

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Criminal Justice

BILL: CS/SB 190

INTRODUCER: Judiciary Committee and Senator Brodeur

SUBJECT: Controlled Substances

DATE: February 7, 2022

REVISED: _____

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

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Technical Changes

I. Summary:

CS/SB 190 amends several sections of law regarding the unlawful distribution of controlled substances.

First, the bill amends the causation requirement for the capital offense of “death caused by the unlawful distribution of a controlled substance.” Currently, the substance needs to be the “proximate cause” of the death of the victim. Determining the proximate cause may be difficult in certain situations. A victim’s medical conditions, substance abuse history, and a “cocktail,” the use of multiple substances at once, may make it difficult to assess precisely what substance was the proximate cause of death. The bill replaces this standard with the “sufficient to cause death” standard. This language would essentially cover situations where an individual overdoses after taking multiple lethal substances, any of which could have caused his or her death.

Additionally, the bill incorporates two recommendations from the Statewide Task Force on Opioid Abuse (Task Force). The bill amends the list of controlled substances eligible for conviction under the above-referenced offense to include methamphetamine. The list of controlled substances eligible for this offense currently includes: cocaine; opium; methadone; alfentanil; carfentanil; fentanyl; sufentanil; or an analog of any of these substances.

The bill incorporates a second recommendation from the Task Force, creating 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.

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).¹ 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.²

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;³
- Cocaine;
- Opium or any synthetic or natural salt, compound, derivative, or preparation of opium;
- Methadone;
- Alfentanil;
- Carfentanil;
- Fentanyl;
- Sufentanil; or

¹ 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).

² 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).

³ See s. 893.03(1), F.S.

- A controlled substance analog of any of the above-listed controlled substances.⁴

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

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,⁷ 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.⁸

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.”⁹ 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.¹⁰

⁴ 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
- 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.

⁵ Section 782.04(1)(a)3., F.S.

⁶ Section 782.082, F.S.

⁷ 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.

⁸ Section 782.04(4)(l), F.S.

⁹ 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).

¹⁰ 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).

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.¹¹

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.¹²

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.”¹³ “A defendant can rebut this showing by demonstrating that the harm would have occurred in any event, regardless of the defendant’s conduct.”¹⁴ 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”¹⁵ 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.”¹⁶

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.¹⁷ 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.¹⁸ 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;

¹¹ *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 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).

¹² *Id.* at 966-967 (citations omitted).

¹³ *Id.* at 967 (citations omitted).

¹⁴ *Id.* (citation omitted).

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

¹⁶ *Id.* (citations omitted).

¹⁷ Section 893.13, F.S.

¹⁸ 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.

- Convenience business;
- Public housing facility; or
- Assisted living facility.¹⁹

III. Effect of Proposed Changes:

The bill amends several sections of law regarding the unlawful distribution of controlled substances.

Section 1 of the bill amends s. 782.04(1)(a), F.S., to revise the causation requirement for the first degree murder offense of “death caused by the unlawful distribution of a controlled substance.” Under current law, a controlled substance is required to be the *proximate cause* of the death of the user. The bill, instead, only requires that the substance be a “substantial factor” in producing the death of the user. “Substantial factor” means that the use of the substance or mixture alone is sufficient to cause death, regardless of whether any other substance or mixture used is also sufficient to cause death. This definition may cover situations where a user dies with a combination of multiple illegal substances in his or her body, each of which could have caused the user’s death.

The bill further amends s. 782.04, F.S., to add methamphetamine to the list of substances that may subject the person who distributed the controlled substance to a conviction for first degree murder based on any unlawful distribution of a controlled substance. This specific change was recommended by the Statewide Task Force on Opioid Abuse.²⁰

Section 2 of the bill incorporates a second recommendation from the Task Force²¹ and creates a penalty enhancement for selling, etc., a controlled substance within 1000 feet of the real property of any:

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

Depending on 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.²²

Section 3 of the bill provides that the bill takes effect October 1, 2022.

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

²⁰ See Florida Statewide Task Force on Opioid Abuse, *supra*, at footnote 1.

²¹ *Id.*

²² 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.

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).²³ 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

²³ CS/SB 190 – *Controlled Substances (Identical CS/HB 95)*, Office of Economic and Demographic Research (on file with the Senate Committee on Criminal Justice).

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.²⁴

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

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

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

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

CS by Judiciary on January 10, 2022:

The committee substitute reorganizes provisions of the bill to make it identical to HB 95 (2022). The committee substitute does not substantially change the bill and only differs in technical drafting choices.

B. Amendments:

None.

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

²⁴ *Id.*