

**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.)

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Prepared By: The Professional Staff of the Committee on Judiciary

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BILL: SB 468

INTRODUCER: Senator Brandes

SUBJECT: Mandatory Sentences

DATE: November 1, 2019

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Elsesser</u>	<u>Cibula</u>	<u>JU</u>	<u>Pre-meeting</u>
2.	_____	_____	<u>ACJ</u>	_____
3.	_____	_____	<u>AP</u>	_____

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**I. Summary:**

SB 468 authorizes a court to impose a sentence and fine “other than” the mandatory minimum for a drug trafficking offense if the court finds on the record that the offender (1) did not engage in a continuing criminal enterprise (2) did not use or threaten violence or use a weapon during the commission of the offense, and (3) did not cause death or serious bodily injury.

**II. Present Situation:**

Section 893.135, F.S., requires mandatory minimum prison sentences for certain drug trafficking offenses. That section provides that possession of more than certain specified amounts of cannabis, cocaine, certain narcotic opioids, sedatives, stimulants, hallucinogens, and other illicit substances constitutes “trafficking,” with increasing mandatory prison terms and fines for possession of amounts beyond certain thresholds.

For example, s. 893.135(1)(a), F.S., defines possession of more than 25 pounds of cannabis as “trafficking in cannabis;” offenders possessing more than 25 pounds but less than 2,000 pounds of cannabis are subject to a mandatory minimum 3-year prison term and \$25,000 fine; offenders possessing 2,000 pounds or more, but less than 10,000 pounds of cannabis are subject to a mandatory minimum 7-year prison term and a \$50,000 fine; and offenders possessing more than 10,000 pounds of cannabis are subject to a mandatory minimum 15-year prison term and \$200,000 fine. Possession of “trafficking” amounts of the substances in s 893.135, F.S., is generally punishable as a first-degree felony,<sup>1</sup> while certain aggravators, such as importation into the state or an intentional killing in the course of trafficking, can increase the offense to a life or capital felony.

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<sup>1</sup> First-degree felonies are generally punishable by up to a 30-year prison sentence, with certain exceptions.

## The Criminal Punishment Code

In most cases, the minimum sentence for a criminal offense is governed by the Criminal Punishment Code, as described in ss. 921.002, 921.0021, 921.0022, 921.0023, and 921.0024, F.S. The Criminal Punishment Code assigns an “offense severity level” ranging from 1-10 to non-capital felonies, with 1 (a third-degree felony) being the least severe and 10 (a life felony) being the most severe.<sup>2</sup> Other factors, such as the nature of any victim injury, can increase an offender’s point total, and the point total can be multiplied based on the nature of an offense (i.e. drug trafficking, adult-on-minor sex offense) or on the categorization of the defendant (i.e. prison release reoffender, habitual felony offender).<sup>3</sup> Points from the defendant’s prior record are factored into the defendant’s point total.<sup>4</sup> For an offender scoring fewer than 44 points, the lowest permissible sentence is any non-state prison sanction.<sup>5</sup> If the offender scores higher than 44 points, the lowest permissible sentence is calculated by subtracting 28 from the defendant’s point total and then decreasing the result by 25 percent.<sup>6</sup> The resulting total represents the defendant’s lowest permissible sentence in months. A court may impose a sentence lower than the lowest permissible sentence only if it finds a mitigating circumstance as described in s. 921.0026, F.S.<sup>7</sup>

Mandatory minimum sentences supersede the lowest permissible sentence under the Criminal Punishment Code: “If the lowest permissible sentence is less than the mandatory minimum sentence, the mandatory minimum sentence takes precedence.”<sup>8</sup>

In some cases, an offender’s conduct is governed by multiple statutes; in such cases, “a prosecutor has discretion to decide whether and how to prosecute the defendant.”<sup>9</sup> As such, if a defendant possesses enough of a controlled substance to violate ss. 893.13 and 893.135, F.S., a prosecutor has the discretion to charge under s. 893.13, F.S., which does not require a mandatory minimum prison sentence for most offenses,<sup>10</sup> or s. 893.135, F.S., which does.

The state’s Youthful Offender Act specifies criteria for the sentencing of youthful offenders “[i]n lieu of other criminal penalties authorized by law ... .”<sup>11</sup> A defendant sentenced as a youthful

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<sup>2</sup> Section 921.0023, F.S.

<sup>3</sup> Section 921.0024(1)(a), F.S.

<sup>4</sup> *Id.*

<sup>5</sup> Section 921.0024(2), F.S.

<sup>6</sup> *Id.*

<sup>7</sup> Section 921.0026, F.S., provides a non-exhaustive list of mitigating factors, including the fact that the “victim was an initiator, willing participant, aggressor, or provoker of the incident,” and the “offense was committed in an unsophisticated manner and was an isolated incident for which the defendant has shown remorse.”

<sup>8</sup> Fla. R. Crim. P. 3.704(d)(26).

<sup>9</sup> *State v. Gonzales*, 121 So. 3d 625, 629 (Fla. 4th DCA 2013).

<sup>10</sup> There are three exceptions. Section 893.13(1)(c)1., F.S., subjects offenders selling certain controlled substances within 1,000 feet of a K-12 school, park, community center, or publicly owned recreational facility to a 3-year mandatory minimum sentence. Section 893.13(1)(g)1., F.S., subjects offenders manufacturing methamphetamine or phencyclidine in a structure or conveyance where any child under 16 is present to a 5-year mandatory minimum sentence. Section 893.13(1)(g)2., F.S., subjects offenders manufacturing methamphetamine or phencyclidine causing a child under 16 to suffer great bodily harm to a 10-year mandatory minimum sentence.

<sup>11</sup> Section 958.04, F.S.

offender, therefore, is not subject to the mandatory minimum sentences for drug trafficking offenses under s. 893.135, F.S.<sup>12</sup>

### **Federal Mandatory Minimum Sentences for Drug Trafficking**

“Federal drug trafficking offenders are primarily convicted of offenses under Title 21 of the United States Code.”<sup>13</sup> Like Florida’s framework, the federal sentencing structure has different tiers of mandatory minimum sentences based on the quantity and type of controlled substance involved in the offense.<sup>14</sup> However, the federal framework involves two tiers (compared to Florida’s three): “[w]hen certain quantity thresholds are met, a 5-year mandatory minimum penalty and a maximum term of 40 years applies, while larger amounts increase the mandatory minimum to 10 years, with a maximum of life imprisonment.”<sup>15</sup> Under 21 U.S.C. ss. 841 and 960, the following amounts are required to trigger mandatory minimums sentences:

<b>Controlled substance</b>	<b>Threshold amount for 5-year minimum mandatory sentence</b>	<b>Threshold amount for 10-year minimum mandatory sentence</b>
Heroin	100 grams	1 kilogram
Powder Cocaine	500 grams	5 kilograms
Cocaine-Based Mixture (crack)	28 grams	280 grams
Methamphetamine (pure)	5 grams	50 grams
Methamphetamine (mixture)	50 grams	500 grams
Marijuana	100 kilograms	1,000 kilograms

Florida’s framework in some cases involves lower thresholds to trigger mandatory minimums. For example, the possession of 25 pounds of marijuana triggers a 3-year mandatory minimum sentence in Florida, but it would not trigger a mandatory minimum federal sentence. Additionally, the possession of 10,000 pounds of marijuana would trigger a 15-year mandatory minimum sentence in Florida, but a 10-year mandatory minimum federal sentence. Notably, regarding threshold amounts of cocaine, Florida treats cocaine and “any mixture containing cocaine” the same, imposing mandatory minimums beginning at the possession of 28 grams. Conversely, federal law differentiates between cocaine mixtures (typically “crack” cocaine) and powder cocaine, having a higher threshold for the latter.

<sup>12</sup> See, e.g., *Salazar v. State*, 544 So. 2d 313, 313 (Fla. 2d DCA 1989) (mandatory minimum did not apply to youthful offender, as “the penalties established in the Youthful Offender Act shall be imposed in lieu of other criminal penalties authorized by law”).

<sup>13</sup> Unites States Sentencing Commission, *Mandatory Minimum Penalties for Drug Offenses in the Federal Criminal Justice System*, available at [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171025\\_Drug-Mand-Min.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171025_Drug-Mand-Min.pdf) (last visited October 31, 2019).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

### III. Effect of Proposed Changes:

This bill allows a sentencing court to impose a sentence “other than”<sup>16</sup> the mandatory minimum on drug trafficking offenders if the court finds on the record that (1) the offender did not engage in a continuing criminal enterprise as defined in s. 893.20, F.S.,<sup>17</sup> (2) the offender did not use or threaten violence or use a weapon during the commission of the offense, and (3) the offender did not cause a death or serious bodily injury.

The bill authorizes a sentencing court to impose a sentence other than the mandatory minimum on an offender convicted of trafficking in the following substances:

- Cannabis or cannabis plants<sup>18</sup>
- Cocaine<sup>19</sup>
- Morphine, opium, hydromorphone, or any salt, derivative, isomer, or salt of an isomer thereof, including heroin<sup>20</sup>
- Hydrocodone, Oxycodone, Alfentanil, Carfentanil, Fentanyl, Sufentanil, or a fentanyl derivative
- Phencyclidine<sup>21</sup>
- Methaqualone<sup>22</sup>
- Amphetamine or methamphetamine<sup>23</sup>
- Flunitrazepam<sup>24</sup>
- Gamma-butyrolactone (GBL)<sup>25</sup>
- 1,4-Butanediol<sup>26</sup>
- Substituted phenethylamine, substituted cathinone, substituted phenethylamine<sup>27</sup>
- Lysergic acid diethylamide (LSD)<sup>28</sup>

<sup>16</sup> Under the broadest reading of this language, a sentence *exceeding the statutory maximum* could also be permitted (as such a sentence would be one “other than” the mandatory minimum). While courts likely would not engage in such an interpretation, more specific language (such as “less than”) seems more consistent with the Legislature’s intent.

<sup>17</sup> Under s. 893.20, F.S., a person is guilty of engaging in a continuing criminal enterprise if he or she “commits three or more felonies under [chapter 893] 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 . . . .”

<sup>18</sup> Section 893.135(1)(a), F.S.

<sup>19</sup> Section 893.135(1)(b), F.S.

<sup>20</sup> Section 893.135(1)(c), F.S.

<sup>21</sup> Section 893.135(1)(d), F.S.; Phencyclidine is a “hallucinogen formerly used as a veterinary anesthetic, and briefly as a general anesthetic for humans.” Phencyclidine, PubChem, U.S. National Library of Medicine, <https://pubchem.ncbi.nlm.nih.gov/compound/Phencyclidine> (last visited October 31, 2019).

<sup>22</sup> Section 893.135(1)(e), F.S.; “Methaqualone is a sedative, hypnotic agent that was used for insomnia, but was taken off of the market, in the U.S., in 1983 due to its high risk of abuse.” Methaqualone, PubChem, U.S. National Library of Medicine, <https://pubchem.ncbi.nlm.nih.gov/compound/6292> (last visited October 31, 2019).

<sup>23</sup> Section 893.135(1)(f), F.S.

<sup>24</sup> Section 893.135(1)(g), F.S.; “Some reports indicate that it is used as a date rape drug and suggest that it may precipitate violent behavior. The United States Government has banned the importation of this drug.” Flunitrazepam, PubChem, U.S. National Library of Medicine, <https://pubchem.ncbi.nlm.nih.gov/compound/3380> (last visited October 31, 2019).

<sup>25</sup> Section 893.135(1)(h), F.S.; GBL is commercial solvent.

<sup>26</sup> Section 893.135(1)(j), F.S.

<sup>27</sup> Section 893.135(1)(k)1., F.S.

<sup>28</sup> Section 893.135(1)(l)1, F.S.

- Synthetic cannabinoids<sup>29</sup>
- N-benzyl phenethylamines<sup>30</sup>

Because the lowest permissible sentence under the Criminal Punishment Code Scoresheet is distinct from a “mandatory minimum sentence,”<sup>31</sup> the bill does not grant a court any additional authority to deviate from the lowest permissible Criminal Punishment Code Scoresheet sentence.<sup>32</sup>

Section 775.084, F.S., which is not amended by the bill, requires “mandatory minimum” prison terms for “habitual felony offenders.”<sup>33</sup> An offender convicted of drug trafficking in violation of s. 893.135, F.S., would still be subject to certain mandatory minimum sentences if he or she meets the definition of a “habitual felony offender.”

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

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

This bill does not require counties or municipalities to spend funds or limit their authority to raise revenue or receive state-shared revenues as specified in Article VII, s. 18 of the Florida Constitution.

##### **B. Public Records/Open Meetings Issues:**

None.

##### **C. Trust Funds Restrictions:**

None.

##### **D. State Tax or Fee Increases:**

None.

##### **E. Other Constitutional Issues:**

None identified.

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<sup>29</sup> Section 893.135(1)(m), F.S., synthetic cannabinoids do not derive their psychoactive effects through THC, but rather are “cannabinoid receptor agonists” that act on various brain receptors in a similar manner to cannabinoids.

<sup>30</sup> Section 893.135(1)(n), F.S.

<sup>31</sup> See Fla. R. Crim. P 3.704(d)(26) (differentiating between a mandatory minimum sentence and the lowest permissible sentence under the Criminal Punishment Code).

<sup>32</sup> Section 921.0026, F.S., authorizes a court to depart downward from the lowest permissible sentence under the Criminal Punishment Code Scoresheet based on a non-exhaustive list of mitigating factors described in that section.

<sup>33</sup> Habitual felony offenders are defendants who have been convicted of two or more prior felonies, or whose conduct meets certain criteria: the offense was committed while the offender was serving a prison sentence or within 5 years after release from a prison sentence, the felony is not simple possession under s. 893.13, F.S., and any of the qualifying felonies were not pardoned or set aside in a postconviction proceeding. Section 775.084(1)(a), F.S.

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

The 2019 Criminal Justice Impact Conference estimated that allowing a court to sentence a drug trafficking offender to a sentence other than the mandatory minimum would have a “negative significant” prison bed impact (a decrease of more than 25 prison beds, where each bed requires an estimated \$68,710 in annual capital costs) in each of the next 5 fiscal years.<sup>34</sup>

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

Section 893.135, F.S., requires life sentences for offenders who possesses 150 or more kilograms of cocaine, 30 or more kilograms of certain opioids, or 30 kilograms or more of flunitrazepam.<sup>35</sup> The statute says these offenders “shall be punished by life imprisonment,” but does not use the words “mandatory minimum.” If the Legislature intends to allow a court to impose a sentence less than life imprisonment for qualifying offenses, it may wish to add clarifying language.

**VIII. Statutes Affected:**

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

**IX. Additional Information:****A. Committee Substitute – Statement of Changes:**

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

None.

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<sup>34</sup> 2019 Conference Results, Criminal Justice Impact Conference, available at <http://edr.state.fl.us/Content/conferences/criminaljusticeimpact/index.cfm> (last visited October 31, 2019); Capital and Operating Costs for the Department of Corrections for Use in Fiscal Impacts by the Criminal Justice Estimating Conference 2019 Session, available at <http://edr.state.fl.us/Content/conferences/criminaljusticeimpact/2019DOCPeDiemandBedCosts.pdf> (last visited October 31, 2019).

<sup>35</sup> Section 893.135(1)(b)2., (c)5., and (g)2., F.S.

B. Amendments:

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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