

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 95 Controlled Substance Offenses

**SPONSOR(S):** Criminal Justice & Public Safety Subcommittee, Plakon & other

**TIED BILLS:** IDEN./SIM. BILLS: SB 190

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice & Public Safety Subcommittee	14 Y, 4 N, As CS	Padgett	Hall
2) Justice Appropriations Subcommittee	9 Y, 4 N	Saag	Keith
3) Judiciary Committee			

### SUMMARY ANALYSIS

In 1972, facing an increase in illicit heroin use, Florida criminalized the unlawful distribution of a controlled substance (heroin) causing a death as first degree murder. In the years since, the list of substances which can serve as the basis for a first degree murder conviction has expanded to reflect the dangers from additional controlled substances as their use increased. Under s. 784.04(1)(a)3., F.S., a person 18 years of age or older who unlawfully distributes specified controlled substances commits first degree murder by causing the death of a victim by the unlawful distribution of a controlled substance if the proximate cause of his or her death was the use of such controlled substances. A defendant's conduct is the proximate cause of another's death if the conduct 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. Prosecutors have reported difficulty in prosecuting such cases under the proximate cause standard where a victim has multiple controlled substances or alcohol in his or her system. In these cases, a medical examiner may not be able to determine the primary or moving cause of a victim's death and may be unable to determine a victim's death would not have occurred but for ingestion of one of the enumerated controlled substances.

CS/HB 95 amends s. 782.04(1)(a)3., F.S., to change the causation requirement for death caused by the unlawful distribution of a controlled substance to require that such distribution is proven to "have caused, or is proven to have been a substantial factor in producing the death of the user." "Substantial factor" is defined to mean 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."

Recently, Florida has been confronted with a new health crisis in the opioid epidemic. In 2019, Governor DeSantis created the Statewide Task Force on Opioid Abuse (Task Force) and 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 compile a report containing legislative recommendations.

The bill amends s. 782.04(1)(a)3., F.S., to implement a recommendation of the Task Force by adding methamphetamine to the list of specified controlled substances which, if the substance caused or is proven to have been a substantial factor in producing the victim's death, can subject the person who distributed the controlled substance to a conviction for first degree murder.

The bill also amends s. 893.13(1)(h), F.S., to implement a second recommendation of the Task Force by increasing the penalties for sale of a controlled substance from a third degree felony to a second degree felony, and from a second degree felony to a first degree felony, when the offense is committed within 1,000 feet of a substance abuse treatment facility.

The Criminal Justice Impact Conference reviewed a prior version of the bill with similar language on March 24, 2021 and determined provisions in the bill may have a positive indeterminate impact to the prison population. The bill may result in an increase of prison beds by an unquantifiable amount.

The bill provides an effective date of October 1, 2022.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

##### Controlled Substances

###### *Florida Law*

Chapter 893, F.S., the Florida Comprehensive Drug Abuse Prevention and Control Act, classifies controlled substances<sup>1</sup> into five categories, called schedules. These schedules regulate the manufacture, distribution, preparation, and dispensing of the substances listed therein. The distinguishing factors between the different drug schedules are the “potential for abuse”<sup>2</sup> of the substance and whether there is a currently accepted medical use for the substance.<sup>3</sup>

The controlled substance schedules are as follows:

- Schedule I substances have a high potential for abuse and currently have no accepted medical use in the United States, including substances such as cannabis and heroin.<sup>4</sup>
- Schedule II substances have a high potential for abuse and have a currently accepted but severely restricted medical use in the United States, including substances such as raw opium, fentanyl, and codeine.<sup>5</sup>
- Schedule III substances have a potential for abuse less than the substances contained in Schedules I and II and have a currently accepted medical use in the United States, including substances such as stimulants and anabolic steroids.<sup>6</sup>
- Schedule IV substances have a low potential for abuse relative to substances in Schedule III and have a currently accepted medical use in the United States, including substances such as benzodiazepines and barbiturates.<sup>7</sup>
- Schedule V substances have a low potential for abuse relative to the substances in Schedule IV and have a currently accepted medical use in the United States, including substances such as mixtures that contain small quantities of opiates, narcotics, or stimulants.<sup>8</sup>

###### *Federal Law*

The Federal Controlled Substances Act<sup>9</sup> also classifies controlled substances into schedules based on the potential for abuse and whether there is a currently accepted medical use for the substance. The Drug Enforcement Administration (DEA) is required to consider the following when determining where to schedule a substance:<sup>10</sup>

- The substance’s actual or relative potential for abuse;
- Scientific evidence of the substance’s pharmacological effect, if known;
- The state of current scientific knowledge regarding the substance;
- The substance’s history and current pattern of abuse;

<sup>1</sup> “Controlled substance” means any substance named or described in Schedules I-V of s. 893.03, F.S. S. 893.02(4), F.S.

<sup>2</sup> “Potential for abuse” means that a substance has properties as a central nervous system stimulant or depressant or a hallucinogen that create a substantial likelihood of its being: 1) used in amounts that create a hazard to the user’s health or safety of the community; 2) diverted from legal channels and distributed through illegal channels; or 3) taken on the user’s own initiative rather than on the basis of professional medical advice. S. 893.035(3)(a), F.S.

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

<sup>4</sup> S. 893.03(1), F.S.

<sup>5</sup> S. 893.03(2), F.S.

<sup>6</sup> S. 893.03(3), F.S.

<sup>7</sup> S. 893.03(4), F.S.

<sup>8</sup> S. 893.03(5), F.S.

<sup>9</sup> 21 U.S.C. § 812.

<sup>10</sup> 21 U.S.C. § 811(c).

- The scope, duration, and significance of abuse;
- What, if any, risk there is to public health;
- The substance's psychic or physiological dependence liability; and
- Whether the substance is an immediate precursor of a substance already controlled.

### *Methamphetamine*

Methamphetamine is a highly addictive stimulant that affects the central nervous system that is classified as a Schedule II controlled substance under state and federal law.<sup>11</sup> Nationally, overdoses from methamphetamine increased ten-fold in the period from 2009-2019.<sup>12</sup> During the 12 month period ending August 2020, there were 21,405 methamphetamine overdose deaths in the United States, and 1,273 methamphetamine overdose deaths in Florida.<sup>13</sup> Recent studies have shown an increase in the use of methamphetamine in combination with opioids, with users reporting the stimulant effect of the methamphetamine acts to balance out the sleepiness that accompanies opioid use.<sup>14</sup> However, the combination can enhance the lethality of the drugs by exacerbating the individual cardiovascular and pulmonary effects of each drug.<sup>15</sup>

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

### *Murder*

Under s. 782.04(1)(a)3., F.S., a person 18 years of age or older who unlawfully distributes specified controlled substances commits first degree murder by causing a victim's death by the unlawful distribution of a controlled substance if the proximate cause of his or her death was the use of such controlled substances. The enumerated controlled substances include:

- A substance controlled under s. 893.03(1), F.S.;<sup>16</sup>
- Cocaine, as described in s. 893.03(2)(a)4., F.S.;
- Opium or any synthetic or natural salt, compound, derivative, or preparation of opium;
- Methadone;
- Alfentanil, as described in s. 893.03(2)(b)1., F.S.;
- Carfentanil, as described in s. 893.03(2)(b)6., F.S.;
- Fentanyl, as described in s. 893.03(2)(b)9., F.S.;
- Sufentanil, as described in s. 893.03(2)(b)30., F.S.; or
- A controlled substance analog<sup>17</sup> of any of the substances specified above.

First degree murder is a capital felony<sup>18</sup>, punishable by a sentence of death or life imprisonment without the possibility of parole.<sup>19</sup>

A person commits third degree murder if he or she unlawfully kills a human being, without any design to effect death, while perpetrating or attempting to perpetrate any felony *other* than a felony listed in s. 782.04(4), F.S.<sup>20</sup> One of the felonies listed is "death caused by the unlawful distribution of a substance

<sup>11</sup> National Institutes of Health, *Methamphetamine Research Report*, <https://www.drugabuse.gov/publications/research-reports/methamphetamine/overview> (last visited Nov. 29, 2021). S. 893.03(2)(c)2., F.S.

<sup>12</sup> *Id.*

<sup>13</sup> National Center for Health Statistics, *Provisional Drug Overdose Death Counts*, <https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm> (last visited Nov. 29, 2021).

<sup>14</sup> National Institute on Drug Abuse, *Rising Stimulant Deaths Show that We Face More than Just an Opioid Crisis*, <https://www.drugabuse.gov/about-nida/noras-blog/2020/11/rising-stimulant-deaths-show-we-face-more-than-just-opioid-crisis> (last visited Nov. 29, 2021).

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

<sup>16</sup> Section 893.03(1), F.S., contains Schedule I controlled substances.

<sup>17</sup> A "controlled substance analog" is defined 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; 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. S. 893.0356(2)(a), F.S.

<sup>18</sup> S. 782.04(1)(a), F.S.

<sup>19</sup> S. 775.082(1)(a), F.S.

<sup>20</sup> S. 782.04(4), F.S.

controlled under s. 893.03(1), F.S., cocaine as described in s. 893.03(2)(a)4., F.S., or opium if such substance is proven to be the proximate cause of the death of the user”.<sup>21</sup> As such, a person who causes another’s death by distributing one of these controlled substances cannot be prosecuted for third degree murder because he or she can already be prosecuted for first degree murder under s. 782.04(1)(a)3., F.S.

### *Causation Requirement*

Under the Florida Standard Jury Instructions for death caused by unlawful distribution of a controlled substance, “[a] defendant’s conduct is the proximate cause of another’s death if the conduct 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>22</sup> Prosecutors have reported difficulty in prosecuting such cases under the proximate cause standard where a victim has multiple controlled substances or alcohol in his or her system. In these cases, a medical examiner may not be able to determine the primary or moving cause of a victim’s death and may be unable to determine that a victim’s death would not have occurred but for ingestion of one of the enumerated controlled substances.<sup>23</sup> In circumstances where a medical examiner is unable to provide a definitive opinion that one of the enumerated substances was the proximate cause of a victim’s death, prosecution under the current law for is virtually impossible.

### Sale of a Controlled Substance

Section 893.13, F.S., prohibits a person from selling, manufacturing<sup>24</sup>, or delivering<sup>25</sup> a controlled substance. 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, sale of a controlled substance is punishable as either a second degree felony<sup>26</sup> or third degree felony.<sup>27</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.

### Offense Severity Ranking Chart

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<sup>21</sup> S. 782.04(4)(l), F.S.

<sup>22</sup> Fla. Std. Jury Instr. (Crim.) 7.3(a). *See also Aumuller v. State*, 944 So.2d 1137 (Fla. 2d DCA 2006).

<sup>23</sup> Letter from Daniel E. Faggard, Assistant State Attorney, Eighteenth Judicial Circuit, HB 325, Re: Substantial Factor Test (Feb. 5, 2021).

<sup>24</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. S. 893.02(15)(a), F.S.

<sup>25</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. S. 893.02(6), F.S.

<sup>26</sup> A second degree felony is punishable by up to 15 years imprisonment and a \$10,000 fine. Ss. 775.082 and 775.083, F.S.

<sup>27</sup> S. 893.13(1), F.S. A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. Ss. 775.082 and 775.083, F.S.

Felony offenses subject to the Criminal Punishment Code (CPC) are listed in a single offense severity ranking chart (OSRC), which uses 10 offense levels to rank felonies from least severe (Level 1) to most severe (Level 10). Each felony offense is assigned to a level according to the severity of the offense, commensurate with the harm or potential for harm to the community that is caused by the offense, as determined by statute. A person's primary offense, any other current offenses, and prior offenses are scored using the points designated for the offense severity level of each offense. The final calculation, following the scoresheet formula, determines the lowest permissible sentence that the trial court may impose, absent a valid reason for departure.<sup>28</sup> If an offense is unranked, the CPC specifies a default level on the OSRC depending on the felony degree of the offense.<sup>29</sup>

### Statewide Task Force on Opioid Abuse

On April 1, 2019, Governor DeSantis created the Statewide Task Force on Opioid Abuse (Task Force).<sup>30</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 compile a report containing legislative recommendations.<sup>31</sup> Two of the recommendations made by the Task Force relating to law enforcement were:

- Include distribution of methamphetamine which proximately causes a user's death as a first degree murder offense; and
- Enhance criminal penalties for the sale of a controlled substance within 1,000 feet of a substance abuse treatment facility.<sup>32</sup>

The Task Force did not make a recommendation on changing the proximate cause requirement for death caused by the unlawful distribution of a controlled substance.

### **Effect of Proposed Changes**

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

##### *Murder*

CS/HB 95 amends s. 782.04(1)(a)3., F.S., to change the causation requirement for death caused by the unlawful distribution of a controlled substance to require that such distribution is proven to "have caused, or is proven to have been a substantial factor in producing the death of the user." "Substantial factor" is defined to mean 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." Changing the causation requirement simplifies the prosecution of such cases by requiring a prosecutor to prove only that a victim had a lethal amount of an enumerated controlled substance in his or her system. This eliminates the current requirement that a prosecutor prove such a substance caused a victim's death to the exclusion of other possible combinations of controlled substances or alcohol.

The bill amends s. 782.04(4)(l), F.S., to conform to changes in the causation requirement made by the bill, and updates the list of specified controlled substances in the third degree murder statute to align with those listed under first degree murder.

##### *Methamphetamine*

The bill also amends s. 782.04(1)(a)3., F.S., to add methamphetamine, as described in s. 893.03(2)(c)5., F.S., to the list of specified controlled substances which, if the substance caused or is proven to be a substantial factor in the victim's death, can subject the person who distributed the controlled substance to a conviction for first degree murder. Under the bill, a person convicted of first

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<sup>28</sup> S. 921.0022, F.S.

<sup>29</sup> S. 921.0023, F.S.

<sup>30</sup> Dose of Reality, *Findings and Recommendation of the Statewide Task Force on Opioid Abuse*, <https://doseofrealityfl.com/pdfs/opioid-task-force-findings-recommendations-opioid-abuse.pdf> (last visited Nov. 29, 2021).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

degree murder in a case where the victim died of an overdose of methamphetamine commits a capital felony.

### Sale of a Controlled Substance

The bill amends s. 893.13(1)(h), F.S., to enhance the penalties for sale of a controlled substance within 1,000 feet of a substance abuse treatment center. Because of the varied nature of drug treatment and recovery programs and facilities, there is not a single comprehensive statutory definition of a substance abuse treatment center. To cover the continuum of substance abuse treatment facilities, the bill enhances penalties for the sale of a controlled substance within 1,000 feet of the real property of:

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

Under the bill, the penalties for sale of a controlled substance increase from a third degree felony to a second degree felony, and from a second degree felony to a first degree felony, when committed within 1,000 feet of a specified substance abuse treatment facility. The bill does not rank the enhanced penalties in the OSRC, so the penalty for a second degree felony defaults to a Level 4 offense, and the penalty for a first degree felony defaults to a Level 7 offense.

The bill provides an effective date of October 1, 2022.

#### B. SECTION DIRECTORY:

**Section 1:** Amends s. 782.04, F.S., relating to murder.

**Section 2:** Amends s. 893.13, F.S., relating to prohibited acts; penalties.

**Section 3:** Provides an effective date of October 1, 2022.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

None.

##### 2. Expenditures:

The Criminal Justice Impact Conference reviewed a prior version of the bill with similar language on March 24, 2021 and determined provisions in the bill may have a positive indeterminate or unquantifiable impact to the prison population.<sup>33</sup> Provisions of the bill may increase the impact on prison beds by changing the causation requirement for death caused by the unlawful distribution of a controlled substance, by adding an additional controlled substance which can serve as the basis for a first degree murder conviction, and by enhancing the criminal penalties for sale of a controlled substance within 1,000 feet of facilities that provide substance abuse treatment.

Per DOC, 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. 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. 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 2019, there were 38,985 nonfatal overdoses and 5,352 fatal overdoses. Of the

<sup>33</sup> Criminal Justice Impact Conference, *PCS for HB 325 – Controlled Substance Offenses*, March 24, 2021, <http://edr.state.fl.us/Content/conferences/criminaljusticeimpact/CSHB325.pdf> (last visited Nov. 29, 2021).

fatal overdoses, methamphetamine was a contributing drug in 896 instances. It is not known how prison admissions will be impacted by this new language.<sup>34</sup>

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

None.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

None.

**B. RULE-MAKING AUTHORITY:**

Not applicable.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On October 21, 2021, the Criminal Justice & Public Safety Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The amendment:

- Aligned the enumerated list of controlled substances in the first degree murder and third degree murder statutes, and
- Made changes to the third degree murder statute to conform to provisions in the bill.

This analysis is drafted to the committee substitute as passed by the Criminal Justice & Public Safety Subcommittee.

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<sup>34</sup> *Id.*