

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 Committee on Criminal Justice

BILL: CS/SB 328

INTRODUCER: Criminal Justice Committee and Senator Joyner

SUBJECT: Trafficking in Illegal Drugs

DATE: March 3, 2014

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|----------|----------------|-----------|--------|
| 1. | Erickson | Cannon | CJ | Fav/CS |
| 2. | | | JU | |
| 3. | | | RC | |

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 328 authorizes a court to grant a defendant motion to depart from a 3-year mandatory minimum term and mandatory fine for trafficking in cocaine, certain opiates or opioids, phencyclidine, amphetamine, methamphetamine, flunitrazepam, phenethylamines, or lysergic acid diethylamide (LSD) if the court finds all of the following criteria are met:

- The defendant has not previously moved for a departure.
- The offense involves simple possession.
- The trafficking violation does not involve exploitation of a minor or violence.
- The defendant does not have a previous conviction, adjudication of delinquency, or withhold or adjudication of guilt for drug trafficking or for selling, manufacturing, or delivering, or possessing with intent to sell, manufacture or deliver, a controlled substance.
- The defendant is amenable to substance abuse treatment if the court determines that he or she is in need of such treatment.

The state attorney may object to the motion to depart.

The court's decision on how to dispose of the motion is completely discretionary. Therefore, the bill does not compel the court to grant the motion to depart even if the court finds that all of the criteria are met.

II. Present Situation:

Drug Trafficking

Unlawful activities involving controlled substances (e.g., possession or sale of controlled substances) are punishable under s. 893.13, F.S. (prohibited acts involving controlled substances), and s. 893.135, F.S. (drug trafficking). “Drug trafficking” consists of knowingly selling, purchasing, manufacturing, delivering, or bringing into this state, or knowingly being in actual or constructive possession¹ of, certain controlled substances in a statutorily-specified quantity.

Whether a person is charged with drug trafficking depends, in part, on the type of controlled substance possessed, sold, etc. Only a limited number of controlled substances are covered under s. 893.135, F.S. Relevant to the bill, s. 893.135, F.S., covers cocaine, certain opiates² or opioids,³ phencyclidine, amphetamine, methamphetamine, flunitrazepam, phenethylamines,⁴ and lysergic acid diethylamide (LSD).

The quantity of a covered controlled substance must also meet a minimum weight threshold prescribed in s. 893.135, F.S. Most drug trafficking offenses are first degree felonies⁵ and are subject to mandatory minimum terms.⁶ Section 893.135, F.S., establishes escalating weight ranges. The mandatory minimum term applicable to a drug trafficking act depends upon which weight range is applicable to the quantity of the controlled substance possessed, sold, etc. In some cases, possession, sale, etc., of a relatively small quantity of a covered controlled substance will trigger drug trafficking penalties.

Relevant to the bill, the shortest mandatory minimum term available under s. 893.135, F.S., is a 3-year mandatory minimum term. Provided are the threshold weights that trigger drug trafficking penalties and the weight ranges applicable to a 3-year mandatory minimum term for each of the controlled substances or controlled substance categories addressed by the bill.

| Statutory Reference | Covered Substance | Threshold Weight | Weight Range Applicable to 3-Year Mandatory Minimum Term |
|-----------------------|-------------------|------------------|--|
| s. 893.13(1)(b), F.S. | Cocaine | 28 grams | 28 grams or more but less than 200 grams |

¹ One important and unique feature of the drug trafficking statute is that the prosecutor is not required to prove that the possession of the controlled substance was with the intent to sell, deliver, manufacture, etc., the substance.

² Examples of opiates are opium and morphine.

³ Examples of opioids are heroin, oxycodone, hydrocodone, and hydromorphone.

⁴ “Phenethylamines” is a broad category of “psychoactive substances.” Sanders B., Lankenau S.E., Bloom J.J., Hathazi D. “‘Research chemicals’: Tryptamine and Phenethylamine Use Among High Risk Youth,” *Substance Use & Misuse* (2008), Vol. 43, No. 3-4, Pages 389-402, available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2536767/> (last viewed on Feb. 25, 2014).

⁵ A first degree felony is generally punishable by up to 30 years in state prison. Section 775.082, F.S. Repeat offender sanctions may be available under ss. 775.082 and 775.084, F.S.

⁶ Most drug offenses under s. 893.13, F.S., are not subject to mandatory minimum terms.

| Statutory Reference | Covered Substance | Threshold Weight | Weight Range Applicable to 3-Year Mandatory Minimum Term |
|-----------------------|----------------------------------|------------------|--|
| s. 893.13(1)(c), F.S. | Opiates and opioids | 4 grams | 4 grams or more but less than 14 grams |
| s. 893.13(1)(d), F.S. | Phencyclidine | 28 grams | 28 grams or more but less than 200 grams |
| s. 893.13(1)(f), F.S. | Amphetamines | 14 grams | 14 grams or more but less than 28 grams |
| s. 893.13(1)(g), F.S. | Flunitrazepam | 4 grams | 4 grams or more but less than 14 grams |
| s. 893.13(1)(k), F.S. | Phenethylamines | 10 grams | 10 grams or more but less 200 grams |
| s. 893.13(1)(l), F.S. | Lysergic acid diethylamide (LSD) | 1 gram | 1 gram or more but less than 5 grams |

The Criminal Punishment Code and Mandatory Minimum Terms

The Criminal Punishment Code (Code)⁷ is Florida's framework or mechanism for determining permissible sentencing ranges for noncapital felonies. Noncapital felonies sentenced under the Code receive an offense severity level ranking (Levels 1-10). Points are assigned and accrue based upon the level ranking (sentence points escalate as the level escalates) assigned to the primary offense, additional offenses, and prior offenses. Points may be added or multiplied for other factors. For example, if the primary offense is drug trafficking, the subtotal sentence points are multiplied by 1.5, at the discretion of the court, for a Level 7 or Level 8 trafficking offense.⁸

Total sentence points are entered into a mathematical calculation (specified in statute) to determine the lowest permissible sentence. The permissible sentencing range primary offense is generally the lowest permissible sentence scored up to and including the maximum penalty provided under s. 775.082, F.S., for the primary offense. The court is permitted to impose sentences concurrently or consecutively.

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 "downward departure"). However, a mandatory minimum term is not subject to these mitigating factors.⁹

Most of the mandatory minimum terms found in Florida law involve drug trafficking offenses. Mandatory minimum terms impact Code sentencing. "If the lowest permissible sentence is less than the mandatory minimum sentence, the mandatory minimum sentence takes precedence."¹⁰

⁷Sections 921.002-921.0027, F.S.

⁸ Section 921.0024(1)(b), F.S.

⁹ See *State v. Vanderhoff*, 14 So.3d 1185 (Fla. 5th DCA 2009).

¹⁰ Rule 3.704(26) ("The Criminal Punishment Code"), Florida Rules of Criminal Procedure.

A mandatory minimum sentence is often longer than a prison sentence scored as the lowest permissible sentence under the Code, so the sentencing range is narrowed. Further, with few exceptions, the sentencing court must impose the mandatory minimum term.¹¹

III. Effect of Proposed Changes:

The bill amends s. 893.135, F.S., to provide that if a defendant is convicted of a violation of this section (drug trafficking), the defendant may move the sentencing court to depart from the 3-year mandatory minimum term of imprisonment and the mandatory fine that would apply to the conviction absent a departure. The state attorney may file an objection to the motion.

The court may grant the motion if the court finds that the defendant has demonstrated by a preponderance of the evidence¹² that all of the following criteria are met:

- The defendant has not previously moved to depart from a 3-year mandatory minimum term and mandatory fine.
- The defendant's violation of s. 893.135, F.S., would be subject to a 3-year mandatory minimum term and mandatory fine absent a departure.
- The defendant's violation of s. 893.135, F.S., involves possession of one of the following controlled substances or a mixture that contains the controlled substance:
 - Cocaine;
 - Hydrocodone;
 - Oxycodone;
 - Any controlled substance as described in s. 893.135(1)(c), F.S. (opiates and opioids);
 - Phencyclidine;
 - Amphetamine or Methamphetamine;
 - Flunitrazepam;
 - A phenethylamine as described in s. 893.135(1)(k)1., F.S.; or
 - Lysergic acid diethylamide (LSD).
- The defendant did not possess the controlled substance or mixture containing the controlled substance with the intent to sell, manufacture, or deliver the substance or mixture.
- The defendant did not obtain the controlled substance or mixture containing the controlled substance by using a minor to obtain the substance or mixture.
- In committing the violation of s. 893.135, F.S., the defendant did not possess or threaten to use a firearm or deadly weapon, or threaten to use or use physical force against another person.

¹¹ Staff found only two circumstances in which a sentencing court is authorized by law to impose a sentence below the mandatory minimum term. The first circumstance is when the court sentences a defendant as a youthful offender. Section 958.04, F.S. See *Christian v. State*, 84 So.3d 437 (Fla. 5th DCA 2012). The second circumstance is when the court grants a motion from the state attorney to reduce or suspend a sentence based upon substantial assistance rendered by the defendant. Section 893.135(4), F.S.

¹² "Preponderance of the evidence" is the same level of proof necessary to establish facts supporting the mitigation of a sentence under the Criminal Punishment Code. Section 921.002(1)(f), F.S. Similarly, each of the findings required as the basis for a habitual offender sentence must be found to exist by a preponderance of the evidence. Section 775.084(3)(a)4., F.S.

- The defendant does not have a previous conviction, adjudication of delinquency, or withhold of adjudication of guilt for a violation s. 893.135, F.S.
- The defendant does not have a previous conviction, adjudication of delinquency, or withhold of adjudication of guilt for a violation of s. 893.13, F.S., which involved the sale, manufacture, or delivery of a controlled substance, or the possession with intent to sell, manufacture, or deliver a controlled substance.
- The defendant is amenable to substance abuse treatment if the court determines that he or she is in need of such treatment.

The court's decision on how to dispose of the motion is completely discretionary. Therefore, the bill does not compel the court to grant the motion to depart even if the court finds that all of the criteria are met.

The bill takes effect on July 1, 2014.

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 has not yet reviewed CS/SB 328.

Staff notes that the court has complete discretion to grant or deny a motion to depart from the 3-year mandatory minimum term for a specified controlled substance even if the court finds that all criteria are met. Therefore, it may be difficult or impossible to project how many defendants would be granted a departure. The Legislature's Office of Economic and Demographic Research preliminary estimates that the bill will have an indeterminate

prison bed impact (no increase in prison beds but indeterminate to what extent, if any the bill would result in a need for fewer prison beds).

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 893.135 of the Florida Statutes.

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Criminal Justice on March 3, 2014:

- Authorizes a court to grant a defendant motion to depart from a 3-year mandatory minimum term and mandatory fine for trafficking in cocaine, certain opiates or opioids, phencyclidine, amphetamine, methamphetamine, flunitrazepam, phenethylamines, or lysergic acid diethylamide (LSD) if the court finds that the defendant has not previously moved for a departure, the offense involves simple possession, and other criteria are met.
- Authorizes the state attorney to object to the motion to depart.

- B. **Amendments:**

None.