

## HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

**BILL #:** CS/HB 95 Controlled Substances

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

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

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**FINAL HOUSE FLOOR ACTION:** 84 Y's      35 N's      **GOVERNOR'S ACTION:** Approved

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### SUMMARY ANALYSIS

CS/HB 95 passed the House on February 24, 2022. The bill was amended in the Senate on March 4, 2022, and was returned to the House. The House concurred in the Senate amendment as amended by the House on March 11, 2022, and the Senate concurred with the House amendment and passed the bill as amended on March 11, 2022.

On April 1, 2019, Governor DeSantis created the Statewide Task Force on Opioid Abuse (Task Force). 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.

The bill contains two of the Task Force's legislative recommendations relating to law enforcement. The bill adds methamphetamine to the list of specified controlled substances which, if the substance is the proximate cause of the victim's death, can subject the person who distributed the controlled substance to a conviction for first degree felony murder. Under the bill, a person convicted of first degree felony murder involving the unlawful distribution of methamphetamine commits a capital felony. 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 bill amends s. 893.135, F.S., to increase the minimum mandatory term of imprisonment for a person convicted of trafficking in specified quantities of dangerous fentanyl or fentanyl analogues from three years to seven years, and from 15 years to 20 years.

The Criminal Justice Impact Conference (CJIC) reviewed a similar version of the bill on February 7, 2022 and determined the bill may have a positive indeterminate impact on the prison population. The bill may result in an increase of prison beds by an unquantifiable amount. CJIC did not review the provision in the bill that increases two mandatory minimum sentences for trafficking in dangerous fentanyl or fentanyl analogues. This provision will also likely have a positive indeterminate impact on the prison population by significantly increasing the mandatory minimum sentences for a person convicted of trafficking in specified quantities of dangerous fentanyl or fentanyl analogues.

The bill was approved by the Governor on May 19, 2022, ch. 2022-129, L.O.F., and will become effective on October 1, 2022.

## I. SUBSTANTIVE INFORMATION

### A. EFFECT OF 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>

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<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 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;
- 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 and is classified as a Schedule II controlled substance under state and federal law.<sup>11</sup> 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>

### *Fentanyl*

Fentanyl is a synthetic opioid analgesic that is approximately 50 to 100 times more potent than morphine.<sup>16</sup> When prescribed by a physician, fentanyl is typically used to treat patients with severe pain or to manage pain after surgery and is administered via injection, transdermal patch, or in lozenges.<sup>17</sup> Although prescription fentanyl can be misused, most overdoses and related deaths have been linked to illicitly manufactured fentanyl, including fentanyl analogs.<sup>18</sup>

Under s. 893.135(1)(c)4., F.S., a person commits the crime of trafficking in fentanyl, punishable as a first degree felony,<sup>19</sup> if he or she possesses certain threshold amounts of the following controlled substances:

- Alfentanil;
- Carfentanil;
- Fentanyl;
- Sufentanil;
- Fentanyl derivatives;
- Fentanyl analogs; or
- Any mixture thereof.

The mandatory minimum penalties applicable to trafficking in fentanyl are:

<sup>11</sup> National Institutes of Health, *Methamphetamine Research Report*, <https://www.drugabuse.gov/publications/research-reports/methamphetamine/overview> (last visited Mar. 15, 2022). 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 Mar. 15, 2022).

<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 Mar. 15, 2022).

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

<sup>16</sup> National Institute on Drug Abuse, *Fentanyl*, <https://www.drugabuse.gov/publications/drugfacts/fentanyl> (last visited Mar. 15, 2022).

<sup>17</sup> *Id.*

<sup>18</sup> Centers for Disease Control and Prevention, *Increases in Fentanyl-Related Overdose Deaths-Florida and Ohio, 2013-2015*, <https://www.cdc.gov/mmwr/volumes/65/wr/mm6533a3.htm> (last visited Mar. 15, 2022).

<sup>19</sup> A first degree felony is punishable by up to 30 years imprisonment and a \$10,000 fine. Ss. 775.082 and 775.083, F.S.

Amount	4 <14 grams	14 < 28 grams	28 grams+
Minimum Mandatory Sentence and Fine	3 years \$50,000	15 years \$100,000	25 years \$500,000

### Statewide Task Force on Opioid Abuse

On April 1, 2019, Governor DeSantis created the Statewide Task Force on Opioid Abuse (Task Force).<sup>20</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>21</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 felony murder offense; and
- Enhance criminal penalties for the sale of a controlled substance within 1,000 feet of a substance abuse treatment facility.<sup>22</sup>

### Murder

Under current law, a person 18 years of age or older who unlawfully distributes specified controlled substances commits first degree felony murder if the proximate cause of a victim's death was the use of such controlled substances. These enumerated controlled substances include:

- A substance controlled under s. 893.03(1), F.S.;<sup>23</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>24</sup> of any substance specified in sub-subparagraphs a.-h.

First degree felony murder is a capital felony<sup>25</sup>, punishable by a sentence of death or life imprisonment without the possibility of parole.<sup>26</sup>

### Sale of a Controlled Substance

<sup>20</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 Mar. 15, 2022).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Section 893.03(1), F.S., contains Schedule I controlled substances.

<sup>24</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.

<sup>25</sup> S. 784.02(1)(a), F.S.

<sup>26</sup> S. 775.082(1)(a), F.S.

Section 893.13, F.S., prohibits a person from selling, manufacturing<sup>27</sup>, or delivering<sup>28</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>29</sup> or third degree felony.<sup>30</sup> The penalties are enhanced to a second degree felony and 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

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>31</sup> If an offense is unranked, the CPC specifies a default level on the OSRC depending on the felony degree of the offense.<sup>32</sup>

### **Effect of the Bill**

#### Murder

The bill adds methamphetamine, as described in s. 893.03(2)(c)5., F.S., to the list of specified controlled substances which, if the substance is the proximate cause of a victim's death, can subject the person who distributed the controlled substance to a conviction for first degree felony murder. Under the bill, a person convicted of first degree felony murder in a case where the victim died of an overdose of methamphetamine commits a capital felony.

#### Trafficking in Dangerous Fentanyl or Fentanyl Analogues

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<sup>27</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 by 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>28</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>29</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>30</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.

<sup>31</sup> S. 921.0022, F.S.

<sup>32</sup> S. 921.0023, F.S.

The bill amends s. 893.135(1)(c)4., F.S., to increase two minimum mandatory sentences for trafficking in dangerous fentanyl or fentanyl analogues as follows:

Amount	4 <14 grams	14 < 28 grams	28 grams+
Minimum Mandatory Sentence and Fine	<b>7 years</b> \$50,000	<b>20 years</b> \$100,000	25 years \$500,000

Sale of a Controlled Substance

The bill enhances 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 definition of substance abuse treatment center in statute. 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:

- 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;
- A health care facility licensed under chapter 395, F.S., that provides substance abuse treatment;
- A substance abuse facility licensed under chapter 397, F.S.;
- A clinical treatment, intervention, or prevention facility as defined 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 s. 458.3265 or s. 459.0137, 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 effective date of this bill is October 1, 2022.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The Criminal Justice Impact Conference (CJIC) reviewed a similar version of the bill on February 7, 2022 and determined provisions in the bill may have a positive indeterminate impact on the prison population.<sup>33</sup> Provisions of the bill may increase the impact on prison beds 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 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 FY 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>34</sup>

CJIC did not review the provision in the bill that increases two mandatory minimum sentences for trafficking in dangerous fentanyl or fentanyl analogues. This provision will also likely have a positive indeterminate impact on the prison population by significantly increasing the mandatory minimum sentences for a person convicted of trafficking in specified quantities of dangerous fentanyl or fentanyl analogues.

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<sup>33</sup> Criminal Justice Impact Conference, *CS/SB 190 – Controlled Substances*, February 7, 2022, <http://edr.state.fl.us/content/conferences/criminaljusticeimpact/CSSB190.pdf> (last visited Mar. 15, 2022).

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