

**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: SB 280

INTRODUCER: Senator Brodeur

SUBJECT: Controlled Substances

DATE: February 13, 2023

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Stokes	CJ	<b>Pre-meeting</b>
2.			ACJ	
3.			FP	

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**I. Summary:**

SB 280 addresses prosecution and punishment of certain unlawful acts involving heroin, fentanyl, and fentanyl-related controlled substances.

The bill amends the causation requirement for the capital offense of “death caused by the unlawful distribution of a controlled substance,” which includes fentanyl and fentanyl-related substances. 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 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.

The bill also makes it a second degree felony or a first degree felony (second or subsequent offense) for an adult to unlawfully distribute, deliver, sell, or dispense heroin, fentanyl, fentanyl-related substances, and mixtures containing any of these substances, and an injury or overdose results, when such substance or mixture is proven to have caused or been a substantial factor in causing the injury or overdose.

The bill also specifies that this unlawful distribution, etc., may be attributed directly or indirectly to the person who was injured or overdosed or as a result of a further unlawful distribution, etc., to another person.

Finally, the bill provides that the administration of medical care by an emergency responder is prima facie evidence that the person receiving medical care was injured or overdosed.

The Legislature's Office of Economic and Demographic Research preliminary 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 July 1, 2023.

## II. Present Situation:

### Scheduling of Fentanyl as a Controlled Substance

Section 893.03, F.S., classifies controlled substances into five categories or classifications, known as schedules. The schedules regulate the manufacture, distribution, preparation, and dispensing of substances listed in the schedules. The most important factors in determining which schedule may apply to a substance are the "potential for abuse"<sup>1</sup> of the substance and whether there is a currently accepted medical use for the substance. The controlled substance schedules are described as follows:

- Schedule I substances (s. 893.03(1), F.S.) have a high potential for abuse and no currently accepted medical use in treatment in the United States. Use of these substances under medical supervision does not meet accepted safety standards.
- Schedule II substances (s. 893.03(2), F.S.) have a high potential for abuse and a currently accepted but severely restricted medical use in treatment in the United States. Abuse of these substances may lead to severe psychological or physical dependence.
- Schedule III substances (s. 893.03(3), F.S.) have a potential for abuse less than the Schedule I and Schedule II substances and a currently accepted medical use in treatment in the United States. Abuse of these substances may lead to moderate or low physical dependence or high psychological dependence. Abuse of anabolic steroids may lead to physical damage.
- Schedule IV substances (s. 893.03(4), F.S.) have a low potential for abuse relative to Schedule III substances and a currently accepted medical use in treatment in the United States. Abuse of these substances may lead to limited physical or psychological dependence relative to Schedule III substances.
- Schedule V substances (s. 893.03(5), F.S.) have a low potential for abuse relative to Schedule IV substances and a currently accepted medical use in treatment in the United States. Abuse of these substances may lead to limited physical or psychological dependence relative to Schedule IV substances.

"Fentanyl is a powerful synthetic opioid that is similar to morphine but is 50 to 100 times more potent. It is a prescription drug that is also used and made illegally."<sup>2</sup> "Synthetic opioids, including fentanyl, are now the most common drugs involved in drug overdose deaths in the

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

<sup>2</sup> *Fentanyl DrugFacts*, National Institute on Drug Abuse (footnotes omitted), available at <https://nida.nih.gov/publications/drugfacts/fentanyl> (last visited on Feb. 6, 2023). As a medicine, fentanyl is "typically used to treat patients with severe pain, especially after surgery[.]" and "is also sometimes used to treat patients with chronic pain who are physically tolerant to other opioids." *Id.*

United States.”<sup>3</sup> According to Florida’s Statewide Drug Policy Advisory Council, the majority of overdose deaths in Florida in 2021 were related to opioids, and “[t]he most significant increases [in overdose deaths relative to the previous year] were deaths involving fentanyl which increased by 11 percent, and deaths caused by fentanyl increased by 9 percent.”<sup>4</sup>

Fentanyl and fentanyl-related substances (e.g., alfentanil, carfentanil, and sufentanil) are Schedule (2)(b) controlled substances.<sup>5</sup> Section 893.13, F.S., punishes various unlawful acts involving Schedule (2)(b) controlled substances:

- Selling, manufacturing, or delivering the substance, or possessing the substance with intent to sell, manufacture, or deliver<sup>6</sup> it are generally second degree felonies;<sup>7</sup>
- Purchasing or possessing the substance with intent to purchase it are generally second degree felonies;<sup>8</sup>
- Bringing the substance into this state (importing) is generally a second degree felony;<sup>9</sup>
- Possessing 10 grams of more of the substance is generally a first degree felony<sup>10</sup> but possessing a lesser amount is generally a third degree felony;<sup>11</sup> and
- Distributing<sup>12</sup> the substance, except through an authorized order form, is generally a third degree felony.<sup>13</sup>

Section 893.135, F.S., punishes drug trafficking, which consists of knowingly selling, purchasing, manufacturing, delivering, or bringing into this state (importing), or knowingly being in actual or constructive possession of, certain Schedule I or Schedule II controlled substances, in a statutorily-specified quantity. The statute only applies to a limited number of such controlled substances, including fentanyl and fentanyl-related substances. The controlled substance involved in the trafficking must meet a specified weight or quantity threshold. Most drug trafficking offenses are first degree felonies and are subject to a mandatory minimum term of imprisonment and a mandatory fine, which is determined by the weight or quantity range applicable to the weight or quantity of the substance involved in the trafficking.

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<sup>3</sup> *Id.*

<sup>4</sup> 2020 Annual Report (Dec. 1, 2022), p. 8, Statewide Drug Policy Advisory Council, available at [https://www.floridahealth.gov/provider-and-partner-resources/dpac/documents/2022\\_DPAC\\_Annual\\_Report.pdf](https://www.floridahealth.gov/provider-and-partner-resources/dpac/documents/2022_DPAC_Annual_Report.pdf) (last visited on Feb. 6, 2023).

<sup>5</sup> Section 893.03(2)(b)1., 6., 9., and 30., F.S.

<sup>6</sup> “Deliver” 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>7</sup> Section 893.13(1)(a)1., F.S. A second degree felony is punishable by not more than 15 years in state prison and a fine not exceeding \$10,000. Section 775.082 and 775.083, F.S.

<sup>8</sup> Section 893.13(2)(a)1., F.S.

<sup>9</sup> Section 893.13(5)(a)1., F.S.

<sup>10</sup> Section 893.13(6)(c), F.S. A first degree felony is generally punishable by not more than 30 years in state prison and a fine not exceeding \$10,000. Sections 775.082 and 775.083, F.S.

<sup>11</sup> Section 893.13(6)(a), F.S. A third degree felony is generally punishable by not more than 5 years in state prison and a fine not exceeding \$5,000. Sections 775.082 and 775.083, F.S. *But see* ss. 775.082(10) and 921.00241, F.S. (prison diversion).

<sup>12</sup> “Distribute” means to deliver, other than by administering or dispensing, a controlled substance. Section 893.02(8), F.S.

“Dispense” means the transfer of possession of one or more doses of a medicinal drug by a pharmacist or other licensed practitioner to the ultimate consumer thereof or to one who represents that it is his or her intention not to consume or use the same but to transfer the same to the ultimate consumer or user for consumption by the ultimate consumer or user. Section 893.02(7), F.S. “Administer” means the direct application of a controlled substance, whether by injection, inhalation, ingestion, or any other means, to the body of a person or animal. Section 893.02(1), F.S.

<sup>13</sup> Section 893.13(7)(a)4., F.S.

Trafficking in 4 grams or more of:

- Alfentanil;
- Carfentanil;
- Fentanyl;
- Sufentanil;
- A fentanyl derivative;<sup>14</sup>
- A controlled substance analog<sup>15</sup> of any previously-described substance or a fentanyl derivative; or
- A mixture containing any previously-described substance or a fentanyl derivative or analog.<sup>16</sup>

If the quantity involved in the drug trafficking violation is:

- 4 grams or more, but less than 14 grams, the person must be sentenced to a mandatory minimum term of imprisonment of 7 years, and must be ordered to pay a fine of \$50,000;
- 14 grams or more, but less than 28 grams, the person must be sentenced to a mandatory minimum term of imprisonment of 20 years, and must be ordered to pay a fine of \$100,000; or
- 28 grams or more, the person must be sentenced to a mandatory minimum term of imprisonment of 25 years, and must be ordered to pay a fine of \$500,000.<sup>17</sup>

### **Controlled Substance Analog**

A “controlled substance analog” is a substance which, due to its chemical structure and potential for abuse, meets the following criteria:

- The substance is substantially similar to that of a controlled substance listed in Schedule I or Schedule II of s. 893.03, F.S.; and
- The substance 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>18</sup>

### **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 a 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>19</sup>
- Cocaine;
- Opium or any synthetic or natural salt, compound, derivative, or preparation of opium;

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<sup>14</sup> See s. 893.03(1)(a)62., F.S.

<sup>15</sup> See s. 893.0356(2)(a), F.S.

<sup>16</sup> Section 893.135(1)(c)4.a.(I)-(VII), F.S.

<sup>17</sup> Section 893.135(1)(c)4.b.(I)-(III), F.S.

<sup>18</sup> Section 893.0356(2)(a), F.S.

<sup>19</sup> See s. 893.03(1), F.S.

- Methadone;
- Alfentanil;
- Carfentanil;
- Fentanyl;
- Sufentanil;
- Methamphetamine; or
- A controlled substance analog of any of the above-listed controlled substances.

First degree murder is a capital felony,<sup>20</sup> punishable by death or life imprisonment.<sup>21</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, 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;
- Opium or any synthetic or natural salt, compound, derivative, or preparation of opium;
- Methadone;
- Alfentanil;
- Carfentanil;
- Fentanyl;
- Sufentanil;
- Methamphetamine; or
- A controlled substance analog of any of the above-listed controlled substances.<sup>22</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>23</sup>

As legal scholars have recognized, before a defendant can be convicted of a crime that includes an element of causation, the [s]tate 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>24</sup>

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<sup>20</sup> Section 782.04(1)(a)3., F.S.

<sup>21</sup> Section 782.082, F.S.

<sup>22</sup> Section 782.04(4)(1), F.S.

<sup>23</sup> *Eversely v. State*, 748 So.2d 963, 966-67 (Fla. 1999) (citations omitted).

<sup>24</sup> *Id.* at 966-967 (citations omitted).

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>25</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>26</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>27</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>28</sup>

Additionally, the state must prove that the defendant’s conduct was the “proximate cause” of the harm. “Florida courts have considered 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.”<sup>29</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 in producing the death, and without it, the death would not have happened.”<sup>30</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>31</sup>

### **Criminal Punishment Code**

The Criminal Punishment Code<sup>32</sup> (Code) is Florida’s primary sentencing policy. Noncapital felonies sentenced under the Code receive an offense severity level ranking (Levels 1-10).<sup>33</sup> Points are assigned and accrue based upon the offense severity level ranking assigned to the

<sup>25</sup> *Id.* at 967 (citations omitted).

<sup>26</sup> *Id.* (citation omitted).

<sup>27</sup> *Id.*, quoting 1 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* s. 3.12, at 394 (footnote and other citations omitted).

<sup>28</sup> *Id.* (citations omitted).

<sup>29</sup> *Id.* (citations omitted).

<sup>30</sup> Fla. Std. Jury Instr. (Crim.) 7.3(a) (emphasis added by staff), available at <https://www.floridabar.org/rules/florida-standard-jury-instructions/criminal-jury-instructions-home/criminal-jury-instructions/sji-criminal-chapter-7/> (last visited on Feb. 6, 2023); and *Aumuller v. State*, 944 So 2d 1137, 1141-1142 (Fla. 2d DCA 2006).

<sup>31</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>32</sup> Sections 921.002-921.0027, F.S. See chs. 97-194 and 98-204, L.O.F. The Code is effective for offenses committed on or after October 1, 1998.

<sup>33</sup> Offenses are either ranked in the offense severity level ranking chart in s. 921.0022, F.S., or are ranked by default based on a ranking assigned to the felony degree of the offense as provided in s. 921.0023, F.S.

primary offense, additional offenses, and prior offenses. Sentence points escalate as the severity level escalates. Points may also be added or multiplied for other factors such as victim injury or the commission of certain offenses. The lowest permissible sentence is any nonstate prison sanction in which total sentence points equal or are less than 44 points, unless the court determines that a prison sentence is appropriate. If total sentence points exceed 44 points, the lowest permissible sentence in prison months is calculated by subtracting 28 points from the total sentence points and decreasing the remaining total by 25 percent.<sup>34</sup> Absent mitigation,<sup>35</sup> the permissible sentencing range under the Code is generally the lowest permissible sentence scored up to and including the maximum penalty provided under s. 775.082, F.S.<sup>36</sup>

### III. Effect of Proposed Changes:

The bill addresses unlawful acts involving heroin, fentanyl, and fentanyl-related controlled substances.

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 a substance or mixture alone is sufficient to cause death or that the use of the substance or mixture contributed to the resulting death, regardless of whether any other substance or mixture used is also sufficient to cause death or contributed to the 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 also creates s. 893.131, F.S., which provides that it is a second degree felony or first degree felony (second or subsequent offense) for a person 18 years of age or older to unlawfully distribute, deliver, sell, or dispense any of the following substances if injury or overdose<sup>37</sup> results, when such substance or mixture is proven to have caused or been a substantial factor<sup>38</sup> in causing the injury or overdose:

- Heroin;<sup>39</sup>
- Alfentanil;
- Carfentanil;
- Fentanyl;
- Sufentanil;

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<sup>34</sup> Section 921.0024, F.S. Unless otherwise noted, information on the Code is from this source.

<sup>35</sup> The court may “mitigate” or “depart downward” from the scored lowest permissible sentence, if the court finds a mitigating circumstance. Section 921.0026, F.S., provides a list of mitigating circumstances.

<sup>36</sup> If the scored lowest permissible sentence exceeds the maximum penalty in s. 775.082, F.S., the sentence required by the Code must be imposed. If total sentence points are greater than or equal to 363 points, the court may sentence the offender to life imprisonment. Section 921.0024(2), F.S.

<sup>37</sup> “Injury or overdose” is defined in the bill as drug toxicity or the temporary loss of locomotor activity, motor coordination, or consciousness or cognitive impairment.

<sup>38</sup> “Substantial factor” means that the use of a substance or mixture alone is sufficient to cause an injury or overdose or that the use of the substance or mixture contributed to a resulting injury or overdose, regardless of whether any other substance or mixture used is also sufficient to cause an injury or overdose.

<sup>39</sup> Heroin is a Schedule (1)(b) controlled substance. See s. 893.03(1)(b)11. F.S.

- Fentanyl derivatives;
- A controlled substance analog of any previously-described substance or a fentanyl derivative; or
- A mixture containing any previously-described substance or a fentanyl derivative or analog.

Neither the second degree felony nor the first degree felony created by the bill are specifically ranked in the Code offense severity level ranking chart. Accordingly, both would be ranked under s. 921.0023, F.S. The second degree felony would be ranked in level 4, and the first degree felony would be ranked in level 7.<sup>40</sup>

The bill specifies that the unlawful distribution, etc., may be attributed directly or indirectly to the person who was injured or who overdosed or as a result of a further unlawful distribution, etc.

Finally, the bill provides that the administration of medical care<sup>41</sup> by an emergency responder, including, but not limited to, a law enforcement officer, a paramedic, or an emergency medical technician, or the administration of an emergency opioid antagonist<sup>42</sup> by such emergency responder, is prima facie evidence that the person receiving medical care was injured or overdosed.<sup>43</sup>

The bill takes effect July 1, 2023.

#### **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.

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<sup>40</sup> Section 921.0023(2) and (3), F.S.

<sup>41</sup> “Medical care” is defined as the administration of treatment for the purposes of preserving or sustaining life or the administration of an emergency opioid antagonist.

<sup>42</sup> “Emergency opioid antagonist” is defined in s. 381.887(1)(d), F.S., as naloxone hydrochloride or any similarly acting drug that blocks the effects of opioids administered from outside the body and that is approved by the United States Food and Drug Administration for the treatment of an opioid overdose.

<sup>43</sup> The bill appears to create a permissive inference. In criminal law, a “permissive inference” is legally permissible if it “allows, but does not require, the trier of fact to infer the elemental fact from proof of a basic fact and does not place any burden on the defendant. In this situation, the basic fact may constitute prima facie evidence of the elemental fact.” *State v. Rygwelski*, 899 So.2d 498, 501 (Fla. 2d DCA 2005) (citations omitted).



**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 Legislature's Office of Economic and Demographic Research (EDR) preliminary estimates that the bill will have a "positive indeterminate" prison bed impact (an unquantifiable increase in prison beds).<sup>44</sup>

The EDR provided the following information relevant to its estimate:

In FY 18-19, the incarceration rate for a Level 4, 2nd degree felony was 28.7%, and in FY 19-20 the incarceration rate was 27.3%. In FY 20-21, the incarceration rate for a Level 4, 2nd degree felony was 23.8%, and in FY 21-22 the incarceration rate was 29.7%. In FY 18-19, the incarceration rate for a Level 1, 1st degree felony was 67.1%, and in FY 19-20 the incarceration rate was 66.5%. In FY 20-21, the incarceration rate for a Level 1, 1st degree felony was 65.5%, and in FY 21-22 the incarceration rate was 63.1%.

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, FY 20-21, or FY 21-22. Per Florida Department of Health, in CY 2021, there were 50,803 non-fatal drug overdose emergency department visits and 8,093 fatal drug overdoses. While it is not known what drug or drugs were in their systems, prior reports have indicated mixtures of the drugs included in this bill. The drugs listed under s. 782.04(1), F.S. and s. 893.131, F.S. showed similar high numbers as contributing to fatal overdoses, so it is likely that the non-fatal overdoses also have these drugs involved. It is not known how prison admissions will be

<sup>44</sup> *HB 365 – Controlled Substances (Identical SB 280)*, Office of Economic and Demographic Research (on file with the Senate Committee on Criminal Justice).

impacted by this new language, nor is it known if this language will expand how a non-fatal overdose is defined.<sup>45</sup>

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends section 782.04 of the Florida Statutes.

This bill creates the section 893.131 of the Florida Statutes.

**IX. 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>45</sup> *Id.*