

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: SB 346

INTRODUCER: Senator Bradley and others

SUBJECT: Controlled Substances

DATE: November 8, 2019

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Erickson/Cellon</u>	<u>Jones</u>	<u>CJ</u>	<u>Pre-meeting</u>
2.	_____	_____	<u>ACJ</u>	_____
3.	_____	_____	<u>AP</u>	_____

I. Summary:

SB 346 provides that a person who purchases or possesses less than two grams of a controlled substance, other than fentanyl, may not be imprisoned for a term longer than 12 months.

The bill also authorizes a court to depart from the mandatory minimum term of imprisonment and the mandatory fine for a drug trafficking offense which does not carry a 25-year mandatory minimum term, if the court finds certain circumstances (specified in the bill) exist.

The bill also requires a custodial interrogation relating to a covered offense (specified in the bill) that is conducted at a place of detention be electronically recorded in its entirety. If the custodial interrogation at the place of detention is not electronically recorded by the law enforcement officer, he or she must prepare a written report explaining the reason for not recording it. The bill provides exceptions to the general recording requirement. The bill further provides:

- If a custodial interrogation is not recorded and no exception applies, a court must consider “the circumstances of an interrogation” in its analysis of whether to admit into evidence a statement made at the interrogation;
- If the court decides to admit a statement made during a custodial interrogation that was not electronically recorded, the defendant may require the court to give a cautionary jury instruction regarding the officer’s failure to comply with the recording requirement;
- If a law enforcement agency “has enforced rules” adopted pursuant to the bill which are reasonably designed to comply with the bill’s requirements, the agency is not subject to civil liability for damages arising from a violation of the bill’s requirements; and
- Requirements relating to electronic recording of a custodial interrogation do not create a cause of action against a law enforcement officer.

Finally, the bill eliminates ineligibility for compensation for wrongfully incarcerated persons who had a violent felony or more than one nonviolent felony before their wrongful conviction and incarceration. However, the bill does not change ineligibility status for persons who: commit

a violent felony or multiple nonviolent felonies during their wrongful incarceration; are serving a concurrent prison sentence; or have served the incarcerative part of their sentence and commit a violent felony or multiple nonviolent felonies resulting in revocation of parole or community.

The Legislature's Office of Economic and Demographic Research preliminarily estimates that the bill has a "negative significant" prison bed impact (a decrease of more than 25 prison beds).

Under the bill, more persons are potentially eligible for compensation for wrongful incarceration. Fiscal impact is indeterminate. Currently, a person who is entitled to compensation based on wrongful incarceration would be paid at the rate of \$50,000 per year of wrongful incarceration up to a limit of \$2 million. Payment is made from an annuity or annuities purchased by the Chief Financial Officer for the benefit of the wrongfully incarcerated person. The Victims of Wrongful Incarceration Compensation Act is funded through a continuing appropriation pursuant to s. 961.07, F.S.

The drug purchase and possession provision of the bill may have an indeterminate county jail bed impact, and the bill's requirements relating to electronically recording custodial interrogations may have an indeterminate fiscal impact on law enforcement agencies.

The effective date of the bill is July 1, 2020.

II. Present Situation:

Florida's Controlled Substance Schedules

Section 893.03, F.S., classifies controlled substances into five categories or classifications, known as schedules. The schedules regulate the manufacture, distribution, preparation, and dispensing of substances listed in the schedules. The most important factors in determining which schedule may apply to a substance are the "potential for abuse"¹ of the substance and whether there is a currently accepted medical use for the substance. The controlled substance schedules are as follows:

- Schedule I substances (s. 893.03(1), F.S.) have a high potential for abuse and no currently accepted medical use in treatment in the United States. Use of these substances under medical supervision does not meet accepted safety standards.
- Schedule II substances (s. 893.03(2), F.S.) have a high potential for abuse and a currently accepted but severely restricted medical use in treatment in the United States. Abuse of these substances may lead to severe psychological or physical dependence.
- Schedule III substances (s. 893.03(3), F.S.) have a potential for abuse less than the Schedule I and Schedule II substances and a currently accepted medical use in treatment in the United States. Abuse of these substances may lead to moderate or low physical dependence or high psychological dependence. Abuse of anabolic steroids may lead to physical damage.
- Schedule IV substances (s. 893.03(4), F.S.) have a low potential for abuse relative to Schedule III substances and a currently accepted medical use in treatment in the United

¹ Section 893.035(3)(a), F.S., defines "potential for abuse" as a substance that has properties as a central nervous system stimulant or depressant or a hallucinogen that create a substantial likelihood of the substance being: used in amounts that create a hazard to the user's health or the safety of the community; diverted from legal channels and distributed through illegal channels; or taken on the user's own initiative rather than on the basis of professional medical advice.

States. Abuse of these substances may lead to limited physical or psychological dependence relative to Schedule III substances.

- Schedule V substances (s. 893.03(5), F.S.) have a low potential for abuse relative to the substances in Schedule IV and a currently accepted medical use in treatment in the United States. Abuse of these substances may lead to limited physical or psychological dependence relative to Schedule IV substances.

Purchase or Possession of a Controlled Substance

Section 893.13, F.S., in part, punishes unlawful purchase and possession of a controlled substance.² The penalty for violating s. 893.13, F.S., depends on the unlawful act committed and the substance involved and, in some instances, the quantity of the substance involved and the location in which the unlawful act occurred.

Purchase or possession with intent to purchase a controlled substance is generally punishable as a first degree misdemeanor,³ third degree felony,⁴ or second degree felony,⁵ depending upon the schedule of the controlled substance purchased or possessed with intent to purchase.⁶ However, purchase or possession with intent to purchase more than 10 grams of certain Schedule I controlled substances is a first degree felony.⁷

“Simple possession” of a controlled substance has been described as “possession of less than a trafficking amount without intent to sell, manufacture or deliver[.]”⁸ Generally, simple possession of a controlled substance is a third degree felony.⁹ However, simple possession of 20 grams or less of cannabis is a first degree misdemeanor,¹⁰ simple possession of a Schedule V controlled substance is a second degree misdemeanor,¹¹ and simple possession of more than 10 grams of certain Schedule I controlled substances is a first degree felony.¹²

Possession with intent to sell, manufacture, or deliver a controlled substance is generally punishable as a first degree misdemeanor, third degree felony, or second degree felony, depending upon the schedule of the controlled substance possessed.¹³ However, punishment is enhanced when the possession occurs within 1,000 feet of certain locations or facilities.¹⁴ For

² Section 893.13(1)(a),(c)-(f) and (h), (2)(a) and (b), and (6)(a)-(d), F.S.

³ A first degree misdemeanor is punishable by up to one year in county jail and a fine of up to \$1,000. Sections 775.082 and 775.083, F.S.

⁴ A third degree felony is punishable by up to 5 years in state prison and a fine of up to \$5,000. Sections 775.082 and 775.083, F.S.

⁵ A second degree felony is punishable by up to 15 years in state prison and a fine of up to \$10,000. Sections 775.082 and 775.083, F.S.

⁶ Section 893.13(2)(a), F.S.

⁷ Section 893.13(2)(b), F.S. A first degree felony is generally punishable by up to 30 years in state prison and a fine of up to \$10,000.

⁸ *Tyler v. State*, 107 So.3d 547, 549 (Fla. 1st DCA 2013), *rev. den.*, 130 So.3d 1278 (Fla. 2013).

⁹ Section 893.13(6)(a), F.S.

¹⁰ Section 893.13(6)(b), F.S.

¹¹ Section 893.13(6)(d), F.S. A second degree misdemeanor is punishable by up to 60 days in county jail and a fine of up to \$500. Sections 775.082 and 775.083, F.S.

¹² Section 893.13(6)(c), F.S.

¹³ Section 893.13(1)(a), F.S.

¹⁴ Section 893.13(1)(c)-(f) and (h), F.S.

example, possession with intent to sell cannabis is generally a third degree felony¹⁵ but a second degree felony when the possession occurs within 1,000 feet of the real property of a K-12 school.¹⁶

Drug Trafficking

Drug trafficking, which is punished in s. 893.135, F.S., consists of knowingly selling, purchasing, manufacturing, delivering, or bringing into this state (importation), or knowingly being in actual or constructive possession of, certain Schedule I or Schedule II controlled substances in a statutorily-specified quantity. The statute only applies to a limited number of such controlled substances, and the controlled substances involved in the trafficking must meet a specified weight or quantity threshold.

Most drug trafficking offenses are first degree felonies and are subject to a mandatory minimum term of imprisonment and a mandatory fine,¹⁷ which is determined by the weight or quantity of the substance.¹⁸ For example, trafficking in 28 grams or more, but less than 200 grams, of cocaine, a first degree felony, is punishable by a 3-year mandatory minimum term of imprisonment and a mandatory fine of \$50,000.¹⁹ Trafficking in 200 grams or more, but less than 400 grams, of cocaine, a first degree felony, is punishable by a 7-year mandatory minimum term of imprisonment and a mandatory fine of \$100,000.²⁰

Criminal Punishment Code

The Criminal Punishment Code²¹ (Code) is Florida's primary sentencing policy. Noncapital felonies sentenced under the Code receive an offense severity level ranking (levels 1-10).²² Points are assigned and accrue based upon the severity level ranking assigned to the primary offense, additional offenses, and prior offenses. Sentence points escalate as the severity level escalates. Points may also be added or multiplied for other factors such as victim injury or the commission of certain offenses like a level 7 or 8 drug trafficking offense. The lowest permissible sentence is any nonstate prison sanction in which total sentence points equal or are less than 44 points, unless the court determines that a prison sentence is appropriate. If total sentence points exceed 44 points, the lowest permissible sentence in prison months is calculated by subtracting 28 points from the total sentence points and decreasing the remaining total by 25 percent.²³ Absent mitigation,²⁴ the permissible sentencing range under the Code is generally the

¹⁵ Section 893.13(1)(a)2., F.S.

¹⁶ Section 893.13(1)(c)2., F.S.

¹⁷ Section 893.135, F.S., provides for mandatory fines which are greater than the maximum \$10,000 fine prescribed in s. 775.083, F.S., for a first degree felony. However, s. 775.083, F.S., which relates to fines, authorizes any higher amount if specifically authorized by statute.

¹⁸ See s. 893.135, F.S.

¹⁹ Section 893.135(1)(b)1.a., F.S.

²⁰ Section 893.135(1)(b)1.b., F.S.

²¹ Sections 921.002-921.0027, F.S. See chs. 97-194 and 98-204, L.O.F. The Code is effective for offenses committed on or after October 1, 1998.

²² Offenses are either ranked in the offense severity level ranking chart in s. 921.0022, F.S., or are ranked by default based on a ranking assigned to the felony degree of the offense as provided in s. 921.0023, F.S.

²³ Section 921.0024, F.S. Unless otherwise noted, information on the Code is from this source.

²⁴ The court may "mitigate" or "depart downward" from the scored lowest permissible sentence, if the court finds a mitigating circumstance. Section 921.0026, F.S., provides a list of mitigating circumstances.

lowest permissible sentence scored up to and including the maximum penalty provided under s. 775.082, F.S.²⁵

Mandatory Minimum Sentences

Mandatory minimum terms of imprisonment limit judicial discretion in Code sentencing: “If the lowest permissible sentence is less than the mandatory minimum sentence, the mandatory minimum sentence takes precedence. If the lowest permissible sentence exceeds the mandatory sentence, the requirements of the Criminal Punishment Code and any mandatory minimum penalties apply.”²⁶ As previously noted, the sentencing range under the Code is generally the scored lowest permissible sentence up to and including the statutory maximum penalty. However, if there is a mandatory minimum sentence that is longer than the scored lowest permissible sentence, the sentencing range is narrowed to the mandatory minimum sentence up to and including the statutory maximum penalty.

With few exceptions (e.g., youthful offender sentencing²⁷ or a reduced or suspended sentence for substantial assistance rendered²⁸), courts must impose the mandatory minimum term of imprisonment applicable to the drug trafficking offense committed.²⁹

State Prison Sentence

Under the Code, any sentence to state prison must exceed one year.³⁰ Notwithstanding s. 948.03, F.S. (terms and conditions of probation), only those persons who are convicted and sentenced in circuit court to a cumulative sentence of incarceration for one year or more, whether the sentence is imposed in the same or separate circuits, may be received by the Department of Corrections into the state correctional system.³¹

Custodial Interrogation

Constitutional Protections and Court Decisions Interpreting and Applying Those Protections

The Fifth Amendment of the United States Constitution states that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.”³² Similarly, the Florida Constitution extends the same protection.³³

²⁵ If the scored lowest permissible sentence exceeds the maximum penalty in s. 775.082, F.S., the sentence required by the Code must be imposed. If total sentence points are greater than or equal to 363 points, the court may sentence the offender to life imprisonment. Section 921.0024(2), F.S.

²⁶ Fla. R. Crim. P. 3.704(d)(26).

²⁷ Section 958.04, F.S. See *Gallimore v. State*, 100 So.3d 1264, 1266-1267 (Fla. 4th DCA 2012).

²⁸ Section 893.135(4) and 921.186, F.S. See *State v. Agerton*, 523 So.2d 1241, 1243 (Fla. 5th DCA 1988), *rev. den.*, 531 So.2d 1352 (Fla. 1988), and *McFadden v. State*, 177 So.3d 562, 566-567 (Fla. 2015). The court cannot *sua sponte* reduce or suspend the sentence because the decision to suspend or reduce a sentence is based upon a motion from the state attorney. The court is not mandated to reduce or suspend a sentence upon a showing of substantial assistance.

²⁹ Mandatory minimum terms under s. 893.135, F.S., do not apply to attempted drug trafficking. *Suarez v. State*, 635 So.2d 154, 155 (Fla. 2d DCA 1994).

³⁰ Section 921.0024(2), F.S.

³¹ Section 944.17(3)(a), F.S.

³² U.S. Const. amend. V.

³³ “No person shall be . . . compelled in any criminal matter to be a witness against himself.” FLA. CONST. article I, s. 9.

Custodial Interrogation Legal Requirements

Whether a person is in custody and under interrogation is the threshold question that determines the need for a law enforcement officer to advise the person of his or her *Miranda* rights.³⁴ In *Traylor v. State*, the Florida Supreme Court found that “to ensure the voluntariness of confessions, the Self-Incrimination Clause of Article I, Section 9, Florida Constitution, requires that prior to custodial interrogation in Florida suspects must be told that they have a right to remain silent, that anything they say will be used against them in court....”³⁵

The test to determine if a person is in custody for the purposes of his or her *Miranda* rights is whether “a reasonable person placed in the same position would believe that his or her freedom of action was curtailed to a degree associated with actual arrest.”³⁶

An interrogation occurs “when a person is subjected to express questions, or other words or actions, by a state agent that a reasonable person would conclude are designed to lead to an incriminating response.”³⁷

Waiver of the Right to Remain Silent

A person subjected to a custodial interrogation is entitled to the protections of *Miranda*.³⁸ The warning must include the right to remain silent as well as the explanation that anything a person says can be used against them in court. The warning includes both parts because it is important for a person to be aware of his or her right and the consequences of waving such a right.³⁹

Admissibility of a Defendant’s Statement as Evidence

The admissibility of a defendant’s statement is a mixed question of fact and law decided by the court during a pretrial hearing or during the trial outside the presence of the jury.⁴⁰ For a defendant’s statement to become evidence in a criminal case, the judge must first determine whether the statement was freely and voluntarily given to a law enforcement officer during the custodial interrogation of the defendant. The court looks to the totality of the circumstances of the statement to determine if it was voluntarily given.⁴¹

The court can consider testimony from the defendant and any law enforcement officers involved, their reports, and any additional evidence such as audio or video recordings of the custodial interrogation.

³⁴ In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court established procedural safeguards to ensure the voluntariness of statements rendered during custodial interrogation.

³⁵ 596 So.2d 957, 965-966 (Fla. 1992).

³⁶ *Id.* at 966 n. 16.

³⁷ *Id.* at 966 n. 17.

³⁸ See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

³⁹ *Sliney v. State*, 699 So.2d 662, 669 (Fla. 1997), *cert. den.*, 522 U.S. 1129 (1998).

⁴⁰ *Nickels v. State*, 90 Fla. 659, 668 (Fla. 1925).

⁴¹ *Supra* n. 39 at 667.

As previously discussed, the courts use a “reasonable person” standard in making the determination of whether the defendant was in custody at the time he or she made a statement.⁴² The court considers, given the totality of the circumstances, whether a reasonable person in the defendant’s position would have believed he or she was free to terminate the encounter with law enforcement and, therefore, was not in custody.⁴³ Among the circumstances or factors the courts have considered are:

- The manner in which the police summon the suspect for questioning;
- The purpose, place, and manner of the interrogation;
- The extent to which the suspect is confronted with evidence of his or her guilt; and
- Whether the suspect is informed that he or she is free to leave the place of questioning.⁴⁴

The court will also determine whether the defendant was made aware of his or her *Miranda* rights and whether he or she knowingly, voluntarily, and intelligently elected to waive those rights and give a statement.⁴⁵

Even if the court deems the statement admissible and the jury hears the evidence, defense counsel will be able to cross-examine any witnesses who testify and have knowledge of the circumstances surrounding the defendant’s statement. Additionally, counsel may argue to the jury in closing argument that the statement was coerced in some way by a law enforcement officer.

Interrogation Recording in Florida

Currently, 26 states and the District of Columbia record custodial interrogations statewide.⁴⁶ These states have statutes, court rules, or court cases that require law enforcement to make the recordings or allow the court to consider the failure to record a statement in determining the admissibility of a statement.⁴⁷ Although Florida is not one of these states, 58 Florida law enforcement agencies have been identified as recording custodial interrogations, voluntarily, at least to some extent.⁴⁸

⁴² *Supra* n. 36.

⁴³ *Voorhees v. State*, 699 So.2d 602, 608 (Fla. 1997).

⁴⁴ *Ramirez v. State*, 739 So.2d 568, 574 (Fla. 1999).

⁴⁵ *Supra* n. 36 at 668.

⁴⁶ *Compendium: Electronic Recording of Custodial Interrogations*, Thomas P. Sullivan, January 2019, National Association of Criminal Defense Lawyers, p. 7, available at <https://www.nacdl.org/getattachment/581455af-11b2-4632-b584-ab2213d0a2c2/custodial-interrogations-compendium-january-2019-.pdf> (last visited November 5, 2019).

⁴⁷ See *Stephan v. State*, 711 P.2d 1156 (AK 1985); Ark. R. Crim. P. 4.7 (2012); Cal. Pen. Code s. 859.5 and Cal. Wel. & Inst. Code s. 626.8 (2013); CO. Rev. Stat. 16-3-601 (2016); CT Gen. Stat. s. 54-1o (2011); D.C. Code ss. 5-116.01 and 5-116.03 (2006); Hawaii was verified by the four departments that govern law enforcement in the state; 705 IL Comp. Stat. Ann. 405/5-401.5; 725 ICSA 5/103-2.1 (2003, 2005, 2013); Ind. R. Evid. 617 (2009); Kan. Stat. s. 22-4620 (2017); 25 ME Rev. Stat. Ann. s. 2803-B(1)(K) (2007); MD Code Ann., Crim. Proc. ss. 2-402 and 2-403 (2008); MI Comp. Laws ss. 763.7 – 763.11 (2012); *State v. Scales*, 518 N.W.2d 587 (MN 1994); MO Rev. Stat. ss. 590.700 and 700.1 (2009 and 2015); MT Code Ann. ss. 46-4-406 – 46-4-410 (2009); NE Rev. Stat. Ann. ss. 29-4501 – 29-4508 (2008); NJ Court Rules, R. 3:17 (2005); NM Stat. Ann. s. 29-1-16 (2006); NC Gen. Stat. s. 15A-211 (2007, 2011); N.Y. Crim. Proc. Law s. 60.45 (McKinney 2018); OR Rev. Stat. s. 133.400 (2010); RI PAC, Accreditation Standards Manual, s. 8.10 (2013); Tex. Crim. Proc. Code ss. 2.32 and 38.22; Tex. Fam. Code s. 51.095; Utah R. Evid. Rule 616 (2015); 13 V.S.A. s. 5585 (2014); *State v. Jerrell*, 699 N.W.2d 110 (WI 2005); and WI Stat. ss. 968.073 and 972.115 (2005). See also *supra* n. 46 at p. 8.

⁴⁸ *Supra* n. 46 at pp. 40-41.

Wrongful Incarceration Compensation Eligibility

The Victims of Wrongful Incarceration Compensation Act (the Act) has been in effect since July 1, 2008.⁴⁹ The Act provides a process whereby a person may petition the original sentencing court for an order finding the petitioner to be a wrongfully incarcerated person who is eligible for compensation from the state.

The Department of Legal Affairs administers the eligible person's application process and verifies the validity of the claim.⁵⁰ The Chief Financial Officer arranges for payment of the claim by securing an annuity or annuities payable to the claimant over at least 10 years, calculated at a rate of \$50,000 for each year of wrongful incarceration up to a total of \$2 million.⁵¹ To date, four persons have been compensated under the Act for a total of \$4,276,901.⁵²

In cases where sufficient evidence of actual innocence exists, a person is nonetheless *ineligible* for compensation if:

- *Before* the person's wrongful conviction and incarceration the person was convicted of, or pled guilty or nolo contendere to, regardless of adjudication:
 - *Any single violent felony, or more than one nonviolent felony, or a crime or crimes committed in another jurisdiction the elements of which would constitute a felony in this state, or a crime committed against the United States which is designated a felony, excluding any delinquency disposition;*
- *During* the person's wrongful incarceration, the person was convicted of, or pled guilty or nolo contendere to, regardless of adjudication, *any violent felony offense or more than one nonviolent felony;* or
- *During* the person's wrongful incarceration, the person was also serving a *concurrent sentence for another felony* for which the person was not wrongfully convicted.⁵³

A person could be wrongfully incarcerated for a crime and then placed on parole or community supervision for that crime after the incarcerative part of the sentence is served.⁵⁴ Section

⁴⁹ Chapter 961, F.S. (ch. 2008-39, L.O.F.). To date, four persons have been compensated under the Act. E-mail and documentation received from the Office of the Attorney General, October 16, 2019 (on file with the Senate Committee on Criminal Justice).

⁵⁰ Section 961.05, F.S.

⁵¹ Additionally, the wrongfully incarcerated person is entitled to: waiver of tuition and fees for up to 120 hours of instruction at any career center established under s. 1001.44, F.S., any state college as defined in s. 1000.21(3), F.S., or any state university as defined in s. 1000.21(6), F.S., if the wrongfully incarcerated person meets certain requirements; the amount of any fine, penalty, or court costs imposed and paid by the wrongfully incarcerated person; the amount of any reasonable attorney's fees and expenses incurred and paid by the wrongfully incarcerated person in connection with all criminal proceedings and appeals regarding the wrongful conviction; and notwithstanding any provision to the contrary in s. 943.0583, F.S., or s. 943.0585, F.S., and immediate administrative expunction of the person's criminal record resulting from his or her wrongful arrest, wrongful conviction, and wrongful incarceration. Section 961.06, F.S.

⁵² E-mail and documentation received from the Office of the Attorney General, October 16, 2019 (on file with the Senate Committee on Criminal Justice).

⁵³ Section 961.04, F.S.

⁵⁴ Persons are not eligible for parole in Florida unless they were sentenced prior to the effective date of the sentencing guidelines, which was October 1, 1983, and only then if they meet the statutory criteria. Chapter 82-171, L.O.F., and s. 947.16, F.S. The term "community supervision" as used in s. 961.06(2), F.S., could include control release, conditional medical release, or conditional release under the authority of the Florida Commission on Offender Review (ch. 947, F.S.), or community control or probation under the supervision of the Department of Corrections (ch. 948, F.S.).

961.06(2), F.S., addresses this situation in terms of eligibility for compensation for the period of wrongful incarceration. Under this provision, if a person commits a misdemeanor, no more than one nonviolent felony, or some technical violation of his or her supervision that results in the revocation of parole or community supervision, the person is still eligible for compensation. If, however, any single violent felony law violation or multiple nonviolent felony law violations result in revocation, the person is ineligible for compensation.⁵⁵

The term “violent felony” is defined in s. 961.02(6), F.S., by cross-referencing felonies listed in s. 775.084(1)(c)1. or s. 948.06(8)(c), F.S. The combined list of those violent felony offenses includes attempts to commit the crimes as well as offenses committed in other jurisdictions if the elements of the crimes are substantially similar. The violent felonies referenced in s. 961.02(6), F.S., are:

- Kidnapping;
- False imprisonment of a child;
- Luring or enticing a child;
- Murder;
- Manslaughter;
- Aggravated manslaughter of a child;
- Aggravated manslaughter of an elderly person or disabled adult;
- Robbery;
- Carjacking;
- Home invasion robbery;
- Sexual Battery;
- Aggravated battery;
- Armed burglary and other burglary offenses that are first or second degree felonies;
- Aggravated child abuse;
- Aggravated abuse of an elderly person or disabled adult;
- Arson;
- Aggravated assault;
- Unlawful throwing, placing, or discharging of a destructive device or bomb;
- Treason;
- Aggravated stalking;
- Aircraft piracy;
- Abuse of a dead human body;
- Poisoning food or water;
- Lewd or lascivious battery, molestation, conduct, exhibition, or exhibition on computer;
- Lewd or lascivious offense upon or in the presence of an elderly or disabled person;
- Sexual performance by a child;
- Computer pornography;
- Transmission of child pornography; and
- Selling or buying of minors.

⁵⁵ Section 961.06(2), F.S.

III. Effect of Proposed Changes:

The bill reduces the punishment for purchasing or possessing less than two grams of a controlled substance, excluding fentanyl; authorizes a court to depart from most mandatory minimum terms of imprisonment and mandatory fines, if the court finds that specified circumstances exist; requires electronic recording of a custodial interrogation at a place of detention in connection with certain offenses; and revises the circumstances under which a wrongfully incarcerated person is eligible for compensation for wrongful incarceration. A detailed discussion of the bill is provided below.

Purchase or Possession of a Controlled Substance (Section 1)

Section 1 of the bill amends s. 893.13, F.S., which punishes various unlawful acts involving controlled substances, to provide that, notwithstanding any provision of s. 893.13, F.S., or any other law, a person who purchases or possesses less than two grams of a controlled substance, other than fentanyl, may not be imprisoned for a term longer than 12 months. This provision appears to preclude a state prison sentence, which must exceed one year.⁵⁶ However, it is unclear if this preclusion would apply if the purchase or possession is a primary offense under the Code and sentencing factors in addition to the primary offense are scored to determine total sentence points and the lowest permissible sentence. Total sentence points and the lowest permissible sentence under the Code are not based solely on the sentence points that accrue for the primary offense, unless the primary offense is the sole sentencing factor accruing sentence points (as may be the case with a first-time offender). For example, an offender may have prior offenses and additional offenses, which also accrue sentence points under the Code.⁵⁷

Drug Trafficking Mandatory Minimum Terms of Imprisonment and Mandatory Fines (Sections 2 and 5)

Section 2 of the bill amends s. 893.135, F.S., which punishes drug trafficking, to provide that, notwithstanding any provision of this section, a court may impose a sentence for a violation of this section other than the mandatory term of imprisonment and the mandatory fine, if the court finds on the record that specified circumstances exist. However, this departure provision does not apply to a drug trafficking offense which carries a mandatory minimum term of imprisonment of 25 years.

The specified circumstances the court must find on the record include the following:

- The defendant has no prior conviction for a forcible felony as defined in s. 776.08, F.S.⁵⁸
- The defendant did not use violence or credible threats of violence, or possess a firearm or other dangerous weapon, or induce another participant to use violence or credible threats of violence, in connection with the offense.
- The offense did not result in the death of or serious bodily injury to any person.

⁵⁶ See ss. 921.0024(2), and 944.17(3)(a), F.S.

⁵⁷ Section 921.0024, F.S.

⁵⁸ Section 776.08, F.S., defines a “forcible felony” as treason; murder; manslaughter; sexual battery; carjacking; home-invasion robbery; robbery; burglary; arson; kidnapping; aggravated assault; aggravated battery; aggravated stalking; aircraft piracy; unlawful throwing, placing, or discharging of a destructive device or bomb; and any other felony which involves the use or threat of physical force or violence against any individual.

- The defendant was not an organizer, leader, manager, or supervisor of others in the offense and was not engaged in a continuing criminal enterprise as defined in s. 893.20, F.S.⁵⁹
- At the time of the sentencing hearing or earlier, the defendant has truthfully provided to the state all information and evidence that he or she possesses concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan.
- The defendant has not previously benefited from the application of this departure provision.

Section 5 of the bill amends s. 893.03, F.S., to correct a cross-reference to s. 893.135, F.S.

Custodial Interrogation (Section 3)

The bill creates s. 900.06, F.S., which creates a statutory requirement, and exceptions to that requirement, that a law enforcement officer conducting a custodial interrogation must electronically record the interrogation in its entirety.

The bill provides the following definitions for terms used in the bill:

- “Custodial interrogation” means questioning or other conduct by a law enforcement officer which is reasonably likely to elicit an incriminating response from an individual and which occurs under circumstances in which a reasonable individual in the same circumstances would consider himself or herself to be in the custody of a law enforcement agency;
- “Electronic recording” means an audio recording or an audio and video recording that accurately records a custodial interrogation;
- “Covered offense” means any of the following criminal offenses:
 - Arson.
 - Sexual battery.
 - Robbery.
 - Kidnapping.
 - Aggravated child abuse.
 - Aggravated abuse of an elderly person or disabled adult.
 - Aggravated assault with a deadly weapon.
 - Murder.
 - Manslaughter.
 - Aggravated manslaughter of an elderly person or disabled adult.
 - Aggravated manslaughter of a child.
 - The unlawful throwing, placing, or discharging of a destructive device or bomb.
 - Armed burglary.
 - Aggravated battery.
 - Aggravated stalking.
 - Home-invasion robbery.
 - Carjacking.
- “Place of detention” means a police station, sheriff’s office, correctional facility, prisoner holding facility, county detention facility, or other governmental facility where an individual

⁵⁹ Section 893.20(1), F.S., provides that any person who commits three or more felonies under ch. 893, F.S., in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management and who obtains substantial assets or resources from these acts is guilty of engaging in a continuing criminal enterprise.

may be held in connection with a criminal charge that has been or may be filed against the individual; and

- “Statement” means a communication that is oral, written, electronic, nonverbal, or in sign language.

The bill requires a custodial interrogation relating to a covered offense that is conducted at a place of detention be electronically recorded in its entirety. The recording must include:

- The giving of a required warning;
- The advisement of rights; and
- The waiver of rights by the individual being questioned.

If a custodial interrogation at a place of detention is not recorded by the law enforcement officer, he or she must prepare a written report explaining the reason for the noncompliance.

If a law enforcement officer conducts a custodial interrogation at a place other than a place of detention, the officer must prepare a written report as soon as practicable. The report must explain the circumstances of the interrogation in that place, and summarize the custodial interrogation process and the individual’s statements.

The general recording requirement does not apply under the following circumstances:

- If there is an unforeseen equipment malfunction that prevents recording the custodial interrogation in its entirety;
- If a suspect refuses to participate in a custodial interrogation if his or her statements are electronically recorded;
- Due to an equipment operator error that prevents the recording of the custodial interrogation in its entirety;
- If the statement is made spontaneously and not in response to a custodial interrogation question;
- If a statement is made during the processing of the arrest of a suspect;
- If the custodial interrogation occurs when the law enforcement officer participating in the interrogation does not have any knowledge of facts and circumstances that would lead an officer to reasonably believe that the individual being interrogated may have committed a covered offense;
- If the law enforcement officer conducting the custodial interrogation reasonably believes that electronic recording would jeopardize the safety of the officer, individual being interrogated, or others; or
- If the custodial interrogation is conducted outside of the state.

Unless a court finds that one or more of the enumerated exceptions applies, the court must consider the officer’s failure to record all or part of the custodial interrogation as a factor in determining the admissibility of a defendant’s statement made during the interrogation. If the court decides to admit the statement, the defendant may request and the court must give a cautionary jury instruction regarding the officer’s failure to comply with the recording requirement.

Finally, if a law enforcement agency has enforced rules that are adopted pursuant to the bill and that are reasonably designed to comply with the bill's requirements, the agency is not subject to civil liability for damages arising from a violation of the bill's requirements. The bill does not create a cause of action against a law enforcement officer.

Wrongful Incarceration Compensation Eligibility (Sections 4, 6, and 7)

Section 4 of the bill amends s. 961.04, F.S., which relates to eligibility for compensation for wrongful incarceration, to eliminate ineligibility for compensation for wrongfully incarcerated persons who had a violent felony or more than one nonviolent felony before their wrongful conviction and incarceration. However, the bill does not change ineligibility status for persons who: commit a violent felony or multiple nonviolent felonies during their wrongful incarceration; are serving a concurrent prison sentence; or have served the incarcerative part of their sentence and commit a violent felony or multiple nonviolent felonies resulting in revocation of parole or community supervision.⁶⁰

Sections 6 and 7 of the bill reenact, respectively, ss. 961.02 and 961.03, F.S., which relate to eligibility for compensation of wrongfully incarcerated persons.

Effective Date (Section 8)

Section 8 of the bill provides that the bill takes effect July 1, 2020.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Section 1 of the bill provides that a person who purchases or possesses less than two grams of a controlled substance, other than fentanyl, may not be imprisoned for a term longer than 12 months. This section may have an indeterminate but positive county jail bed impact, if a state prison sanction is precluded. Further, Section 3 of the bill relating to electronic recording of custodial interrogations may result in indeterminate local fund expenditures for equipment, maintenance, and operation. However, these provisions relate to the defense, prosecution, or punishment of criminal offenses, and criminal laws are exempt from the requirements of article VII, subsection 18(d) of the Florida Constitution, relating to unfunded mandates.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

⁶⁰ See s. 961.06(2), F.S.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. **Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

It is possible that more persons will be eligible for compensation under the provisions of the bill. A person who is entitled to compensation under the Victims of Wrongful Incarceration Compensation Act will be paid at the rate of \$50,000 per year of wrongful incarceration up to a limit of \$2 million.⁶¹ Payment is made from an annuity or annuities purchased by the Chief Financial Officer for the benefit of the wrongfully incarcerated person.⁶²

C. Government Sector Impact:

Local Government Impact

The drug purchase and possession provision of the bill may have an indeterminate jail bed impact if defendants who might be sentenced to prison under current law are instead sentenced to jail under the provisions of the bill. The requirements of the bill relating to electronic recording of custodial interrogation may have an indeterminate fiscal impact on local law enforcement agencies if agencies determine that expenditures to purchase recording equipment, retain recorded statements, and store electronic recordings are necessary to comply with the requirements of the bill relating to electronically recording custodial interrogations.

State Government Impact***Prison Bed Impact***

The Criminal Justice Impact Conference, which provides the financial, official estimate of the prison bed impact, if any, of legislation has not yet reviewed the bill. However, the Legislature's Office of Economic and Demographic Research (EDR) preliminarily estimates that the bill has a "negative significant" prison bed impact (a decrease of more than 25 prison beds).⁶³ Regarding specific sections of the bill in which impact is noted, the EDR's preliminary estimate is that Section 1 of the bill, which reduces the

⁶¹ Section 961.06(1), F.S.

⁶² Section 961.06(4), F.S.

⁶³ The EDR's preliminary estimate of SB 346 is on file with the Senate Committee on Criminal Justice.

punishment for purchasing or possessing less than two grams of a controlled substance excluding fentanyl, has a “negative significant” prison bed impact.⁶⁴ Section 2 of the bill, which authorizes a court to depart from most mandatory minimum terms of imprisonment and mandatory fines, if the court finds that specified circumstances exist, has a “negative indeterminate” prison bed impact (an unquantifiable decrease in prison beds).⁶⁵

Compensation for Wrongful Incarceration

More persons are potentially eligible for compensation for wrongful incarceration under provisions of the bill. A person who is entitled to compensation based on wrongful incarceration would be paid at the rate of \$50,000 per year of wrongful incarceration up to a limit of \$2 million. Payment is made from an annuity or annuities purchased by the Chief Financial Officer for the benefit of the wrongfully incarcerated person. The Victims of Wrongful Incarceration Compensation Act is funded through a continuing appropriation pursuant to s. 961.07, F.S.

Although statutory limits on compensation under the Act are clear, the fiscal impact of the bill is unquantifiable. The possibility that a person would be compensated for wrongful incarceration is based upon variables that cannot be known, such as the number of wrongful incarcerations that currently exist or might exist in the future. Four successful claims since the Act became effective total \$4,276,901.

VI. Technical Deficiencies:

The bill provides that a person who purchases or possesses less than 2 grams of a controlled substance, other than fentanyl, may not be imprisoned for a term longer than 12 months. The exclusion of fentanyl is presumably due to its high potency.⁶⁶ However, the exclusion does not address fentanyl derivatives and analogs (e.g., alfentanil, sufentanil, or carfentanil) or mixtures containing any of these substances. Some of these controlled substances are more potent than fentanyl. For example, carfentanil has a quantitative potency approximately 100 times that of fentanyl.⁶⁷ If the bill sponsor’s intent is to include these substances and mixtures, the sponsor should amend line 49 of the bill to read: “than fentanyl or any substance or mixture listed in s. 893.135(1)(c)4.a.(I)-(VII),⁶⁸ may not be imprisoned for a term longer than 12”.

Purchase and possession with intent to purchase receive the same punishment under current law.⁶⁹ It is unclear if Section 1 of the bill, as it relates to “possession” is also intended to apply to possession with intent to purchase. If this is the bill sponsor’s intent, the sponsor should amend

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ According to the U.S. Drug Enforcement Administration, fentanyl can be lethal at the 2-milligram range, depending on route of administration and other factors. *Officer Safety Alert* (“Carfentanil: A Dangerous New Factor in the U.S. Opioid Crisis”), U.S. Drug Enforcement Administration, available at <https://www.justice.gov/usao-edky/file/898991/download> (last visited on Oct. 16, 2019).

⁶⁷ *Carfentanil*, National Center for Biotechnology Information, U.S. National Library of Medicine, available at <https://pubchem.ncbi.nlm.nih.gov/compound/carfentanil#section=Top> (last visited on Oct. 16, 2019).

⁶⁸ Section 893.135(1)(c)4.a., F.S., lists the following substances and mixtures that are applicable to “trafficking in fentanyl”: alfentanil; carfentanil; fentanyl; sufentanil; a fentanyl derivative; a controlled substance analog of any of these substances; and a mixture containing any of these substances.

⁶⁹ Section 893.13(2)(a), F.S.

lines 46-48 of the bill to read: “other law relating to the punishment for possessing, purchasing, or possessing with intent to purchase a controlled substance, a person who possesses, purchases, or possesses with the intent to purchase less than 2 grams of a controlled substance, other””.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 893.03, 893.13, 893.135, and 961.04.

This bill creates section 900.06 of the Florida Statutes.

This bill reenacts the following sections of the Florida Statutes: 961.02 and 961.03.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

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

None.

B. Amendments:

None.