

**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 190

INTRODUCER: Senator Brodeur

SUBJECT: Controlled Substances

DATE: November 29, 2021      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Ravelo	Cibula	JU	<b>Pre-meeting</b>
2.			CJ	
3.			RC	

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**I. Summary:**

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 victims 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 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 and substance abuse treatment. Depending on the substance, the enhancement may increase the penalty from a third degree felony to a second degree felony, or from a second degree felony to a first degree felony.

The bill provides an effective date of 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 certain controlled substances resulting in the death of the user.

### **First Degree Murder**

Under Florida law, first degree murder is a capital felony<sup>3</sup> punishable by a sentence of death or life imprisonment without the possibility of parole.<sup>4</sup> Although first degree murder is commonly thought of as requiring "premeditation," Florida law classifies three separate classes of first degree murder, two of which do not require any sort of premeditation or intent to cause a death.

#### ***Premeditated First Degree Murder***

Premeditated first degree murder<sup>5</sup> generally requires that:

- The death of the victim be caused by the criminal act of the defendant, and
- The defendant make a conscious decision to kill the victim.

#### ***Felony Murder***

First degree felony murder, often termed the "Felony Murder Rule," is an unlawful killing as a result of an individual engaging in the perpetration of, or in the attempt to perpetrate certain felonies, including:

- Certain drug trafficking offenses,<sup>6</sup>
- Arson,
- Sexual battery,
- Robbery,

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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>.

<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>.

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

<sup>4</sup> Section 775.082(1)(a), F.S.

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

<sup>6</sup> See s. 893.135(1)(a), F.S., which includes knowingly selling, purchasing, manufacturing, delivering or bringing into the state certain amounts of cannabis, cannabis plants, cocaine, morphine, opium, hydromorphone, or any salt, derivative, isomer, or salt of an isomer thereof, including heroin.

- Burglary,
- Kidnapping,
- Escape,
- Aggravated child abuse,
- Aggravated abuse of an elderly person or disabled adult,
- Aircraft piracy,
- Unlawful throwing, placing, or discharging of a destructive device or bomb,
- Carjacking,
- Home-invasion robbery,
- Aggravated stalking,
- Murder of another human being,
- Resisting an officer with violence to his or her person,
- Aggravated fleeing or eluding with serious bodily injury or death,
- Any felony that is an act of terrorism or is in furtherance of an act of terrorism, and
- Human trafficking.<sup>7</sup>

### ***Death Caused by the Unlawful Distribution of a Controlled Substance***

First degree murder offenses include the unlawful distribution of certain controlled substances if committed by a person 18 years of age or older and the distribution *proximately causes* the death of a user. (Emphasis added).<sup>8</sup> The applicable controlled substances include:

- Cocaine,
- Opium or any synthetic or natural salt, compound, derivative, or preparation of opium,
- Methadone,
- Alfentanil,
- Carfentanil,
- Fentanyl,
- Sufentanil, and
- A controlled substance analog of any of the above controlled substances.<sup>9</sup>

The Florida Standard Jury instructions for death caused by the unlawful distribution of a controlled substance 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>10</sup> (Emphasis added). 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 *equally* could have caused his or her death. Prosecutors have

<sup>7</sup> Section 782.04(1)(a)2., F.S.

<sup>8</sup> Section 782.04(1)(a)3., F.S.

<sup>9</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
- 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>10</sup> Fla. Std. Jury Instr. (Crim.) 7.3(a); *see also Aumuller v. State*, 944 So. 2d 1137 (Fla. 2d DCA 2006).

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>11</sup>

### Sale of a Controlled Substance

Florida law prohibits a person from selling, manufacturing,<sup>12</sup> or delivering<sup>13</sup> a controlled substance.<sup>14</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 of a controlled substance is punishable as either a second degree felony<sup>15</sup> or third degree felony.<sup>16</sup> The penalties are enhanced to a second degree felony or first degree felony if the sale 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,
- Place of worship that conducts religious services,
- Convenience business,
- Public housing facility, or
- Assisted living facility

### 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

<sup>11</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 Judiciary).

<sup>12</sup> “Manufacture” means the production, preparation, propagation, compounding, cultivating, growing, conversion, or processing of a controlled substance, either directly or indirectly, by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging of the substance or labeling or relabeling of its container, except that this term does not include the preparation, compounding, packaging, or labeling of a controlled substance by:

- A practitioner or pharmacist as an incident to his or her administering or delivering of a controlled substance in the course of his or her professional practice.
- A practitioner, or his or her authorized agent under the practitioner’s supervision, for the purpose of, or as an incident to, research, teaching, or chemical analysis, and not for sale. Section 893.02(15)(a), F.S.

<sup>13</sup> “Deliver” or “delivery” means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship. Section 893.02(6), F.S.

<sup>14</sup> Section 893.13, F.S.

<sup>15</sup> A second degree felony is punishable by up to 15 years imprisonment and a \$10,000 fine. Sections 775.082 and 775.083, F.S.

<sup>16</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.

the death of the user. This new language 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 include methamphetamine to the list of substances that may subject the person who distributed the controlled substance to a conviction for first degree murder based any unlawful distribution. This specific provision was recommended by the Statewide Task Force on Opioid Abuse.<sup>17</sup>

**Section 2** of the bill incorporates a second recommendation from the Task Fork and creates an enhancement to the criminal act of selling, manufacturing, delivering, or possessing with the intent to sell, manufacture, or deliver a controlled substance within 1000 feet 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 substance, the enhancement increases the penalty from a third degree felony to a second degree felony, or from a second degree felony to a first degree felony.

**Section 3** of the bill provides an effective date of October 1, 2022.

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

A. Municipality/County Mandates Restrictions:

None.

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>17</sup> See Fla. Exec. Order No. 19-97 and Florida Statewide Task Force on Opioid Abuse, *supra* notes 1-2.

**V. Fiscal Impact Statement:**

## A. Tax/Fee Issues:

None.

## B. Private Sector Impact:

None.

## C. Government Sector Impact:

SB 190, like CS/HB 325 (2021), a somewhat similar bill from last session is likely to increase the prison population by an indeterminate amount.<sup>18</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 and 893.13.

**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.

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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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<sup>18</sup> Criminal Justice Impact Conference, Narrative Analysis of Adopted Impact for PCS for HB 325, (updated Mar. 4, 2021) <http://edr.state.fl.us/Content/conferences/criminaljusticeimpact/adoptedimpacts.cfm>.