

**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 Criminal Justice

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BILL: CS/CS/SB 190

INTRODUCER: Criminal Justice Committee; Judiciary Committee; and Senator Brodeur

SUBJECT: Controlled Substances

DATE: February 8, 2022

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Ravelo</u>	<u>Cibula</u>	<u>JU</u>	<b>Fav/CS</b>
2.	<u>Erickson</u>	<u>Jones</u>	<u>CJ</u>	<b>Fav/CS</b>
3.	_____	_____	<u>RC</u>	_____

**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/CS/SB 190 addresses two recommendations of the Statewide Task Force on Opioid Abuse (Task Force) and creates an exception to the definition of “drug paraphernalia.”

The bill amends s. 782.04, F.S., which punishes an adult for first degree murder if the adult unlawfully distributes a listed controlled substance or a mixture containing the substance, when it is proven that the substance or mixture was the proximate cause of a user’s death. The bill adds methamphetamine to the list of scheduled controlled substances applicable to the offense and makes conforming changes. The addition of methamphetamine was a recommendation by the Task Force.

The bill also amends s. 893.13, F.S., to create an enhanced penalty for the sale of a controlled substance if the offense is committed within 1,000 feet of certain facilities that often provide health care and substance abuse treatment. Depending on the substance, the enhancement increases a third degree felony to a second degree felony, and increases a second degree felony to a first degree felony. This change was also recommended by the Task Force.

Finally, the bill amends s. 893.145, F.S., to exclude from the definition of “drug paraphernalia” narcotic drug testing products that are used to determine whether a controlled substance contains fentanyl or a fentanyl analog.

The Legislature's Office of Economic and Demographic Research (EDR) preliminarily estimates that the bill will have a "positive indeterminate" prison bed impact (an unquantifiable increase in prison beds). See Section V. Fiscal Impact Statement.

The bill takes effect October 1, 2022.

## II. Present Situation:

On April 1, 2019, citing an increase in the number of opioid-caused deaths in Florida, Governor DeSantis created the Statewide Task Force on Opioid Abuse (Task Force).<sup>1</sup> The Governor directed the Task Force to develop a statewide strategy to identify best practices to combat the opioid epidemic through education, treatment, prevention, recovery, and law enforcement, and to compile a report containing legislative recommendations. Two specific recommendations made by the Task Force relating to law enforcement included:

- Adding methamphetamine as a controlled substance qualifying for prosecution as a first degree murder offense when its distribution proximately causes the user's death; and
- Enhancing criminal penalties for the sale of a controlled substance within 1,000 feet of substance abuse treatment facilities.<sup>2</sup>

The Task Force's report did not address the proximate cause requirement for the capital offense of the unlawful distribution of certain controlled substances resulting in the death of the user.

### **Murder by Unlawful Distribution of Certain Controlled Substances**

Section 782.04(1)(a)3., F.S., provides that first degree murder includes unlawfully killing of a human being which resulted from the unlawful distribution by a person 18 years of age or older of any of the following substances, or mixture containing any of the following substances, when such substance or mixture is proven to be the *proximate cause* of the death of the user:

- A Schedule I controlled substance;<sup>3</sup>
- Cocaine;
- Opium or any synthetic or natural salt, compound, derivative, or preparation of opium;
- Methadone;
- Alfentanil;
- Carfentanil;
- Fentanyl;
- Sufentanil; or
- A controlled substance analog of any of the above-listed controlled substances.<sup>4</sup>

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<sup>1</sup> Fla. Exec. Order No. 19-97 (April 1, 2019), available at <https://www.flgov.com/wp-content/uploads/2019/04/EO-19-97.pdf> (last visited on Feb. 3, 2022).

<sup>2</sup> Florida Statewide Task Force on Opioid Abuse, *Findings and Recommendation of the Statewide Task Force on Opioid Abuse*, 45 (April 1, 2020), available at <https://doseofrealityfl.com/pdfs/opioid-task-force-findings-recommendations-opioid-abuse.pdf> (last visited on Feb. 3, 2022).

<sup>3</sup> See s. 893.03(1), F.S.

<sup>4</sup> A "controlled substance analog" is defined in s. 893.0356(2)(a), F.S., as a substance which, due to its chemical structure and potential for abuse, meets the following criteria:

- Is substantially similar to that of a controlled substance listed in Schedule I or Schedule II of s. 893.03, F.S.; and

First degree murder is a capital felony,<sup>5</sup> punishable by death or life imprisonment.<sup>6</sup>

### **Third Degree Murder – Exclusion of Unlawful Distribution of Certain Controlled Substances**

Section 782.04(4), F.S., provides that it is third degree murder, a second degree felony,<sup>7</sup> when an unlawful killing of a human being, was perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate any felony other than any felony listed in subsection (4). This list of excluded felonies includes unlawful distribution by a person 18 years of age or older of any of the following substances when such substance is proven to be the *proximate cause* of the death of the user:

- A Schedule I controlled substance;
- Cocaine; or
- Opium or any synthetic or natural salt, compound, derivative, or preparation of opium.<sup>8</sup>

### ***Florida Standard Jury Instructions for Murder by Unlawful Distribution of Certain Controlled Substances***

The Florida Standard Jury instructions for murder by unlawful distribution of certain controlled substances defines *proximate cause* as conduct “that was the *primary* or moving cause of the death; the death would not have occurred but for the defendant’s conduct; and the death was a natural and reasonably anticipated consequence of the defendant’s conduct.”<sup>9</sup> Because the instruction requires the substance be the *primary* cause of death, a prosecutor may encounter certain scenarios where he or she cannot prove a specific substance was the primary cause of death. A victim may, for example, have ingested lethal amounts of both cocaine and opium, each of which could have caused his or her death. Prosecutors have reported difficulty obtaining convictions in scenarios such as this, as it is virtually impossible to determine if something was the *primary* cause if there are multiple sufficient possibilities that were all equally lethal.<sup>10</sup>

### **Crimes with an Element of Causation**

The Florida Supreme Court has identified “two distinct subelements” of causation for crimes that include an element of causation.<sup>11</sup>

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- Has a stimulant, depressant, or hallucinogenic effect on the central nervous system or is represented or intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than that of a controlled substance listed in Schedule I or Schedule II of s. 893.03, F.S.

<sup>5</sup> Section 782.04(1)(a)3., F.S.

<sup>6</sup> Section 782.082, F.S.

<sup>7</sup> 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.

<sup>8</sup> Section 782.04(4)(1), F.S.

<sup>9</sup> Fla. Std. Jury Instr. (Crim.) 7.3(a) (emphasis added by staff), available at <https://www-media.floridabar.org/uploads/2021/04/7.3aCrimJI.rtf> (last visited on Feb. 3, 2022); and *Aumuller v. State*, 944 So 2d 1137, 1141-1142 (Fla. 2d DCA 2006).

<sup>10</sup> Office Memorandum to Bob Cortes from Daniel E. Faggard, Assistant State Attorney, Eighteenth Judicial Circuit, Re: Substantial Factor Test (Feb. 5, 2021) (on file with the Senate Committee on Criminal Justice).

<sup>11</sup> *Eversely v. State*, 748 So.2d 963, 966 (Fla. 1999). Courts consider “two basic questions in determining proximate cause: (1) whether the prohibited result of the defendant’s conduct is beyond the scope of any fair assessment of the danger created

As legal scholars have recognized, before a defendant can be convicted of a crime that includes an element of causation, the State must prove beyond a reasonable doubt that the defendant's conduct was (1) the "cause in fact" and (2) the "legal cause" (often called "proximate cause" of the relevant harm.<sup>12</sup>

Typically, to establish the "cause in fact" subelement, the State "must demonstrate that 'but for' the defendant's conduct, the harm would not have occurred."<sup>13</sup> "A defendant can rebut this showing by demonstrating that the harm would have occurred in any event, regardless of the defendant's conduct."<sup>14</sup> However, "[i]n those rare circumstances where 'two causes, each alone sufficient to bring about the harmful result, operate together to cause it,' the 'but for' test becomes impossible to prove"<sup>15</sup> and "the State may prove the "'cause-in-fact' causation by demonstrating that the defendant's conduct was a 'substantial factor' in bringing about the harm."<sup>16</sup>

### **Controlled Substance Offenses Committed Within 1,000 Feet of Certain Places**

Florida law prohibits a person from selling, manufacturing, or delivering, or possession with the intent to do the same, a controlled substance.<sup>17</sup> The penalty for selling a controlled substance varies depending on several factors, including the type and amount of the substance sold and the location where the sale takes place. Generally, the sale, etc., of a controlled substance is punishable as either a second degree felony or third degree felony.<sup>18</sup> However, these felony penalties are enhanced (by one felony degree) if the sale, etc., occurs within 1,000 feet of the real property of specified locations, including a:

- Child care facility;
- Public or private elementary, middle, or secondary school;
- State, county, or municipal park;
- Community center or publicly owned recreational facility;
- Public or private college, university, or other postsecondary institution;
- Physical place of worship at which a church or religious organization regularly conducts religious services;
- Convenience business;
- Public housing facility; or
- Assisted living facility.<sup>19</sup>

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by the defendant's conduct and (2) whether it would be otherwise unjust, based on fairness and policy considerations, to hold the defendant criminally responsible for the prohibited result." *Id.* at 967 (citations omitted).

<sup>12</sup> *Id.* at 966-967 (citations omitted).

<sup>13</sup> *Id.* at 967 (citations omitted).

<sup>14</sup> *Id.* (citation omitted).

<sup>15</sup> *Id.*, quoting 1 Wayne R. LaFare & Austin W. Scott, Jr., *Substantive Criminal Law* s. 3.12, at 394 (footnote and other citations omitted).

<sup>16</sup> *Id.* (citations omitted).

<sup>17</sup> Section 893.13, F.S.

<sup>18</sup> Section 893.13(1), F.S. A third degree felony is punishable by up to 5 years imprisonment and a \$5,000 fine.

Sections 775.082 and 775.083, F.S.

<sup>19</sup> See s. 893.13(1)(c), (d), (e), (f), and (h), F.S.

### III. Effect of Proposed Changes:

The bill addresses two recommendations of the Statewide Task Force on Opioid Abuse (Task Force) and creates an exception to the definition of “drug paraphernalia.”

**Section 1** of the bill amends s. 782.04, F.S., which punishes an adult for first degree murder if the adult unlawfully distributes a listed controlled substance or a mixture containing the substance when it is proven that the substance or mixture was the proximate cause of a user’s death. The bill adds methamphetamine to the list of scheduled controlled substances applicable to the offense and makes conforming changes. The addition of methamphetamine was a recommendation by the Task Force.

**Section 2** of the bill amends s. 893.13, F.S., to create an enhanced penalty for the sale of a controlled substance if the offense is committed within 1,000 feet of certain facilities that often provide health care and substance abuse treatment. This change was also recommended by the Task Force. The facilities covered include any:

- Mental health facility under ch. 394, F.S.;<sup>20</sup>
- Health care facility licensed under ch. 395, F.S.,<sup>21</sup> which provides substance abuse treatment;
- Licensed service provider as defined in s. 397.311, F.S.;<sup>22</sup>
- Facility providing services that include clinical treatment, intervention, or prevention as described in s. 397.311(26), F.S.;<sup>23</sup>
- Recovery residence as defined in s. 397.311, F.S.;<sup>24</sup> or
- Pain management clinic as defined in ss. 458.3265(1)(a)1.c. or s. 459.0137(1)(a)1.c., F.S.<sup>25</sup>

Depending upon the controlled substance, the enhancement increases a third degree felony to a second degree felony, and increases a second degree felony to a first degree felony.<sup>26</sup>

<sup>20</sup> Section 394.455(17), F.S., defines “facility” as any hospital, community facility, public or private facility, or receiving or treatment facility providing for the evaluation, diagnosis, care, treatment, training, or hospitalization of persons who appear to have or who have been diagnosed as having a mental illness or substance abuse impairment. The term does not include a program or an entity licensed under ch. 400, F.S. (nursing homes and related facilities) or ch. 429 (assisted care communities).

<sup>21</sup> Section 395.002(17), F.S., defines a “licensed facility” as a hospital or ambulatory surgical center licensed in accordance with ch. 395, F.S. (hospital licensing and regulation).

<sup>22</sup> Section 397.311(25), F.S., defines a “licensed service provider” as a public agency under ch. 397, F.S. (substance abuse services), a private for-profit or not-for-profit agency under ch. 397, F.S., a physician or any other private practitioner licensed under ch. 397, F.S., or a hospital that offers substance abuse services through one or more licensed service components.

<sup>23</sup> Section 397.311(26), F.S., provides that licensed service components include a comprehensive continuum of accessible and quality substance abuse prevention, intervention, and clinical treatment services. Clinical treatment services include, but are not limited to, medication-assisted treatment for opioid use disorders.

<sup>24</sup> Section 397.311(38), F.S., defines “recovery residence” as a residential dwelling unit, the community housing component of a licensed day or night treatment facility with community housing, or other form of group housing, which is offered or advertised through any means, including oral, written, electronic, or printed means, by any person or entity as a residence that provides a peer-supported, alcohol-free, and drug-free living environment.

<sup>25</sup> Section 458.3265(1)(a)1.c., F.S., defines a “pain-management clinic” as any publicly or privately owned facility: that advertises in any medium for any type of pain-management services; or where in any month a majority of patients are prescribed opioids, benzodiazepines, barbiturates, or carisoprodol for the treatment of chronic nonmalignant pain. Section 459.0137(1)(a)1.c., F.S., includes the same definition of “pain-management clinic.”

<sup>26</sup> Generally, a first degree felony is 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.

**Section 3** of the bill amends s. 893.145, F.S., to exclude from the definition of “drug paraphernalia” narcotic drug testing products that are used to determine whether a controlled substance contains fentanyl or a fentanyl analog.

**Section 4** of the bill provides that the bill takes effect October 1, 2022.

#### **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 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.

#### **V. Fiscal Impact Statement:**

**A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

The Criminal Justice Impact Conference, which provides the final, official estimate of the prison bed impact, if any, of legislation, has not yet reviewed the bill. The EDR preliminarily estimates that the bill will have a “positive indeterminate” prison bed

impact (an unquantifiable increase in prison beds).<sup>27</sup> The EDR adds the following information relevant to its estimate:

Per [Department of Corrections], in FY 18-19, there was 1 new commitment under s. 782.04, F.S. relating to drugs, and no new commitments in FY 19-20 or FY 20-21. There were 2 new commitments for drug activity near an assisted living facility in FY 18-19 and no new commitments in FY 19-20. There was 1 new commitment in FY 20-21. Although this number is low, there are generally over 500 new commitments a year for selling drugs near a restricted place. Per Florida Department of Health, in CY 2019, there were 38,985 nonfatal overdoses and 5,352 fatal overdoses. Of the fatal overdoses, methamphetamine showed 896 where it was a contributing drug. Additionally, the drugs listed under s. 782.04(1), F.S. showed similar high numbers as contributing to fatal overdoses. It is not known how prison admissions will be impacted by this new language.<sup>28</sup>

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 782.04, 893.13 and 893.145.

**IX. Additional Information:**

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

**CS/CS by Criminal Justice on February 8, 2022:**

The committee substitute:

- Removes provisions of the bill that change the “proximate cause” element of first degree murder by unlawful distribution of a listed controlled substance; and
- Excludes from the definition of “drug paraphernalia” narcotic drug testing products that are used to determine whether a controlled substance contains fentanyl or a fentanyl analog.

**CS by Judiciary on January 10, 2022:**

The committee substitute:

- Reorganizes provisions of the bill to make it identical to HB 95 (2022).

<sup>27</sup> CS/SB 190 – *Controlled Substances (Identical CS/HB 95)*, Office of Economic and Demographic Research (on file with the Senate Committee on Criminal Justice).

<sup>28</sup> *Id.*

- The committee substitute does not substantially change the bill and only differs in technical drafting choices.

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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