13 is facially unconstitutional. The court reasoned that the Florida Legislature's 2002 amendment to Florida's Drug Abuse Prevention and Control law, codified at Fla. Stat. § 893.101, eliminated any *mens rea* requirement for the drug offenses enumerated in Fla. Stat. § 893.13, thus rendering these offenses strict liability offenses. The court then held that the statute could not pass constitutional muster as a strict liability statute because it subjects its offenders to "harsh penalties," "gravely besmirches an individual's reputation," and "punishes otherwise

[17] Chapter 2002-258, L.O.F.
[18] Section 893.101(2), F.S. "An 'affirmative defense' is any defense that assumes the complaint or charges to be correct but raises other facts that, if true, would establish a valid excuse or justification or a right to engage in the conduct in question." *State v. Cohen*, 568 So. 2d 49, 51 (Fla.1990). Florida courts have also recognized a defense (not in statute) where possession is based on temporary control of a controlled substance for legal disposition by throwing the substance away, destroying the substance, or giving the substance to police. *See Robinson v. State*, 57 So. 3d 278, 281 (Fla. 4th DCA 2011); *Keller v. State*, 946 So. 2d 1233, 1235 (Fla. 4th DCA 2007), *rev. den*., 958 So. 2d 919 (Fla.2007); *Ramsubhag v. State*, 937 So. 2d 1192, 1194-1195 (Fla. 4th DCA 2006); *Stanton v. State*, 746 So. 2d 1229, 1230 (Fla. 3d DCA 1999).
[19] Section 893.101(3), F.S.
[20] 684 So. 2d 736 (Fla.1996).
[21] *Garcia v. State*, 901 So. 2d 788, 793 (Fla.2005).
[22] *Maestas v. State*, 76 So. 3d 991 (Fla. 4th DCA 2011), 2011 WL 5964337 (Fla. 4th DCA November 30, 2011), at *1 (citation omitted), describing the *Shelton* holding.
[23] 802 F. Supp. 2d 1289, No. 6:07-cv-839-ORL-35, 2011 WL 3236040 (M.D. Fla. July 27, 2011).

> innocuous conduct without proof of knowledge or other criminal intent," which violates the Due Process Clause of the United States Constitution.[24]

Attorney General Pam Bondi appealed the order in *Shelton* to the United States Court of Appeals, Eleventh Circuit.[25] To date there has not been a decision on that appeal.

Subsequent to Judge Scriven's order, at least one other Florida federal district court judge in the U.S. District Court, Middle District of Florida, Tampa Division, disagreed with *Shelton* that s. 893.13, F.S., is facially unconstitutional.[26] It appears that only two Florida circuit court judges have agreed with *Shelton*.[27] Further, Florida's First, Third, Fourth, and Fifth district courts of appeal have rejected *Shelton*.[28] All of these courts have held that s. 893.13, F.S., as amended by s. 893.101, F.S., is constitutional. The Second District Court of Appeal did not consider the merits of *Shelton* but rather certified the constitutionality issue to the Florida Supreme Court as an issue of great public importance.[29] The Florida Supreme Court accepted jurisdiction to hear this question and briefs have been filed and oral argument has taken place.[30] To date there has not been a decision.

The holdings of those district courts of appeal that have considered the merits are based on a number of findings. Perhaps the finding of greatest importance in regard to the question of whether *Shelton* was correctly decided is the finding that s. 893.101, F.S., does not create strict liability crimes. For example, the Fourth District in *Maestes* held that "section 893.101 did not remove scienter from section 893.13 offenses and did not create an unconstitutional strict liability crime."[31] The court found a *mens rea* requirement for drug possession:

> Although knowledge of presence is not expressly required by the text of section 893.13, such knowledge has always been required in drug possession cases. Section 893.13 is no exception. Indeed, the standard jury instruction for possession of a controlled substance requires the jury find that "([d]efendant) had knowledge of the presence of the substance." Fla. Std. Jury Instr. (Crim.) 25:2.[32]

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[24] *United States v. Bunton*, No. 8:10-cr-327-T-30EAJ (M.D. Fla. October 26, 2011), 2011 WL 5080307 (M.D. Fla. October 26, 2011), at *1, citing *Shelton*, supra, at *9.
[25] *Secretary, Florida Department of Corrections v. Shelton*, No. 11-13515-G, United States Court of Appeals, Eleventh Circuit.
[26] *Bunton, supra* note 24. Further, *Shelton* appears to conflict with another order out of the U.S. District Court, Middle District of Florida, Jacksonville Division, in which the court rejected the petitioner's assertion that sale or delivery of cocaine was a strict liability offense. *See Knox v. Secretary of the Florida Department of Corrections*, No. 8:10-cv-306-J-20TEM (M.D. Fla. August 11, 2011).
[27] *State v. Washington*, Nos. F11-11019, et al. (Fla. 11th Cir. Ct. August 17, 2011); *State v. Adkins*, Nos. 2011 CF 002001, et al. (Fla. 12th Cir. Ct. September 14, 2011).
[28] *See Flagg v. State*, 74 So.3d 138 (Fla. 1st DCA 2011); *Little v. State*, --- So. 3d --- (Fla. 3d DCA 2011), 2011 WL 5554812 (Fla. 3d DCA November 16, 2011); *Maestas, supra* note 22; *Holcy v. State*, --- So. 3d --- (Fla. 5th DCA 2011), 2011 WL 5299328 (Fla. 5th DCA November 1, 2011).
[29] *State v. Adkins*, 71 So. 3d 184 (Fla. 2d DCA 2011), *rev. granted*, 71 So. 3d 117 (Fla. Oct 12, 2011).
[30] *State v. Adkins*, No. SC11-1878, Supreme Court of Florida.
[31] *Maestas*, at *4.
[32] *Maestas*, at *2 (other citations omitted).

The offenses in s. 893.13, F.S., are "general intent crimes and, although not expressly stated in the statute, require that the defendant *voluntarily* commit the proscribed act. Contrary to the holding in *Shelton*, the statute does not punish strictly an unknowing possession or delivery.[33]

Hydrocodone Trafficking and Weighing Mixtures

Prior to legislative changes in 2000 (and subsequent changes in 2001), s. 893.03, Florida's controlled substance scheduling statute, provided that, unless specifically excepted or unless listed in another schedule, any material, compound, mixture or preparation containing not more than 300 milligrams of hydrocodone (or its salts) per 100 milliliters or not more than 15 milligrams per dosage unit (e.g., tablet or pill), with recognized therapeutic amounts of one or more active ingredients which are not controlled substances, was a Schedule III controlled substance. However, hydrocodone in amounts in excess of 300 milligrams per 100 milliliters or 15 milligrams per dosage unit was a Schedule II controlled substance.

In *Hayes v. State*, 750 So. 2d 1 (Fla. 1999), a hydrocodone trafficking case, the Florida Supreme Court reviewed this scheduling language and s. 893.135, F.S. The Court found that s. 893.135, F.S., applied only to Schedule I or Schedule II controlled substances (or mixtures containing such substances). Reading together s. 893.135, F.S., and s. 893.03, F.S., the court concluded that Hayes, who unlawfully possessed Lorcet tablets (which contain hydrocodone) could not be charged with hydrocodone trafficking because the tablets possessed by Hayes each contained not more than 15 milligrams of hydrocodone and were, therefore, Schedule III controlled substances outside the purview of s. 893.135, F.S.[34] The court also found it of further significance that the Schedule III scheduling language did not provide that aggregate weight of the dosage units should be considered in order to determine whether the hydrocodone was a Schedule III controlled substance.[35]

In 2000, in reaction to the *Hayes* decision, the Legislature amended Schedule III to delete reference to hydrocodone.[36] The effect of this change was that hydrocodone was a Schedule II controlled substance subject to s. 893.135, F.S., if the weight threshold for trafficking was met. However, in 2001, the Legislature partially reversed itself.[37] It reinstated the prior Schedule III scheduling language for hydrocodone (while retaining the existing Schedule II scheduling language). However, new language was added that specified that, for purposes of charging a trafficking violation involving hydrocodone, hydrocodone that meets Schedule III scheduling is a Schedule III controlled substance but the weight of the hydrocodone per milliliter or per dosage unit is not relevant to the charging of a trafficking violation.[38, 39] The weight of the hydrocodone is to be determined pursuant to s. 893.135(6), F.S. (a provision created by the 2001 legislation),

[33] *Maestas*, at *2 (citation omitted). "A 'general intent' statute is one that prohibits either a specific voluntary act or something that is substantially certain to result from the act (e.g., damage to a building is the natural result of the act of setting a building afire. A person's subjective intent to cause the particular result is irrelevant to general intent crimes because the law ascribes to him a presumption that he intended such result." *Linehan v. State*, 442 So.2d 244, 247 (Fla. 2d DCA 1983).
[34] *Hayes v. State*, 750 So. 2d 1, 5 (Fla. 1999).
[35] *Id.* at 4.
[36] Chapter 2000-320, L.O.F.
[37] Chapter 2001-55, L.O.F.
[38] Section 893.03(3)(c)3., F.S.
[39] Section 893.135(1)(c), F.S.

which provides that the weight of a controlled substance is the total weight of the mixture, including the controlled substance and any other substance in the mixture. Further, aggregate weighing is authorized. The Legislature also added a findings provision indicating disagreement with the *Hayes* decision and agreement with two district court of appeal decisions which authorized aggregate weighing [*States v. Hayes*, 720 So. 2d 1095 (Fla. 4th DCA 1998), which the *Hayes* decision quashed, and *State v. Baxley*, 684 So. 2d 831 (Fla. 5th DCA 1996), which the *Hayes* decision abrogated].[40]

Effect of Hydrocodone Trafficking on Possession Cases

In a 2009 interim project report, staff of the Senate Committee on Criminal Justice noted a concern that had been raised that a person could be subject to a trafficking mandatory minimum term and other trafficking penalties for knowing possession of a relatively small number of prescription tablets or pills containing hydrocodone, oxycodone, and hydromorphone:

> Hydrocodone, oxycodone, and hydromorphone, which are listed in s. 893.135, F.S., are powerful opioid analgesics. Section 893.135, F.S., punishes trafficking in these controlled substances. The minimum weight threshold for trafficking in these substances is 4 grams. The minimum weight threshold as well as applicable weight ranges and mandatories have raised a concern that unlawful possession of relatively small numbers of tablets/pills containing these substances may result in trafficking penalties, including mandatories. For example, 6.25 tablets of Vicodin® that contain 10 milligrams per tablet weigh 4 grams. A person who unlawfully possesses 7 such tablets could be subject to a 3-year mandatory. The 28 gram threshold (potentially triggering a 25-year mandatory) for hydrocodone trafficking can be reached by possession of 44 of these tablets (43.75 of these tablets equals 28 grams). As a point of comparison, a person trafficking in 149 kilograms of cocaine or 10,000 pounds or more of cannabis is subject to a 15-year mandatory. As another point of comparison, a person who commits lewd molestation on a child less than 12 years of age and who is sentenced under the statutory split-sentence option receives a minimum 25-year prison sentence.[41]

Staff also noted a concern that had been raised about the application of trafficking mandatory minimum terms to chronic pain management cases involving patients who unlawfully procure pain medication because of limitations on access to those medications:

> Important to understanding the concern about the potential application of mandatories to chronic pain management patients is an understanding of some of the issues involving the use of opioid analgesics for chronic pain management. Expanded use of opioid analgesics in the treatment of chronic or acute pain has "magnified opportunities for diversion and abuse." However, "[e]fforts to address

[40] The *Hayes* decision has no relevancy to hydrocodone trafficking cases charged under the scheduling and/or trafficking statutes as amended in 2000 and 2001 since the law no longer exists in the form reviewed by the Florida Supreme Court in *Hayes*. Further, the *Hayes* decision did not address aggregate weighing of other mixtures, like oxycodone tablets. *State v. Travis*, 808 So. 2d 194, 196 (Fla.2002).

[41] Committee on Criminal Justice, The Florida Senate, *A Policy Analysis of Mandatory Minimum Sentencing for Drug Traffickers*, 8 (Interim Report 2010-109) (October 2009) (footnotes omitted).

> prescription opioid abuse may have the undesirable consequence of diminishing legitimate access to opioids; conversely, actions to improve access to opioids for legitimate pain may fuel the prescription opioid abuse problem." Medical information indicates that chronic pain management patients are rarely addicted to the opioid analgesics prescribed them for pain but over time may develop a tolerance to and physical dependence upon opioid analgesics that may be misperceived as addiction rather than the "normal consequences of sustained opioid use." Some practitioners may be reluctant to treat chronic management cases for fear that regulatory and law enforcement agencies may not understand or appreciate this distinction.[42]

III. Effect of Proposed Changes:

Section 1 amends s. 893.135, F.S., to make the following changes:

- Requires that prosecutors prove "intent to sell, purchase, manufacture, or deliver" for various trafficking offenses when the trafficking charge is based on knowing possession of a relevant controlled substance in a trafficking quantity. This is a significant departure from current law in which the trafficking charge can be based on knowing possession of a relevant controlled substance in a trafficking quantity.
- Increases minimum weight thresholds and weight ranges for various trafficking offenses involving morphine, opium, oxycodone, hydrocodone and hydromorphone.

Offense	Current minimum weight threshold or weight range	Revised weight threshold or weight range (SB 732)
Trafficking in illegal drugs (s. 893.13(1)(c)1., F.S.)	Minimum weight threshold: 4 grams.	Minimum weight threshold: 28 grams.
Trafficking in illegal drugs (s. 893.13(1)(c)1.a., F.S.)	Weight range: 4 grams or more, but less than 14 grams.	Weight range: 28 grams or more, but less than 50 grams.
Trafficking in illegal drugs (s. 893.13(1)(c)1.b., F.S.)	Weight range: 14 grams or more, but less than 28 grams.	Weight range: 50 grams or more, but less than 200 grams.
Trafficking in illegal drugs (s. 893.13(1)(c)1.c., F.S.)	Weight range: 28 grams or more, but less than 30 kilograms.	Weight range: 200 grams or more, but less than 30 kilograms.

- Specifies that if a mixture is a prescription drug as defined in s. 499.003, F.S., and the weight of the controlled substance in the mixture can be identified using the national drug code, the weight of the controlled substance is the weight identified in the national drug code (NDC). This weighing method applies only to those mixtures that meet the criteria. (See "Technical Deficiencies" section of this analysis.) The weight of other mixtures containing a relevant controlled substance would be the total weight of the mixtures possessed, sold, etc. (current law).

[42] *Id*. at 9 (footnotes omitted).

- Provides that a judge hearing a motion from the state attorney to reduce or suspend a sentence for substantial assistance rendered may reduce or suspend, defer, or withhold, the sentence or adjudication of guilt (current law authorizes the judge to reduce or suspend the sentence).
- Deletes legislative finding relevant to construction of controlled substance scheduling language in relation to drug trafficking weight thresholds. Specifically, current legislative findings are that *Hayes v. State*, 750 So. 2d 1 (Fla. 1999) does not correctly construe legislative intent, and that *State v. Hayes*, 720 So. 2d 1095 (Fla. 4th DCA 1998) and *State v. Baxley*, 684 So. 2d 831 (Fla. 5th DCA 1996) do correctly construe legislative intent. (See "Technical Deficiencies" section of this analysis.)

Section 2 amends s. 921.0022, F.S., the offense severity ranking chart of the Criminal Punishment Code, to make technical changes to a number of descriptions of ranked trafficking offenses to reflect changes made to weight ranges in Section 1 of the bill. However, amendment Barcode 285176 changed some of the weight ranges in Section 1, but did not make conforming changes to Section 2. (See "Technical Deficiencies" section of this analysis.)

Sections 3 and 4 reenact, respectively, some provisions of s. 775.087, F.S. (the "10-20-Life" statute) and s. 782.04, F.S. (murder) for the purpose of incorporating amendments made by the act to s. 893.135, F.S., in reference to s. 893.135, F.S. These reenactments do not make any changes to these statutes.

Section 5 provides that the act takes effect July 1, 2012.

Other Potential Implications:

The Florida Department of Law Enforcement (FDLE) has indicated a potential issue with regard to the new language in the bill on weighing mixtures that are prescription drugs:

> There are also questions as to the veracity of the information contained within the NDC [National Drug Code]. On the Food and Drug Administration's [FDA] website it clearly states that "Inclusion of information in the NDC Directory does not indicate that FDA has verified the information provided. The content of each NDC Directory entry is the responsibility of the labeler submitting the SPL [Structured Product Labeling] file. Assignment of an NDC number does not in any way denote FDA approval of the product."[43]

If the new language in the bill on weighing mixtures that are prescription drugs were to become law it would mean that a substantial number of tablets/pills containing hydrocodone or oxycodone would be required to charge trafficking. As stated by FDLE:

> The increased weight thresholds for trafficking prescription drugs and the requirements to separate and weigh only the drug in determining weight will increase the total number of pills or tablets that can be possessed or sold before

[43] Florida Department of Law Enforcement, *Senate Bill 732 A Bill Relating to Sentences of Inmates* (January 4, 2012) (on file with the Committee on Judiciary). Further references to this source are cited as "FDLE Analysis."

> minimum mandatory trafficking sentences could be applied. For example: The first level of trafficking in opiates is 4 grams. If a Lortab preparation consists of 5 milligrams of hydrocodone, it would take 800 or more tablets to reach the trafficking threshold. Similarly, it would take 133 or more tablets containing 30 milligrams [of] Oxycodone to constitute a trafficking weight. This is a substantial change in the number of tablets and potency one could possess without being subjected to trafficking penalties.[44]

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 final official estimate of the prison bed impact, if any, of legislation, estimates that the bill will have an indeterminate prison bed impact.

The Florida Department of Law Enforcement (FDLE) has indicated that the new language on weighing mixtures that are prescription drugs has a potential fiscal impact on the FDLE if quantitation (testing to determine weight of the controlled substance in tablets/pills) is required. The Florida Department of Law Enforcement does not perform quantitation but rather tests the tablets/pills to determine if they contain a controlled substance and identify what that substance is. The Florida Department of Law Enforcement states:

[44] *Id.*

> The proposed wording to refer to the NDC [National Drug Code] for the weight of prescription drugs in a mixture will not impact Florida's crime laboratories. However, potential legal challenges may result in the state attorneys' requesting the crime laboratories to quantitate the exact amounts of the controlled substance. Unless there is enabling statutory language for prosecution by utilizing a reference sample, the only way to determine quantity of a controlled substance is through analytical quantitation. This will require the crime labs to first analyze the substance to determine if a controlled substance is present in the suspected pill, tablet or capsule. Upon determining the controlled substance presence in the pill, tablet or capsule, the chemist will need to perform a quantitation process to determine the exact amount of the substance present. This quantitation process will require a stringent quality monitoring program to maintain the laboratory's accreditation standards through the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB).[45]

The Florida Department of Law Enforcement further states:

> [T]he mandates to separate only the active ingredient within a controlled substance and determine the weight of only that portion of the substance could require forensic laboratories to perform quantitation analysis on drug exhibits. Between November 1, 2010 and October 31, 2010, FDLE received 12,681 exhibits containing tablets or pills for drug chemistry analysis. An estimated 50% of those exhibits contained tablets or pills potentially related to trafficking offenses (6,341).
>
> Based on adjusted workload standards, 810 drug samples can be quantitated by per chemist per year, and initial analysis currently performed with existing staff will still be required for all case submissions. Therefore existing staff will need to be retained. Based on these estimates, the quantitation process will require 8 additional Crime Laboratory Analysts.[46]

The Florida Department of Law Enforcement has indicated the following specific costs[47] if quantitation is required:

	FY 2012-13	**FY 2013-14**	**FY 2014-15**	
8 Positions - 8 Crime Lab Analysts	$502,893	$502,893	$502,893	Salary & Benefits
Standard Expense for 8 Positions	$81,624	$52,440	$52,440	Expense
Standard HR Services for 8	$2,848	$2,848	$2,848	Human

[45] FDLE Analysis.
[46] *Id.*
[47] *Id.*

Positions				Resources
Equipment for new Crime Lab Analysts (Gas Chromatographs, balances, and computer software)	$337,200			Expense
Training for existing Crime Lab Analysts in quantitation process	$20,000			Expense
Consumables (additional chemicals and supplies needed to run triplicate samples on every lab submission)	$40,000	$40,000	$40,000	Expense
TOTAL	**$984,565**	**$598,181**	**$598,181**	

In addition to the specified costs provided, FDLE notes:

> [The Florida Department of Law Enforcement] may be required to transition from gas chromatography to liquid chromatography to comply with accreditation standards if a quantitation process is required. This will result in an estimated additional $780,000 in new equipment to outfit the 6 laboratories performing drug chemistry analysis. This would be in addition to the initial fiscal year impact of $984,565. Once implemented recurring consumable costs would be added to the recurring cost of $598,181 each subsequent fiscal year.[48]

Finally, FDLE notes local government impact if quantitation is required: "The five county operated crime labs would also experience a fiscal impact if legal challenges result in the need to quantitate the controlled substances. Previous estimates provided were approximately $1.875 million for additional personnel, training, equipment and consumables."[49]

There may be legal costs to state government if the bill becomes law and the veracity of the information contained within the national drug code is challenged and/or it is argued that, absent quantitation, evidence is insufficient to prove the weight of the controlled substance in tablets/pills possessed, sold, etc.

The Office of the State Courts Administrator provided the following estimate of the impact of the bill on the state court system:

> The net effect will probably be an increase in court workload. By raising the quantity of drugs in order to qualify as trafficking, there will be fewer trafficking cases. But the trafficking cases are often resolved with plea agreements because of the mandatory minimum sentences. What had been

[48] *Id.*
[49] *Id.*

> charged as trafficking will now be charged as possession and possession with intent. When a person is caught with a large amount of drugs (although not a trafficking amount under the proposed bill), the state may push for a jail or prison sentence because the prosecutor will conclude the person is a drug dealer. That is uncertain, however. Prosecutors may end up treating the former trafficking cases like a low level felony case. It is also uncertain how judges will treat these new possession and possession with intent cases. Without the risk of a mandatory minimum sentence, the accused has more incentive to go to trial. Without the certainty of a mandatory minimum sentence, the state has less incentive to go to trial. In sum, the bill will probably lead to fewer pleas and more trials, which will increase judicial workload. The best estimate will be a modest increase in judicial workload, although that is highly speculative.[50]

VI. Technical Deficiencies:

There are two technical issues regarding the new language in the bill on weighing mixtures of prescription drugs and weight thresholds:

First, the new language is in potential conflict with current law language pertaining to weight thresholds. The Florida Department of Law Enforcement (FDLE) identifies this problem as follows:

> [T]here appears to be conflicting language within the bill. On page 5, lines 125-126 is existing language that specifies "4 or more grams of any mixture containing any such substance" is considered trafficking in morphine, opium, oxycodone, hydrocodone, or hydromorphone. The newly added language on page 20, lines 566-570, states that if the mixture is a prescription drug and the weight of the controlled substance can be identified using the NDC [National Drug Code], then the weight of the controlled substance is the weight identified in the NDC. The controlled substances outlined on page 5 are all prescription drugs.[51]

Second, section 1 of the bill amends s. 93.135(1)(c), F.S., to revise the amount of drugs a person must possess before the person is subject to a mandatory minimum sentence for a drug possession offense. Section 2 of the bill amends s. 921.0022, F.S., which is the criminal punishment code. The criminal punishment code specifies the offense level of these drug possession offenses in s. 921.0022(3), F.S., based on the amount of drugs in a person's possession.

The provisions of the criminal punishment code specifying drug amounts for the various offense levels should correspond to the drug amounts specified in s. 893.135(1)(c), F.S., as amended by the bill. However, the drug amounts in the criminal punishment code do not correspond to the drug amounts specified in s. 921.0022(3), F.S., as amended by the bill. As such, the Legislature

[50] Office of the State Courts Administrator, *2012 Judicial Impact Statement SB 732* (November 18, 2011) (on file with the Committee on Judiciary).
[51] FDLE Analysis.

may wish to amend the bill to conform the drug amounts specified in the criminal punishment code to the amounts specified in s. 893.135(1)(c), F.S., as amended by the bill.

Additionally, the bill deletes legislative findings that *Hayes v. State*, 750 So.2d 1 (Fla. 1999) does not correctly construe legislative intent, and that *State v. Hayes*, 720 So.2d 1095 (Fla. 4th DCA 1998) and *State v. Baxley*, 684 So.2d 831 (Fla. 5th DCA 1996) do correctly construe legislative intent.

Hayes (Florida Supreme Court) was superseded when the Legislature changed s. 893.03, F.S., in 2000, and changed ss. 890.03 and 893.135, F.S., in 2001. Changes to Schedule III scheduling language in 2001 allowed for dosage units that contain 15 milligrams or less of hydrocodone, and which are classified as Schedule III controlled substances, to be considered under s. 893.135, F.S. The effect of *Hayes* was that tablets/pills containing 15 milligrams or less of hydrocodone were outside the purview of s. 893.135, F.S. In the bill, such tablets/pills are within the purview of s. 893.135, F.S. The bill just changes the method of weighing those tablets/pills (considering only the weight of the controlled substance in the tablet/pills).

Hayes (4th DCA) and *Baxley* appear to provide some support for the aggregate weighing method currently used for weighing mixtures (total weight rather than weight of the controlled substances only), a method which is retained in the bill for mixtures (including tablets/pills) that are not prescription drugs.

VII. Related Issues:

The bill references the National Drug Code (NDC), this list may be frozen in time when the bill becomes effective due to the combined effects of incorporation by reference and the non-delegation doctrine.

> "Florida courts strictly adhere to the rule that the Legislature may not delegate its authority to make laws, when material other than Florida law is incorporated in a statute by reference, only the version of that material in existence at the time the Legislature made the incorporation will be given effect. An attempt to incorporate future versions of federal law . . . would delegate to Congress . . . the power to make Florida law, which resides solely with the Legislature."[52]

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

[52] The Florida Senate, *Manual for Drafting Legislation*, 124 (6th ed. 2009) (citing Section 1, Article III of the State Constitution. *See also* Freimuth v. State, 272 So.2d 473 (Fla. 1972) and Florida Industrial Commission v. State *ex rel*. Orange State Oil Co., 21 So.2d 599 (Fla. 1945)).

CS/CS by Judiciary on February 16, 2012:
The Committee Substitute (CS) restores the weight thresholds for the imposition of a minimum mandatory sentence, s. 893.135(1), F.S., to existing law, except for paragraph (c) and makes other technical changes.

The CS replaces a requirement that a person have the intent to distribute a controlled substance with a requirement that a person have the intent to "sell, purchase, or deliver" a controlled substance.

The CS also deletes legislative findings regarding cases relevant to construction of controlled substance scheduling language in relation to drug trafficking weight thresholds.

CS by Criminal Justice on January 31, 2012:
Removes a provision that was in the original bill that repealed s. 893.101, F.S.

B. Amendments:

None.