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 732

INTRODUCER: Senators Bogdanoff and Joyner

SUBJECT: Sentences of Inmates

DATE: January 9, 2012 REVISED: 01/30/12

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Cannon	CJ	**Pre-meeting**
2.			JU	
3.			BC	
4.				
5.				
6.				

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 distribute" for various trafficking offenses when 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 various trafficking offenses involving cocaine, phenecylidine, amphetamine/methamphetamine, gamma-hydroxybutyric acid (GHB), gamma-butyrolactone (GBL), 1,4-Butanediol, and various phenethylamines.
- 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).
- Revises current legislative findings regarding cases relevant to construction of controlled substance scheduling language in relation to drug trafficking weight thresholds.
- Repeals s. 893.101, F.S., which provides that lack of knowledge of the illicit nature of a controlled substance may be raised as an affirmative defense.

This bill substantially amends sections 893.135 and 921.0022, Florida Statutes; reenacts sections 775.087(2)(a) and 782.04(1)(a), (3), and (4), Florida Statutes; and repeals section 893.101, Florida Statutes.

II. Present Situation:

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

Section 893.135, F.S., punishes 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) that 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 28 grams of cocaine is not a trafficking offense (28 grams is the minimum weight threshold for cocaine trafficking). There is a 3-year mandatory minimum term and $50,000 fine for knowing possession of 28 grams or more, but less than 200 grams of cocaine. Mandatory minimum terms and fines increase to a 7-year mandatory minimum term and $100,000 fine for 200 grams or more, but less than 400 grams of cocaine, and a 15-year mandatory minimum term and $250,000 fine for 400 grams or more of cocaine.

If the controlled substance appears in a mixture, the total weight of the mixture is 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 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.

The Criminal Punishment Code (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). Points are assigned and accrue based upon the level assigned (sentence points escalate as the level escalates). Level rankings and points are assigned to the primary offense, additional offenses, and prior offenses. Points may also accrue based upon other factors specified in the law. These points are entered into a mathematical calculation to determine the lowest permissible sentence. 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 28 grams or more, but less than 200 grams of cocaine is a Level 7 offense, but trafficking in 200 grams or more, but less than 400 grams of cocaine is a Level 8 offense. 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.

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 offered. 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[1] or when the court grants a motion from the State to reduce or suspend a sentence based on substantial assistance rendered.[2]

Knowledge of the Illicit Nature of a Controlled Substance

In 2002, the Legislature enacted s. 893.101, F.S.[3] The statute provides that the "[l]ack of knowledge of the illicit nature of a controlled substance is an affirmative defense"[4] 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."[5]

Section 893.101, F.S., was intended to legislatively supersede *Chicone v. State,*[6] in which the Florida Supreme Court held that knowledge of the illicit nature of a substance is an element of

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[1] 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).
[2] 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).
[3] Chapter 2002-258, L.O.F.
[4] 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); and *Stanton v. State*, 746 So.2d 1229, 1230 (Fla. 3d DCA 1999).
[5] Section 893.101(3), F.S.
[6] 684 So.2d 736 (Fla.1996).

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."[7]

On July 21, 2011, Judge Mary Scriven, who presides in 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."[8] This case was *Shelton v. Secretary, Department of Corrections.*[9] "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 innocuous conduct without proof of knowledge or other criminal intent,' which violates the Due Process Clause of the United States Constitution."[10]

Attorney General Pam Bondi appealed the order in *Shelton* to the United States Court of Appeals, Eleventh Circuit.[11] 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.[12] It appears that only two Florida circuit court judges have agreed with *Shelton*.[13] Further, Florida's First, Third, Fourth, and Fifth district courts of appeal have rejected *Shelton*. All of these courts have held that s. 893.13, F.S., as amended by s. 893.101, F.S., is constitutional.[14] 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.[15] The Florida Supreme Court accepted jurisdiction to hear this question and briefs have been filed and oral argument has taken place.[16] To date there has not been a decision.

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[7] *Garcia v. State*, 901 So.2d 788, 793 (Fla.2005).
[8] *Maestas v. State*, --- So.3d --- (Fla. 4th DCA 2011), 2011 WL 5964337 (Fla. 4th DCA November 30, 2011), at *3 (citation omitted), describing the *Shelton* holding.
[9] --- F.Supp.2d ---, No. 6:07-cv-839-ORL-35, 2011 WL 3236040 (M.D. Fla. July 27, 2011).
[10] *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.
[11] *Secretary, Florida Department of Corrections v. Shelton*, No. 11-13515-G, United States Court of Appeals, Eleventh Circuit.
[12] *Bunton*, *supra*. 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. *Knox v. Secretary of the Florida Department of Corrections*, No. 8:10-cv-306-J-20TEM (M.D. Fla. August 11, 2011) (on file with the Committee on Criminal Justice).
[13] *State v. Washington*, Nos. F11-11019, et al. (Fla. 11th Cir.Ct. August 17, 2011) and *State v. Adkins*, Nos. 2011 CF 002001, et al. (Fla. 12th Cir.Ct. September 14, 2011).
[14] *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*; and *Holcy v. State*, --- So.3d --- (Fla. 5th DCA 2011), 2011 WL 5299328 (Fla. 5th DCA November 1, 2011).
[15] *State v. Adkins*, 71 So.3d 184 (Fla. 2d DCA 2011), *rev. granted*, 71 So.3d 117 (Fla. Oct 12, 2011).
[16] *State v. Adkins*, No. SC11-1878, Supreme Court of Florida.

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."[17] 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."[18] 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.[19]

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. 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.

In 2000, in reaction to the *Hayes* decision, the Legislature amended Schedule III to delete reference to hydrocodone.[20] The effect of this change was that hydrocodone was a Schedule II

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[17] *Maestas,* at *4.
[18] *Maestas,* at *2 (other citations omitted).
[19] *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).
[20] Chapter 2000-320, L.O.F.

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.[21] 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. The weight of the hydrocodone is to be determined pursuant to s. 893.135(6), F.S. (a provision created by the 2001 legislation), 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].[22]

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.[23]

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[21] Chapter 2001-55, L.O.F.

[22] 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).

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

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 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.[24]

III. Effect of Proposed Changes:

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

- Requires that prosecutors prove "intent to distribute" 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. (See "Technical Deficiencies" section of this analysis.)
- Increases minimum weight thresholds and weight ranges for various trafficking offenses involving cocaine, phenecylidine, amphetamine/methamphetamine, gamma-hydroxybutyric acid, (GHB), gamma-butyrolactone (GBL), 1,4-Butanediol, and various phenethylamines.

Offense	Current minimum weight threshold or weight range	Revised weight threshold or weight range (SB 732)
Trafficking in cocaine (s. 893.13(1)(b)1., F.S.)	Minimum weight threshold: 28 grams.	Minimum weight threshold: 50 grams.
Trafficking in cocaine (s. 893.13(1)(b)1.a., F.S.)	Weight range: 28 grams or more, but less than 200 grams.	Weight range: 50 grams or more, but less than 400 grams.
Trafficking in cocaine (s. 893.13(1)(b)1.b., F.S.)	Weight range: 200 grams or more, but less than 400 grams.	Weight range: 400 grams or more, but less than 4 kilograms.

[24] *Id*,. at p. 9 (footnotes omitted).

Offense	Current minimum weight threshold or weight range	Revised weight threshold or weight range (SB 732)
Trafficking in cocaine (s. 893.13(1)(b)1.c., F.S.)	Weight range: 400 grams or more, but less than 150 kilograms.	Weight range: 4 kilograms or more, but less than 150 kilograms.
Trafficking in phencyclidine (s. 893.13(1)(d)1., F.S.)	Minimum weight threshold: 28 grams.	Minimum weight threshold: 50 grams.
Trafficking in phencyclidine (s. 893.13(1)(d)1.a., F.S.)	Weight range: 28 grams or more, but less than 200 grams.	Weight range: 50 grams or more, but less than 200 grams.
Trafficking in phencyclidine (s. 893.13(1)(d)1.b., F.S.)	Weight range: 200 grams or more, but less than 400 grams.	Weight range: 400 grams or more, but less 4 kilograms.
Trafficking in phencyclidine (s. 893.13(1)(d)1.c., F.S.)	Weight range: 400 grams or more.	Weight range: 4 kilograms or more.
Capital importation of phencyclidine (s. 893.13(1)(d)2., F.S.)	Weight range: 800 grams or more.	Weight range: 8 kilograms or more.
Trafficking in amphetamine (s. 893.13(1)(f)1., F.S.)	Minimum weight threshold: 14 grams.	Minimum weight threshold: 30 grams.
Trafficking in amphetamine (s. 893.13(1)(f)1.a, F.S.)	Weight range: 14 grams or more, but less than 28 grams.	Weight range: 30 grams or more, but less than 200 grams.
Trafficking in amphetamine (s. 893.13(1)(f)1.b., F.S.)	Weight range: 28 grams or more, but less than 200 grams.	Weight range: 200 grams or more, but less than 400 grams.
Trafficking in amphetamine (s. 893.13(1)(f)1.c., F.S.)	Weight range: 200 grams or more.	Weight range: 400 grams or more.
Capital importation of amphetamine (s. 893.13(1)(f)2., F.S.)	Weight range: 400 grams or more.	Weight range: 1.5 kilograms or more.
Trafficking in GHB (s. 893.13(1)(h)1., F.S.)	Minimum weight threshold: 1 kilogram.	Minimum weight threshold: 5 kilograms.
Trafficking in GHB (s. 893.13(1)(h)1.a., F.S.)	Weight range: 1 kilogram or more, but less than 5 kilograms.	Weight range: 5 kilograms or more, but less than 15 kilograms.
Trafficking in GHB (s. 893.13(1)(h)1.b., F.S.)	Weight range: 5 kilograms or more, but less than 10 kilograms.	Weight range: 15 kilograms or more, but less than 30 kilograms.
Trafficking in GHB (s. 893.13(1)(h)1.c., F.S.)	Weight range: 10 kilograms or more.	Weight range: 30 kilograms or more.
Trafficking in GBL (s. 893.13(1)(i)1., F.S.)	Minimum weight threshold: 1 kilogram.	Minimum weight threshold: 5 kilograms.
Trafficking in GBL (s. 893.13(1)(i)1.a., F.S.)	Weight range: 1 kilogram or more, but less than 5 kilograms.	Weight range: 5 kilograms or more, but less than 15 kilograms.

Offense	Current minimum weight threshold or weight range	Revised weight threshold or weight range (SB 732)
Trafficking in GBL (s. 893.13(1)(i)1.b., F.S.)	Weight range: 5 kilograms or more, but less than 10 kilograms.	Weight range: 15 kilograms or more, but less than 30 kilograms.
Trafficking in GBL (s. 893.13(1)(i)1.c., F.S.)	Weight range: 10 kilograms or more.	Weight range: 30 kilograms or more.
Trafficking in 1,4-Butanediol (s. 893.13(1)(j)1., F.S.)	Minimum weight threshold: 1 kilogram.	Minimum weight threshold: 5 kilograms.
Trafficking in 1,4-Butanediol (s. 893.13(1)(j)1.a., F.S.)	Weight range: 1 kilogram or more, but less than 5 kilograms.	Weight range: 5 kilograms or more, but less than 15 kilograms.
Trafficking in 1,4-Butanediol (s. 893.13(1)(j)1.b., F.S.)	Weight range: 5 kilograms or more, but less than 10 kilograms.	Weight range: 15 kilograms or more, but less than 30 kilograms.
Trafficking in 1,4-Butanediol (s. 893.13(1)(j)1.c., F.S.)	Weight range: 10 kilograms or more.	Weight range: 30 kilograms or more.
Trafficking in phenethylamine (s. 893.13(1)(k)1., F.S.)	Minimum weight threshold: 10 grams.	Minimum weight threshold: 30 grams.
Trafficking in phenethylamine (s. 893.13(1)(k)1.a., F.S.)	Weight range: 10 grams or more, but less than 200 grams.	Weight range: 30 grams or more, but less than 200 grams.

- 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. 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).
- 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).
- Revises current 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. The bill amends the findings provisions to reflect the complete opposite, i.e., support for the construction in *Hayes v. State*, 750 So.2d 1 (Fla. 1999). (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.

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 repeals s. 893.101, F.S., which provides that lack of knowledge of the illicit nature of a controlled substance may be raised as an affirmative defense. This is a substantial departure from current law. It appears that were the statute to be repealed, knowledge of the illicit nature of a substance would be an element of the crime of possession, as specifically held in *Chicone v. State*.

Section 6 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. On the Food and Drug Administration's 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 file. Assignment of an NDC number does not in any way denote FDA approval of the product.'"[25]

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 the 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 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."[26]

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

[25] Analysis of SB 732, Florida Department of Law Enforcement, dated January 4, 2012 (on file with the Committee on Criminal Justice). Further references to this source are cited as "FDLE Analysis."
[26] *Id.*

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 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. FDLE 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 FDLE states:

> The proposed wording to refer to the NDC 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).[27]

[27] FDLE Analysis.

The FDLE 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.[28]

The FDLE has indicated the following specific costs[29] 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 Positions	$2,848	$2,848	$2,848	Human 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, the FDLE notes: "FDLE 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

[28] *Id.*
[29] *Id.*

$984,565. Once implemented recurring consumable costs would be added to the recurring cost of $598,181 each subsequent fiscal year."[30]

Finally, the 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, equipments and consumables."[31]

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 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.[32]

VI. Technical Deficiencies:

The bill requires that prosecutors prove "intent to distribute" for various trafficking offenses when the trafficking charge is based on knowing possession of a relevant controlled substance in a trafficking quantity. Staff performed a textual search of the Florida Statutes and could only find one statute that uses similar wording: s. 831.032(1), F.S. ("possesses with intent to distribute" the trademark or service mark). Typically, in the context of drug offenses, the language that is used to criminalize possession with intent is "possess with the intent to sell, manufacture or deliver"

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[30] *Id.*
[31] *Id.*
[32] Analysis of SB 732, Office of the State Courts Administrator 2012 Judicial Impact Statement, dated November 18, 2011 (on file with the Committee on Criminal Justice).

or similar language.[33] That language is usually used because the possession with intent offense immediately follows "sell, manufacture, or deliver" and the Legislature is indicating that the possession with the intent to commit those acts (selling, etc.) is as serious as the actual commission of those acts.

There are two technical issues regarding new language in the bill on weighing mixtures that are prescription drugs:

First, while this new language specifically addresses a single mixture (tablet/pill), it does not specifically address how to weigh multiple mixtures (multiple tablets/pills). It must be inferred. Compounding the problems of inference is: 1) this new language appears in the middle of current law language that addresses how to weigh a mixture; and 2) the new language is immediately followed by current law language on how to weigh multiple mixtures that is different than the new language.

Second, the new language is in potential conflict with current law language pertaining to weight thresholds. The 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, 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."

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. The bill amends the findings provisions to reflect the complete opposite, i.e., support for the construction in *Hayes v. State*, 750 So.2d 1 (Fla. 1999).

The changes made by the bill to s. 893.135, F.S., do not support the *Hayes* construction. *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. However, findings indicating support for these cases could be

[33] *See, e.g.,* s. 893.13(1)(a), F.S.

confusing as it relates to the provision of the bill that requires a different weighing method for mixtures that are prescription drugs.

In light of these considerations and because post-*Hayes* changes to the law other than these findings appear to clearly indicate legislative intent, staff recommends that these findings be repealed if the sponsor retains in the bill the new language on weighing mixtures that are prescription drugs. If this language is removed from the bill, staff recommends not modifying these findings.

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.