

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 328

INTRODUCER: Senator Rouson

SUBJECT: Sentencing

DATE: March 29, 2021

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Jones	CJ	Pre-meeting
2.			ACJ	
3.			AP	

I. Summary:

SB 328 retroactively applies the 2016 amendments to s. 775.087, F.S., the “10-20-Life” statute, which removed aggravated assault and attempted aggravated assault as predicate offenses for sentencing under that statute. The 2016 amendments were prospective in application and only benefitted offenders who committed those offenses on or after the effective date of the 2016 amendments. Retroactive application of the amendments benefits those offenders subject to the mandatory sentencing provisions of “10-20-Life” based on aggravated assault or attempted aggravated assault committed before the effective date of the 2016 amendments. They would no longer be subject to this statute and its mandatory penalties.

The bill also retroactively applies:

- The 2019 amendments to the gram weight thresholds and ranges applicable to hydrocodone trafficking and codeine trafficking; and
- The 2014 amendments to the gram weight thresholds and ranges applicable to oxycodone trafficking.

These amendments were prospective in application and only benefited those offenders with relevant trafficking offenses committed on or after the effective date of the amendments. Retroactive application of the amendments may benefit those offenders who committed hydrocodone, codeine, or oxycodone trafficking before the effective date of the amendments. Depending on the quantity trafficked, the offenders may no longer be subject to mandatory trafficking penalties or may be subject to reduced mandatory trafficking penalties.

The bill also provides procedures for resentencing eligible offenders.

The Criminal Justice Impact Conference estimates that the bill will have a “negative indeterminate” prison bed impact (an unquantifiable decrease in prison beds). The Department of Corrections (DOC) indicates that impact of the bill on the department is indeterminate but may

require \$17,400 for programming changes to adjust gain-time and identify impacted offenders. See Section V. Fiscal Impact Statement.

The bill takes effect October 1, 2021.

II. Present Situation:

2016 Amendments to the “10-20-Life” Statute

Section 775.087, F.S., otherwise known as the “10-20-Life” statute, requires a judge to sentence a person convicted of a specified offense to a minimum term of imprisonment if, while committing the offense, the person possesses or discharges a firearm or destructive device¹ or if the discharge of the firearm results in death or great bodily harm. Specified offenses include such offenses as murder, sexual battery, robbery, and burglary.²

Under s. 775.087, F.S., a person convicted of a specified offense, or the attempt to commit such offense, must be sentenced to the following mandatory minimum term of imprisonment:

- 10 years for possession of a firearm;
- 15 years for possession of a semi-automatic/machine gun;
- 20 years for discharge of a firearm (any type); or
- 25 years to life imprisonment for discharge with great bodily injury or death.³

However, s. 775.087(2)(a)(1), F.S., provides for a minimum mandatory sentence of 3 years, instead of 10 years, for the possession of a firearm by a felon or burglary of a conveyance if the possession occurred during the commission of the offense.

A person sentenced under s. 775.087, F.S., is not eligible for statutory gain-time under s. 944.275, F.S.⁴

Section 775.087, F.S.,⁵ used to include aggravated assault and attempted aggravated assault as predicate offenses for purposes of mandatory minimum sentencing under the statute, until the Legislature removed those offenses from the statute in 2016. Further, the statute in effect immediately prior to its 2016 amendment also prohibited imposing the mandatory minimum sentence for aggravated assault and attempted aggravated assault if the court made written findings that:

- The defendant had a good faith belief that the aggravated assault was justifiable pursuant to ch. 776, F.S.;
- The aggravated assault was not committed in the course of committing another criminal offense;
- The defendant does not pose a threat to public safety; and

¹ The terms “firearm” and “destructive device” are defined in s. 790.001, F.S.

² For a complete list of offenses, see s. 775.087(3)(a)1., F.S.

³ Section 775.087(2)(a)1.-3. and (3)(a)1.-3., F.S.

⁴ Section 775.087(2)(b) and (3)(b), F.S.

⁵ Chapter 2016-7, L.O.F. (effective July 1, 2016).

- The totality of the circumstances involved in the offense do not justify the imposition of such sentence.⁶

The 2016 legislation had prospective application.

Drug Trafficking Offenses

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 controlled substances, including hydrocodone, codeine, and oxycodone.

Most drug trafficking offenses are first degree felonies⁷ and are subject to a mandatory minimum term of imprisonment and a mandatory fine,⁸ which is determined by the weight or quantity of the substance.⁹ 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 \$50,000.¹⁰ 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 \$100,000.¹¹

Changes have been made over the years to gram weight threshold and ranges for trafficking in hydrocodone, codeine, and oxycodone (described below). As a result of changes to gram weight thresholds, the bar became higher for charging trafficking. As a result of changes to gram weight ranges, some persons were subject to less severe mandatory minimum terms and mandatory fines than they would have been subject to had the law not been changed. All of these changes were prospective in application.

Trafficking in Oxycodone

Prior to 2014 legislative changes to s. 893.135, F.S., the statute provided for the following gram weight threshold and ranges and mandatory penalties for trafficking in oxycodone, any salt of oxycodone, and any mixture containing oxycodone:

- If 4 grams or more but less than 14 grams, a mandatory minimum term of imprisonment of 3 years and a fine of \$50,000;
- If 14 grams or more but less than 28 grams, a mandatory minimum term of imprisonment of 15 years and a fine of \$100,000; or

⁶ Section 775.087(6), F.S. (2015). This exception to mandatory minimum sentencing was created by ch. 2014-195, L.O.F. (effective June 20, 2014).

⁷ A first degree felony is generally punishable by up to 30 years in state prison and a fine of up to \$10,000. Sections 775.082 and 775.083, F.S.

⁸ 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.

⁹ See s. 893.135, F.S.

¹⁰ Section 893.135(1)(b)1.a., F.S.

¹¹ Section 893.135(1)(b)1.b., F.S.

- If 28 grams or more but less than 30 kilograms, a mandatory minimum term of imprisonment of 25 years and a fine of \$500,000.¹²

In 2014, the Legislature revised the gram weight threshold and ranges for trafficking in oxycodone, any salt of oxycodone, and any mixture containing oxycodone:

- If 7 grams or more but less than 14 grams, a mandatory minimum term of imprisonment of 3 years and a fine of \$50,000;
- If 14 grams or more but less than 25 grams, a mandatory minimum term of imprisonment of 7 years and a fine of \$100,000;
- If 25 grams or more but less than 100 grams, a mandatory minimum term of imprisonment of 15 years and a fine of \$500,000; or
- If 100 grams or more but less than 30 kilograms, a mandatory minimum term of imprisonment of 25 years and a fine of \$750,000.¹³

Trafficking in Hydrocodone

Prior to 2014 legislative changes to s. 893.135, F.S., the statute provided the same gram weight threshold and ranges and mandatory penalties for trafficking in hydrocodone, any salt of hydrocodone, and any mixture containing hydrocodone as were provided for trafficking in oxycodone, any salt of oxycodone, and any mixture containing oxycodone (see description above of the oxycodone trafficking offense before the 2014 legislative changes).

The 2014 legislation that amended the oxycodone trafficking offense also revised the gram weight threshold and ranges for trafficking in hydrocodone, any salt of hydrocodone, and any mixture containing hydrocodone:

- If 14 grams or more but less than 28 grams, a mandatory minimum term of imprisonment of 3 years and a fine of \$50,000;
- If 28 grams or more but less than 50 grams, a mandatory minimum term of imprisonment of 7 years and a fine of \$100,000;
- If 50 grams or more but less than 200 grams, a mandatory minimum term of imprisonment of 15 years and a fine of \$500,000; or
- If 200 grams or more but less than 30 kilograms, a mandatory minimum term of imprisonment of 25 years and a fine of \$750,000.¹⁴

In 2019, the Legislature further revised the gram weight threshold and ranges for trafficking in hydrocodone, any salt of hydrocodone, and any mixture containing hydrocodone:

- If 28 grams or more but less than 50 grams, a mandatory minimum term of imprisonment of 3 years and a fine of \$50,000;
- If 50 grams or more but less than 100 grams, a mandatory minimum term of imprisonment of 7 years and a fine of \$100,000;
- If 100 grams or more but less than 300 grams, a mandatory minimum term of imprisonment of 15 years and a fine of \$500,000; or

¹² Section 893.135(1)(c)1., F.S. (2013).

¹³ Chapter 2014-176, L.O.F. (effective July 1, 2014) and s. 893.135(1)(c)3., F.S.

¹⁴ Chapter 2014-176, L.O.F. (effective July 1, 2014) and s. 893.135(1)(c)2., F.S.

- If 300 grams or more but less than 30 kilograms, a mandatory minimum term of imprisonment of 25 years and a fine of \$750,000.¹⁵

Trafficking in Codeine

The offense of trafficking in codeine, which was created in 2017,¹⁶ was also amended by the 2019 legislation that amended the hydrocodone trafficking offense.¹⁷ Prior to the 2019 legislative changes to s. 893.135, F.S., the statute provided for the following gram weight threshold and ranges and mandatory penalties for trafficking in codeine, any salt of codeine, and any mixture containing codeine:

- If 14 grams or more but less than 28 grams, a mandatory minimum term of imprisonment of 3 years and a fine of \$50,000;
- If 28 grams or more but less than 50 grams, a mandatory minimum term of imprisonment of 7 years and a fine of \$100,000;
- If 50 grams or more but less than 200 grams, a mandatory minimum term of imprisonment of 15 years and a fine of \$500,000; and
- If 200 grams or more but less than 30 kilograms, a mandatory minimum term of imprisonment of 25 years and a fine of \$750,000.¹⁸

The 2019 legislation that amended the hydrocodone trafficking offense¹⁹ also revised the gram weight threshold and ranges for trafficking in codeine, and salt of codeine, and any mixture containing codeine in the same manner as for the hydrocodone trafficking offense (see description above of the 2019 legislative changes to the hydrocodone trafficking offense).²⁰

Constitutional and Statutory Savings Clauses

Until recently, Article X, s. 9, of the State Constitution (Florida’s constitutional savings clause) expressly prohibited any repeal or amendment of a criminal statute that affected prosecution or punishment for any crime previously committed, and therefore, the Florida Legislature was “powerless to lessen penalties for past transgressions; to do so would require constitutional revision.”²¹

In 2018, Florida voters adopted the following amendment to Article X, s. 9, of the State Constitution:

~~Repeal or amendment~~ of a criminal statute shall not affect prosecution ~~or punishment~~ for any crime ~~previously~~ committed before such repeal.

¹⁵ Chapter 2019-167, L.O.F. (effective Oct. 1, 2019) and s. 893.135(1)(c)2., F.S.

¹⁶ Chapter 2017-197, L.O.F. (effective Oct. 1, 2017) and s. 893.135(1)(c)2., F.S.

¹⁷ Chapter 2019-167, L.O.F. (effective Oct. 1, 2019).

¹⁸ Section 893.135(1)(c)2., F.S. (2018).

¹⁹ Chapter 2019-167, L.O.F. (effective Oct. 1, 2019).

²⁰ Section 893.135(1)(c)2., F.S.

²¹ Comment, *Today’s Law and Yesterday’s Crime: Retroactive Application of Ameliorative Criminal Legislation*, 121 U. Pa. L. Rev. 120, 129 (1972).

Revised Article X, s. 9, of the State Constitution only prohibits applying the repeal of a criminal statute to any crime committed before such repeal if this retroactive application “affects prosecution.” The revised constitutional savings clause does not expressly prohibit retroactive application of a repeal that does not affect prosecution, a repeal that affects punishment, or an amendment of a criminal statute that affects prosecution or punishment.

The elimination of the expressed prohibition on certain retroactive applications is not a directive to the Legislature to retroactively apply what was formerly prohibited. As the Florida Supreme Court stated: “... [T]here will no longer be any provision in the Florida Constitution that would prohibit the Legislature from applying an amended criminal statute retroactively to pending prosecutions or sentences. However, nothing in our constitution does or will require the Legislature to do so, and the repeal of the prohibition will not require that they do so.”²²

In 2019, the Legislature created s. 775.022, F.S., a general savings statute for criminal statutes. The statute defines a “criminal statute” as a statute, whether substantive or procedural, dealing in any way with a crime or its punishment, defining a crime or a defense to a crime, or providing for the punishment of a crime.²³

The statute specifies legislative intent to preclude:

- Application of the common law doctrine of abatement to a reenactment or an amendment of a criminal statute; and
- Construction of a reenactment or amendment as a repeal or an implied repeal²⁴ of a criminal statute for purposes of Article X, s. 9, of the State Constitution.²⁵

The statute also states that, except as expressly provided in an act of the Legislature or as provided in two specified exceptions, the reenactment or amendment of a criminal statute operates prospectively and does not affect or abate any of the following:

- The prior operation of the statute or a prosecution or enforcement under the criminal statute;
- A violation of the criminal statute based on any act or omission occurring before the effective date of the act; and
- A prior penalty, prior forfeiture, or prior punishment incurred or imposed under the statute.²⁶

The first exception is a retroactive amelioration exception that provides that if a penalty, forfeiture, or punishment for a violation of a criminal statute is reduced by a reenactment or an amendment of a criminal statute, the penalty, forfeiture, or punishment, if not already imposed, must be imposed according to the statute as amended.²⁷ This means the penalty, forfeiture, or punishment reduction must be imposed retroactively *if the sentence has not been imposed*, including the situation in which the sentence is imposed after the effective date of the amendment. However, nothing in the general savings statute precludes the Legislature from

²² *Jimenez v. Jones*, 261 So.3d 502, 504 (Fla. 2018).

²³ Section 775.022(2), F.S.

²⁴ The Florida Supreme Court previously indicated that the “standard [is] that implied repeals are disfavored and should only be found in cases where there is a ‘positive repugnancy’ between the two statutes or ‘clear legislative intent’ indicating that the Legislature intended the repeal[.]” *Flo-Sun, Inc. v. Kirk*, 783 So.2d 1029, 1036 (Fla. 2001).

²⁵ Section 775.022(1), F.S.

²⁶ Section 775.022(3), F.S.

²⁷ Section 775.022(4), F.S.

providing for a more extensive retroactive application either to legislation in the future or legislation that was enacted prior to the effective date of the general savings statute. This is because the general savings statute specifically provides for a legislative exception to the default position of prospectively. The Legislature only has to “expressly provide” for this retroactive application.²⁸

The second exception relates to defenses and provides that the general savings statute does not limit the retroactive effect of any defense to a criminal statute enacted or amended by the Legislature to any criminal case that has not yet reached final judgment.²⁹

III. Effect of Proposed Changes:

Retroactive Application of Amendments to the “10-20-Life” Statute

The bill creates s. 775.08701, F.S., to retroactively apply the 2016 legislative changes³⁰ to s. 775.087, F.S., the “10-20-Life” statute, which removed aggravated assault and attempted aggravated assault from the list of predicate offenses for mandatory minimum sentencing under the statute. The 2016 legislative changes are retroactively applied in the following manner:

- A person who committed aggravated assault or attempted aggravated assault before July 1, 2016, (the effective date of the 2016 legislation) but was not sentenced under former s. 775.087, F.S., before October 1, 2021 (the effective date of the bill), may not be sentenced for that violation to a mandatory minimum term of imprisonment under former s. 775.087, F.S.
- A person who committed aggravated assault or attempted aggravated assault before July 1, 2016, who was sentenced before “October 1, 2019,”³¹ to a mandatory minimum term of imprisonment pursuant to former s. 775.087, F.S., and who is serving such mandatory minimum term of imprisonment on or after October 1, 2021, must be resentenced in accordance with resentencing procedures (described below) to a sentence without such mandatory minimum term of imprisonment. The new sentence must be as provided in s. 775.082, F.S., s. 775.083, F.S., or s. 775.084, F.S.

Resentencing must occur in the following manner:

- The DOC must notify the person described above of his or her eligibility to request a sentence review hearing.
- The person seeking sentence review under s. 775.08701, F.S., may submit an application to the court of original jurisdiction requesting that a sentence review hearing be held. The sentencing court retains original jurisdiction for the duration of the sentence for this purpose.
- A person who is eligible for a sentence review hearing under s. 775.08701, F.S., is entitled to be represented by counsel, and the court must appoint a public defender to represent the person if he or she cannot afford an attorney.
- Upon receiving an application from the eligible person, the court of original sentencing jurisdiction must hold a sentence review hearing to determine if the eligible person meets the

²⁸ Section 775.022(3), F.S.

²⁹ Section 775.022(5), F.S.

³⁰ Chapter 2016-7, L.O.F. (effective July 1, 2016).

³¹ The date referenced is incorrect. The correct date appears to be October 1, 2021, the effective date of the bill. See “Technical Deficiencies” section of this bill analysis.

criteria for resentencing under s. 775.08701, F.S. If the court determines at the sentence review hearing that the eligible person meets the criteria in s. 775.08701, F.S., for resentencing, the court must resentence the person as provided in this statute; however, the new sentence may not exceed the person's original sentence with credit for time served. If the court determines that such person does not meet the criteria for resentencing under s. 775.08701, F.S., the court must provide written reasons why such person does not meet such criteria.

A person sentenced or resentenced (as described above) is eligible to receive any gain-time pursuant to s. 944.275, F.S., which he or she was previously ineligible to receive because of the imposition of the mandatory minimum term of imprisonment.

Retroactive Application of Changes to the Hydrocodone Trafficking and Codeine Trafficking Offenses

The bill creates s. 893.13501, F.S., to retroactively apply the 2019 legislative changes to the gram weight threshold and ranges for trafficking in hydrocodone, codeine, any salt of hydrocodone or codeine, and any mixture containing either controlled substance.³² The 2019 legislative changes are reflected in current law.³³ The retroactive application does not change the felony degree of the trafficking offense (first degree felony), because the 2019 legislation, did not change the felony degree.

The retroactive application applies to the following persons:

- A person who committed a first degree felony violation involving trafficking in hydrocodone, codeine, any salt of hydrocodone or codeine, or any mixture containing either controlled substance before October 1, 2019 (the effective date of the 2019 legislation) but who was not sentenced for such violation before October 1, 2021, must be sentenced as described below.
- A person who committed a previously-described trafficking violation involving hydrocodone, codeine, etc., before October 1, 2019, and who is serving a mandatory minimum term of imprisonment for such violation on or after October 1, 2021, must be resentenced as described below and in accordance with resentencing procedures (also described below).

The bill provides that if the person trafficked in hydrocodone, codeine, any salt of hydrocodone or codeine, or any mixture containing either substance, in a quantity of:

- 4 grams or more but less than 28 grams, the person must be sentenced or resentenced as provided in s. 775.082, F.S., s. 775.083, F.S., or s. 775.084, F.S.;
- 28 grams or more but less than 50 grams, the person must be sentenced or resentenced to a mandatory minimum term of imprisonment of 3 years and ordered to pay a fine of \$50,000;
- 50 grams or more but less than 100 grams, the person must be sentenced or resentenced to a mandatory minimum term of imprisonment of 7 years and pay a fine of \$100,000;
- 100 grams or more but less than 300 grams, the person must be sentenced or resentenced to a mandatory minimum term of imprisonment of 15 years and pay a fine of \$500,000; and

³² Chapter 2019-167, L.O.F. (effective Oct. 1, 2019).

³³ Section 893.135(1)(c)2., F.S.

- 300 grams or more but less than 30 kilograms, the person must be sentenced or resentenced to a mandatory minimum term of imprisonment of 25 years and pay a fine of \$500,000.³⁴

Resentencing must occur in the following manner:

- The DOC must notify the person described above of his or her eligibility to request a sentence review hearing.
- The person seeking sentence review under s. 893.13501, F.S., may submit an application to the court of original jurisdiction requesting that a sentence review hearing be held. The sentencing court retains original jurisdiction for the duration of the sentence for this purpose.
- A person who is eligible for a sentence review hearing under s. 893.13501, F.S., is entitled to be represented by counsel, and the court must appoint a public defender to represent the person if he or she cannot afford an attorney.
- Upon receiving an application from the eligible person, the court of original sentencing jurisdiction must hold a sentence review hearing to determine if the eligible person meets the criteria for resentencing under s. 893.13501, F.S. If the court determines at the sentence review hearing that the eligible person meets the criteria in s. 893.13501, F.S., for resentencing, the court must resentence the person as provided in this statute; however, the new sentence may not exceed the person's original sentence with credit for time served. If the court determines that such person does not meet the criteria for resentencing under s. 893.13501, F.S., the court must provide written reasons why such person does not meet such criteria.

Retroactive Application of Amendments to the Oxycodone Trafficking Offense

Section 893.13501, F.S., also retroactively applies the 2014 legislative changes to the gram weight thresholds and ranges for trafficking in oxycodone, any salt thereof, and a mixture containing oxycodone.³⁵ The 2014 legislative changes are reflected in current law.³⁶ The retroactive application does not change the felony degree of the trafficking offense (first degree felony), because the 2014 legislation, did not change the felony degree.

The retroactive application applies to the following persons:

- A person who committed a first degree felony violation of former s. 893.135(1)(c)1., F.S., before July 1, 2014 (the effective date of the 2014 legislation), which involved trafficking in oxycodone, any salt of oxycodone, or any mixture containing oxycodone, but who was not sentenced for such violation before October 1, 2021, must be sentenced as described below.
- A person who was sentenced before October 1, 2021, for a first degree felony violation of former s. 893.135(1)(c)1., F.S., which was committed before July 1, 2014, and which involved trafficking in oxycodone, any salt of oxycodone, or any mixture containing oxycodone, must be resentenced as described below and in accordance with resentencing procedures (see description above of resentencing procedures relating to hydrocodone trafficking and codeine trafficking).

³⁴ See "Technical Deficiencies" section of this analysis.

³⁵ Chapter 2014-176, L.O.F. (effective July 1, 2014).

³⁶ Section 893.135(1)(c)3., F.S.

The bill provides that if the person trafficked in oxycodone, any salt of oxycodone, or any mixture containing oxycodone, in a quantity of:

- 4 grams or more but less than 7 grams, the person must be sentenced or resentenced as provided in s. 775.082, F.S., s. 775.083, F.S., or s. 775.084, F.S.;
- 7 grams or more but less than 14 grams, the person must be sentenced or resentenced to a mandatory minimum term of imprisonment of 3 years and pay a fine of \$50,000;
- 14 grams or more but less than 25 grams, of oxycodone, any salt thereof, or an oxycodone mixture, the person must be sentenced or resentenced to a mandatory minimum term of imprisonment of 7 years and pay a fine of \$100,000;
- 25 grams or more but less than 100 grams, the person must be sentenced or resentenced to a mandatory minimum term of imprisonment of 15 years and a fine of \$500,000; and
- 100 grams or more but less than 30 kilograms, the person must be sentenced or resentenced to a mandatory minimum term of imprisonment of 25 years and a fine of \$500,000.

Resentencing occurs in the same manner as previously described for resentencing in cases involving retroactive application of changes involving trafficking in hydrocodone or codeine.

Effective Date

The bill takes effect October 1, 2021.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The bill does not appear to require cities and counties to expend funds or limit their authority to raise revenue or receive state-shared revenues as specified by Article VII, s. 18, of the State 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.

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

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Criminal Justice Impact Conference (CJIC), which provides the final, official estimate of the prison bed impact, if any, of legislation, estimates that the bill will have a “negative indeterminate” prison bed impact (an unquantifiable decrease of more than 25 prison beds).³⁷

The Legislature’s Office of Economic and Demographic Research (EDR) provided the following information relevant to retroactive application of changes to the 10-20-Life statute: “Per DOC, there are currently 145 cases eligible under this criteria, though it is unknown how their new sentences would be structured. Furthermore, it is not known how many offenders committed their offenses prior to July 1, 2016 and have yet to be sentenced.”³⁸

The EDR also provided the following information regarding relevant to retroactive application of changes to provisions relating to trafficking in oxycodone, hydrocodone, and codeine.

Per DOC, as of February 28, 2021, there were 754 offenders incarcerated for trafficking in illegal drugs with an offense committed before July 1, 2014. For the 4 or more, but less than 14 gram threshold group, of the 217 incarcerated, there were no offenders with sentence lengths less than 3 years, though this is likely the outcome of when the offenses were committed, since most with smaller sentences would no longer be incarcerated over six years after committing an offense. For the 14 or more, but less than 28 gram threshold group, of the 244 incarcerated, there are some with sentence lengths less than 15 years (37, 15.16%), with 138 (56.56%) having sentences of exactly fifteen years. Finally, for the 28 or more, but less than 30 kilogram threshold group, of the 293 incarcerated, there is also a large number with sentence lengths less than 25 years (123, 41.98%), with 105 (35.84%) having sentences of exactly 25 years. Though it is possible that those offenders clustered around the mandatory minimum sentences could see an impact from this bill, it is not known how many of these offenders would be eligible for resentencing since DOC does not have information on how many were incarcerated for hydrocodone/codeine or oxycodone prior to July 1, 2014. It is

³⁷ Email received by staff of the Senate Committee on Criminal Justice from staff of the Office of Economic and Demographic Research, dated March 24, 2021, (on file with the Senate Committee on Criminal Justice).

³⁸ EDR estimate information on file with the Senate Committee on Criminal Justice.

also not known how many additional offenders have yet to be sentenced who committed their offenses prior to October 1, 2021.

There have been no commitments to prison since the change in hydrocodone/codeine thresholds on October 1, 2019. However, there are currently 53 offenders incarcerated under the hydrocodone/codeine thresholds prior to that date. For the 14 or more, but less than 28 gram threshold group, of the 29 incarcerated, there are some with sentence lengths less than 3 years (2, 6.9%), with 8 (27.59%) having sentences of exactly three years. Finally, for the 28 or more, but less than 50 grams threshold group, of the 16 incarcerated, there are also a few with sentence lengths less than 7 years (3, 18.75%), with 7 (43.75%) having sentences of exactly 7 years. There are only 8 incarcerated at higher thresholds, and all fall below the mandatory minimums for these thresholds. Given the new thresholds for hydrocodone/codeine removing the 3 year mandatory minimum for more than 14 and less than 28 grams, as well as reducing the mandatory minimum from 7 years to 3 years for more than 28 and less than 50 grams, these two incarcerated groups, especially the 15 offenders with sentence lengths that line up with mandatory minimums, could possibly be impacted by this language. However, it is also not known how many additional offenders have yet to be sentenced who committed their offenses prior to October 1, 2021.

Since hydrocodone and oxycodone were initially recorded under trafficking in illegal drugs, it is not known how many would be eligible for resentencing, nor is it known how offenders are currently sentenced when hydrocodone and oxycodone fall below their trafficking thresholds. However, both sentence length and incarceration rates are significantly lower for offenses under s. 893.13, F.S. when compared to the trafficking in illegal drugs threshold where these drug types initially were (4 grams or more, less than 14 grams), and could impact resentencing decisions for those who are eligible.³⁹

The DOC indicates that impact of the bill on the department is indeterminate but may require \$17,400 for programming changes to adjust gain time and identify impacted offenders (200 hrs. x \$87.00/per hr.).⁴⁰

VI. Technical Deficiencies:

Line 57:

The reference on line 57 to “October 1, 2019” is incorrect. The correct reference is “October 1, 2021,” which is the effective date of the bill.

³⁹ *Id.*

⁴⁰ 2021 Agency Legislative Bill Analysis (SB 328) (Feb. 26, 2021), Department of Corrections (on file with the Senate Committee on Criminal Justice).

Line 151:

Prior to 2014, a \$500,000 mandatory fine applied to the highest range of first degree felony oxycodone and hydrocodone trafficking (both of these substances appeared together in the same subparagraph). In 2014, the Legislature broke oxycodone and hydrocodone into their own subparagraphs and increased the existing mandatory fine for the highest range of first degree felony oxycodone trafficking from \$500,000 to \$750,000. The 2014 legislation did not increase the mandatory fine for the highest range of first degree felony hydrocodone trafficking from \$500,000 to \$750,000 until 2017, when it also added codeine to the same subparagraph that punished hydrocodone trafficking.

Retroactive application of the \$750,000 fine to hydrocodone trafficking and oxycodone trafficking would be an unconstitutional ex post facto punishment. The bill addresses this problem by directing that a mandatory fine of \$500,000 be retroactively applied to the highest range of first degree felony hydrocodone trafficking and oxycodone trafficking. This appears to solve the ex post facto issue relating to those two substances. However, the \$500,000 fine is also retroactively applied to the highest range of first degree felony codeine trafficking. As previously stated, codeine was added to the hydrocodone trafficking subparagraph in 2017, which was also the same time that the mandatory fine for the highest range of first degree felony trafficking was increased from \$500,000 to \$750,000. Therefore, unlike hydrocodone trafficking, codeine trafficking always had the mandatory fine of \$750,000 for the highest range of first degree felony codeine trafficking. Retroactively applying a mandatory fine of \$500,000 for the highest range of first degree felony codeine trafficking does not constitute an unconstitutional ex post facto punishment because it does not disadvantage the offender; however, it does constitute a benefit the Legislature is unlikely to intend. Staff suggest amending line 151 to read:

\$500,000, if the trafficking involves hydrocodone, any salt thereof, or any mixture containing hydrocodone, or \$750,000, if the trafficking involves codeine, or any salt thereof, or any mixture containing codeine.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates the following sections of the Florida Statutes: 775.08701 and 893.13501.

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.

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