

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 477 Controlled Substances  
**SPONSOR(S):** Criminal Justice Subcommittee, Boyd and others  
**TIED BILLS:** **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	13 Y, 1 N, As CS	Hall	White
2) Justice Appropriations Subcommittee			
3) Judiciary Committee			

### SUMMARY ANALYSIS

Chapter 893, F.S., sets forth the Florida Comprehensive Drug Abuse Prevention and Control Act ("the Act") which classifies controlled substances into five categories, known as schedules. These schedules regulate the manufacture, distribution, preparation, and dispensing of the substances listed therein. The distinguishing factors between the different schedules are the "potential for abuse" of the substances and whether there is a currently accepted medical use for the substances. Florida law also regulates emerging substances, not yet included in the schedules, under s. 893.0356, F.S., the Analogue Statute. An analog drug is substantially similar in chemical structure and potential for abuse to a drug already prohibited by statute and is treated the same as the controlled substance to which it is an analog for the purpose of assigning criminal penalties.

Recently, Florida has experienced increased incidents involving fentanyl. Fentanyl is a Schedule II synthetic opioid drug that is approximately 50 to 100 times stronger than morphine and has analogs that can be up to 100 times stronger than the drug itself. Similar synthetic opioid compounds previously used as "research drugs" have also surfaced in the state. In addition to users, these drugs are dangerous to emergency responders and law enforcement, as even small amounts absorbed through the skin or inhaled can be lethal.

The bill enhances existing penalties and creates new penalties for synthetic opioid drugs by:

- Adding certain fentanyl related controlled substances to the substances for which distribution, that results in death and is the proximate cause of a user's death, is punishable as murder;
- Adding a class of fentanyl derivatives and five "research drugs" to Schedule I;
- Creating a first degree felony for possession of 10 grams or more of certain Schedule II substances including certain fentanyl related substances;
- Revising the substances that constitute trafficking offenses for hydrocodone, oxycodone, phencyclidine, and phenethylamines;
- Creating trafficking offenses for fentanyl, synthetic cannabinoids, and n-benzyl phenethylamines; and
- Authorizing certain crime laboratory personnel to possess, store, and administer emergency opioid antagonists used to treat opioid overdoses.

Additionally, the bill, in order to ensure that all of Florida's statutes are automatically updated whenever the Act is amended, creates s. 893.015, F.S., to specify that cross-references throughout the Florida Statutes to the Act, or any portion thereof, include all subsequent amendments to the Act.

The Criminal Justice Impact Conference met on March 2, 2017 and determined the bill will have a positive significant impact (increase of more than 25 prison beds) as it creates new felony offenses and minimum mandatory sentences. Please see "FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT," *infra*.

The bill provides it takes effect upon becoming law.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Present Situation**

##### *Regulation of Controlled Substances*

Chapter 893, F.S., the Florida Comprehensive Drug Abuse Prevention and Control Act (“the Act”), classifies controlled substances 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>1</sup> of the substance and whether there is a currently accepted medical use for the substance.<sup>2</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>3</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>4</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>5</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>6</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>7</sup>

Chapter 893, F.S., contains a variety of provisions criminalizing behavior related to controlled substances. Most of these provisions are found in s. 893.13, F.S., which criminalizes and provides the penalties for the possession, sale, purchase, manufacture, and delivery of controlled substances. In general, the severity of the penalty for a violation of these provisions depends on the schedule in which the controlled substance is listed.<sup>8</sup> Other factors such as the quantity of the controlled substance involved or the location where the violation occurs may also enhance the penalties for a violation of ch. 893.13, F.S. Additionally, s. 893.135, F.S., provides penalties for drug trafficking offenses, including minimum mandatory sentences and fines, which increase in severity as the quantity of the controlled substance involved increases.

In an effort to regulate emerging substances that are not yet included in the schedules, the Legislature created s. 893.0356, F.S., commonly called the Analogue Statute, to prohibit drugs that are

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<sup>1</sup> Section 893.035(3)(a), F.S., defines “potential for abuse” to mean 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.

<sup>2</sup> See s. 893.03, F.S.

<sup>3</sup> s. 893.03(1), F.S.

<sup>4</sup> s. 893.03(2), F.S.

<sup>5</sup> s. 893.03(3), F.S.

<sup>6</sup> s. 893.03(4), F.S.

<sup>7</sup> s. 893.03(5), F.S.

<sup>8</sup> See s. 893.13, F.S.

substantially similar to those prohibited by statute.<sup>9</sup> Under the law a “controlled substance analog” is defined as:

- A substance which, due to its chemical structure and potential for abuse, is substantially similar to that of a controlled substance listed in Schedule I or Schedule II of s. 893.03, F.S.; and
- Either has or is represented 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>

The Analogue Statute requires the controlled substance analog to be treated the same as the highest scheduled controlled substance in s. 893.03, F.S. of which it is an analog, for the purposes of determining criminal penalties.<sup>11</sup> The Analogue Statute specifies that a “controlled substance analog” does not include:

- A controlled substance;
- Any substance for which there is an approved new drug application;
- Any compound, mixture, or preparation which contains any controlled substance which is not for administration to a human being or animal, and which is packaged in such form or concentration, or with adulterants or denaturants, so that as packaged it does not present any significant potential for abuse; or
- Any substance to which an investigation exemption applies under s. 505 of the Food, Drug, and Cosmetic Act, 21 U.S.C. § 355, but only to the extent that conduct with respect to the substance is pursuant to such exemption.

### *Fentanyl and Related Drugs*

Fentanyl, carfentanyl,<sup>12</sup> alfentanil,<sup>13</sup> and sufentanil<sup>14</sup> are Schedule II controlled substances.<sup>15</sup> Florida law punishes the possession of these controlled substances as a third degree felony,<sup>16</sup> and the possession with intent to sell, manufacture, or deliver, or the sale, manufacture, or delivery of these controlled substances as a second degree felony.<sup>17</sup>

Fentanyl is a synthetic opioid analgesic that is approximately 50 to 100 times more potent than morphine.<sup>18</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>19</sup> Although prescription fentanyl can be misused, most overdoses and related deaths have been linked to illicitly manufactured fentanyl, including fentanyl analogs.<sup>20</sup> Such illicitly manufactured fentanyl is produced in clandestine laboratories and can be sold as a powder, spiked on blotter paper, mixed with heroin, or as tablets made to look like other, less potent opioids.<sup>21</sup>

<sup>9</sup> The Analogue Statute, created in 1987, is largely modeled after the federal Controlled Substance Analogue Enforcement Act under 21 U.S.C. § 802(32)(A).

<sup>10</sup> s. 893.0356(2)(a), F.S.

<sup>11</sup> s. 893.0356(5), F.S.

<sup>12</sup> Carfentanyl was first developed in the 1970s and is only routinely used as an anesthetic for elephants and other large animals. Erika Kinetz & Desmond Butler, *Chemical Weapon for sale: China's unregulated narcotic*, AP TOP NEWS, October 07, 2016, available at <https://apnews.com/7c85cda5658e46f3a3be95a367f727e6>.

<sup>13</sup> Alfentanil is a fentanyl derivative opioid anesthetic, which has a faster onset of action, and also the shorter duration of action than fentanyl. PUBMED, *Clinical uses of fentanyl, sufentanil, and alfentanil*, <https://www.ncbi.nlm.nih.gov/pubmed/1834393> (last visited February 22, 2017).

<sup>14</sup> Sufentanil is a fentanyl derivative that is even more potent than fentanyl. *Id.*

<sup>15</sup> s. 893.03(2)(b), F.S.

<sup>16</sup> Violation of s. 893.13(6)(a), F.S., is punishable by up to five years imprisonment and a \$5,000 fine. ss. 775.082 and 775.083, F.S.

<sup>17</sup> Violation of s. 893.13(1)(a)1. is punishable by up to 15 years imprisonment and a \$10,000 fine. ss. 775.082 and 775.083, F.S.

<sup>18</sup> NATIONAL INSTITUTE ON DRUG ABUSE, *Fentanyl*, <https://www.drugabuse.gov/publications/drugfacts/fentanyl> (last visited February 2, 2017).

<sup>19</sup> *Id.*

<sup>20</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 February 7, 2017).

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

Frequently, fentanyl is mixed into other drugs and sold without the customer's knowledge of the presence of fentanyl.<sup>22</sup> The Drug Enforcement Agency (DEA) reports that since 2014, law enforcement agencies within the United States have begun seizing counterfeit prescription opioid pills, mimicking authentic medications, which contain fentanyl.<sup>23</sup> Recently in Florida, nine overdose deaths in Pinellas County were linked to counterfeit Xanax pills containing a combination of Xanax and fentanyl.<sup>24</sup>

Between late 2013 and late 2014, the DEA estimates over 700 deaths in the United States were related to fentanyl; however, this number is believed to be underestimated due to variations in reporting techniques between states and deaths being attributed to heroin.<sup>25</sup> According to a recent report from the Centers for Disease Control and Prevention (CDC), fentanyl submissions to law enforcement increased 494 percent in Florida (from 33 to 196) between 2013 and 2014, while the state also experienced a 115 percent increase (from 185 to 397) in fentanyl-related deaths during the same time frame.<sup>26</sup> Fentanyl analogs, specifically, were implicated in 49 drug overdose deaths in Florida between January and June 2015.<sup>27</sup> The CDC estimates the numbers and rates of fentanyl deaths, relating to Florida specifically, are also underestimated because testing for fentanyl and fentanyl analogs is not systematic statewide.<sup>28</sup>

Carfentanil, one fentanyl analog, has been responsible for multiple overdose deaths in Florida. The drug is chemically similar to, but 100 times stronger, than fentanyl itself and is so deadly that an amount smaller than a poppy seed can be lethal.<sup>29</sup> In Manatee County, FL, carfentanil was confirmed in at least 43 fatal overdoses in 2016, with 12 more cases in which the drug was suspected, but not yet confirmed by the toxicology lab as the cause of death.<sup>30</sup> In August 2016, the National Institute on Drug Abuse issued an alert for Ohio and Florida concerning carfentanil overdoses, warning that the drug is likely being added to mixtures of heroin and other street drugs, creating a higher risk for overdoses.<sup>31</sup>

In addition to the rise of fentanyl and its analogs, a new group of synthetic opioid compounds has emerged. These drugs are a part of a group of compounds known as "research chemicals" that have been typically reserved for industrial and medical trials and remain largely untested in humans.<sup>32</sup> This group includes, but is not limited to:

- W-15, 4-chloro-N- [1- (2-phenylethyl) -2-piperidinylidene] -benzenesulfonamide.
- W-18, 4-chloro-N- [1-[ 2-(4-nitrophenyl) ethyl] -2-piperidinylidene] -benzenesulfonamide<sup>33</sup>.
- AH-7921, 3, 4-dichloro-N- [[1-dimethylamino) cyclohexyl]methyl] -benzamide<sup>34</sup>.

<sup>22</sup> Drug Enforcement Agency, *Counterfeit Prescription Pills Containing Fentanyls: A Global Threat*, DEA INTELLIGENCE BRIEF, July 2016, at 2, available at

[https://content.govdelivery.com/attachments/USDOJDEA/2016/07/22/file\\_attachments/590360/fentanyl%2Bpills%2Breport.pdf](https://content.govdelivery.com/attachments/USDOJDEA/2016/07/22/file_attachments/590360/fentanyl%2Bpills%2Breport.pdf).

<sup>23</sup> *Id.* at 2.

<sup>24</sup> Kristen Mitchell, *Sheriff: Blend of Xanax, fentanyl has killed nine people in Pinellas*, TAMPA BAY ONLINE (March 22, 2016), <http://www.tbo.com/pinellas-county/sheriff-blend-of-xanax-fentanyl-has-killed-nine-people-in-pinellas-20160322/>.

<sup>25</sup> Drug Enforcement Agency, *Counterfeit Prescription Pills Containing Fentanyls: A Global Threat*, DEA INTELLIGENCE BRIEF, July 2016, at 9, available at

[https://content.govdelivery.com/attachments/USDOJDEA/2016/07/22/file\\_attachments/590360/fentanyl%2Bpills%2Breport.pdf](https://content.govdelivery.com/attachments/USDOJDEA/2016/07/22/file_attachments/590360/fentanyl%2Bpills%2Breport.pdf).

<sup>26</sup> In contrast, the prescription rate for fentanyl only increased five percent in the state of Florida. 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 February 7, 2017).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Erika Kinetz & Desmond Butler, *Chemical Weapon for sale: China's unregulated narcotic*, AP TOP NEWS, October 07, 2016, available at <https://apnews.com/7c85cda5658e46f3a3be95a367f727e6>.

<sup>30</sup> Jessica De Leon, *Bradenton is opioid overdose capital of Florida. And still no one knows why.*, BRADENTON HERALD (December 19, 2016, 8:58 AM), <http://www.bradenton.com/news/local/heroin-epidemic/article121725633.html>.

<sup>31</sup> NATIONAL INSTITUTE ON DRUG ABUSE, *Alert Issued in Ohio for Human Use of Animal Sedative Carfentanil, with Cases Also Seen in Florida*, <https://www.drugabuse.gov/drugs-abuse/emerging-trends-alerts> (last visited February 23, 2017).

<sup>32</sup> Christopher Moraff, *How Knockoff Fentanyl Dodges Cops*, THE DAILY BEAST (June 07, 2016, 1:00 AM), <http://www.thedailybeast.com/articles/2016/06/07/how-knockoff-fentanyl-dodges-cops.html>.

<sup>33</sup> The drug is said to be 10,000 times stronger than morphine (however, tests have only been conducted on mice). *Id.*

<sup>34</sup> The synthetic opioid drug was emergency scheduled by the DEA in May 2016. *Id.*

- U47700, *trans*-3, 4-dichloro-N- [2-(dimethylamino) cyclohexyl] -N-methyl-benzamide<sup>35</sup>.
- MT-45, 1-cyclohexyl-4- (1,2-diphenylethyl) -piperazine, dihydrochloride.

In March 2016, law enforcement in Lorain County, Ohio seized 500 pills that appeared to be oxycodone pills but were actually the research chemical U-4770. The DEA estimates that U-47700 has been linked to at least 46 deaths in the United States.<sup>36</sup> Also in March 2016, law enforcement in South Florida discovered counterfeit OxyContin tablets containing the research chemical W-18 in Miramar, FL.<sup>37</sup> The DEA predicts that although many counterfeit opioid pill traffickers currently use fentanyl, it is likely that synthetic opioids like these will be utilized if fentanyl becomes unavailable or if user preferences shift.<sup>38</sup>

#### *Effect of the Bill on the Regulation of Controlled Substances*

The bill amends s. 893.03(1)(a), F.S., to add certain substances, called fentanyl derivatives, to Schedule I, including:

- A general class by chemical structure;
- A description of chemical substitutions that can be made to the structure to remain an illicit member of the structure family;
- Twenty-three substances specifically identified as fentanyl derivatives; and
- An exclusion for alfentanil, carfentanil, fentanyl, and sufentanil so as to not alter their current placement in Schedule II.<sup>39</sup>

Offenses involving fentanyl derivatives will be subject to the following criminal penalties:

- Possession<sup>40</sup> of less than 10 grams is a third degree felony.<sup>41</sup>
- Possession of 10 grams or more is a first degree felony.<sup>42</sup>
- Purchase or possession with intent to purchase is a second degree felony.<sup>43</sup>
- Sale, manufacture, or delivery, or possession with intent to sell, manufacture, or deliver is a second degree felony.<sup>44</sup>

The bill amends s. 893.03(1)(c), F.S., to add five new substances to Schedule I. These substances have traditionally been used as research chemicals, but have emerged for illicit use and include:

- W-15, 4-chloro-N- [1- (2-phenylethyl) -2-piperidinylidene] –benzenesulfonamide.
- W-18, 4-chloro-N- [1- [2-(4-nitrophenyl) ethyl] -2-piperidinylidene] –benzenesulfonamide.
- AH-7921, 3, 4-dichloro-N-[ [1-(dimethylamino) cyclohexyl] methyl] –benzamide.
- U47700, *trans*-3, 4-dichloro-N- [2-(dimethylamino) cyclohexyl] -N-methyl-benzamide.
- MT-45, 1-cyclohexyl-4- (1, 2-diphenylethyl) -piperazine, dihydrochloride.

<sup>35</sup> This drug was developed by pharmaceutical manufacturer Upjohn in the 1970s and is 7.5 times more powerful than morphine. *Id.*

<sup>36</sup> NATIONAL INSTITUTE ON DRUG ABUSE, *DEA Temporarily Bans Synthetic Opioid U-47700 ("Pink"), Linked to Nearly 50 Deaths*, <http://www.drugabuse.gov/drug-abuse/emerging-trends-alerts> (last visited February 23, 2017).

<sup>37</sup> Jerry Iannelli, *New Synthetic Drug, W-18, Found in South Florida*, NEW TIMES BROWARD-PALM BEACH, March 22, 2016, available at <http://www.browardpalmbeach.com/new-synthetic-drug-w-18-found-in-south-florida-7667569>.

<sup>38</sup> Drug Enforcement Agency, *Counterfeit Prescription Pills Containing Fentanyl: A Global Threat*, DEA INTELLIGENCE BRIEF, July 2016, at 2, available at [https://content.govdelivery.com/attachments/USDOJDEA/2016/07/22/file\\_attachments/590360/fentanyl%2Bpills%2Breport.pdf](https://content.govdelivery.com/attachments/USDOJDEA/2016/07/22/file_attachments/590360/fentanyl%2Bpills%2Breport.pdf).

<sup>39</sup> These fentanyl derivative compounds have limited medical or veterinary applications. See s. 893.03(b), F.S.

<sup>40</sup> Unless lawfully obtained from a practitioner or pursuant to a valid prescription. s. 893.13(6)(a), F.S.

<sup>41</sup> Pursuant to s. 893.13(6)(a), 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>42</sup> Pursuant to s. 893.13(6)(c), F.S. 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.

<sup>43</sup> Pursuant to s. 893.13(2)(a)1., F.S. 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>44</sup> Pursuant to s. 893.13(1)(a)1., F.S. 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.

Offenses involving these drugs are subject to the following criminal penalties:

- Possession is a third degree felony.<sup>45</sup>
- Purchase or possession with intent to purchase is a third degree felony.<sup>46</sup>
- Sale, manufacture, or delivery, or possession with intent to sell, manufacture, or deliver is a third degree felony.<sup>47</sup>

The bill amends s. 893.13(6)(c), F.S., to add 29 Schedule II controlled substances listed in s. 893.03(2)(b), F.S., to the list of substances for which possession of 10 grams or more is now punishable as a first degree felony. These substances include, but are not limited to: alfentanil, carfentanil, fentanyl, and sufentanil.

The bill amends existing trafficking offenses to revise the prohibited substances that are subject to heightened penalties.<sup>48</sup> The bill amends s. 893.135(1)(c)2., F.S., trafficking in hydrocodone, to:

- Add codeine,<sup>49</sup> a Schedule II substance and an isomer<sup>50</sup> of hydrocodone,<sup>51</sup> to the controlled substances punishable under this subparagraph, and
- Remove “derivative, isomer, or salt of an isomer” related to hydrocodone from those punishable under this subparagraph.<sup>52</sup>

By adding codeine to the trafficking in hydrocodone offenses, codeine becomes subject to the following mandatory minimum sentences and fines or capital penalties:

Amount	14 <28 grams	28 < 50 grams	50 < 200 grams	200 grams < 30 kilograms	30+ kilos
Minimum Mandatory Sentence and Fine or Capital Offense	3 years \$50,000	7 years \$100,000	15 years \$500,000	25 years \$750,000	Capital trafficking and importation in illegal drugs <sup>53</sup>

The bill amends s. 893.135(1)(c)3., F.S, trafficking in oxycodone, to remove “derivative, isomer, or salt of an isomer” related to oxycodone punishable under this subparagraph. The removal of the language has no effect on the types of substances prohibited because there have not been any drugs identified as a derivative, isomer, or salt of an isomer of oxycodone.<sup>54</sup>

<sup>45</sup> Pursuant to s. 893.13(6)(a), 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>46</sup> Pursuant to s. 893.13(2)(a)2., 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>47</sup> Pursuant to s. 893.13(1)(a)2., 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>48</sup> Trafficking is a first degree felony punishable by up to 30 years imprisonment. s. 775.082, F.S.

<sup>49</sup> Codeine is classified as an opioid, typically prescribed as a pain reliever and cough suppressant, which has a high potential for addiction. DRUG ABUSE.COM, *The Effects of Codeine Use*, [drugabuse.com/library/the-effects-of-codeine-use/](http://drugabuse.com/library/the-effects-of-codeine-use/) (last visited February 24, 2017).

<sup>50</sup> Isomers are compounds with the same chemical formula but different structures. BODNER RESEARCH WEB, *Isomers*, [chemed.chem.purdue.edu/genchem/topicreview/bp/ch12/isomers.php](http://chemed.chem.purdue.edu/genchem/topicreview/bp/ch12/isomers.php) (last visited February 24, 2017).

<sup>51</sup> Email from Michelle DePaola, Chemistry Technical Leader, Florida Department of Law Enforcement, HB 0477 (February 23, 2017) (on file with the Criminal Justice Subcommittee).

<sup>52</sup> This language is stricken since codeine is the only known isomer of hydrocodone and is now specifically listed in the law. *Id.*

<sup>53</sup> s. 893.13(1)(c)5. and 6., F.S.

<sup>54</sup> Email from Michelle DePaola, Chemistry Technical Leader, Florida Department of Law Enforcement, HB 0477 (February 23, 2017) (on file with Criminal Justice Subcommittee).

The bill amends s. 893.135(1)(d), F.S., relating to trafficking in phencyclidine,<sup>55</sup> to add the following substances to those currently punishable under this paragraph:

- Substituted phenylcyclohexylamines,<sup>56</sup>
- Five controlled substances identified as phenylcyclohexylamine analogs; or
- Any mixture thereof.

By adding the new substances to the trafficking in phencyclidine offenses, the new substances become subject to the following mandatory minimum sentences and fines or capital penalties:

Amount	28 <200 grams	200 < 400 grams	400 < 800 grams	800+ grams
Minimum Mandatory Sentence and Fine or Capital Offense	3 years \$50,000	7 years \$100,000	15 years \$250,000	Capital importation or manufacture <sup>57</sup>

The bill amends s. 893.135(1)(k), F.S., relating to trafficking in phenethylamines<sup>58</sup>, to add the following substances to those punishable under this paragraph:

- Approximately sixty controlled substances identified as phenethylamines or cathinones,<sup>59</sup>
- Substituted cathinones listed in s. 893.03(1)(c)191., F.S.;
- Substituted phenethylamines listed in s. 893.03(1)(c)192., F.S.;
- Any mixture thereof; or
- Any mixture of the salts, isomers, esters, or ethers, and salts of isomers, esters, or ethers thereof.

By adding the new substances to the trafficking in phenethylamines offenses, the new substances become subject to the following mandatory minimum sentences and fines or capital penalties:

Amount	10 <200 grams	200 < 400 grams	400 grams < 30 kilograms	30+ kilograms
Minimum Mandatory Sentence and Fine or Capital Offense	3 years \$50,000	7 years \$100,000	15 years \$250,000	Capital Importation or Manufacture <sup>60</sup>

In addition to amending existing trafficking offenses, the bill creates new trafficking offenses for possession of threshold amounts of certain controlled substances including: fentanyl, synthetic cannabinoids, and n-benzyl phenethylamines.

The bill amends s. 893.135(1)(c)4., F.S., to create the offense of trafficking in fentanyl, for the possession of certain threshold amounts of the following controlled substances and creates penalties as follows:

<sup>55</sup> Phencyclidine is classified as a hallucinogen and goes by the street name “PCP”. DRUG ENFORCEMENT AGENCY DIVERSION CONTROL, *Phencyclidine*, [www.deadiversion.usdoj.gov/drug\\_chem\\_info/pcp.pdf](http://www.deadiversion.usdoj.gov/drug_chem_info/pcp.pdf) (last visited February 24, 2017).

<sup>56</sup> These substances are phencyclidine analogs. See generally Richard R. Laing, HALLUCINOGENS: A FORENSIC DRUG HANDBOOK, 60-62, Jay A. Siegel (2003).

<sup>57</sup> This offense is punishable as provided in ss. 775.082 and 921.142, F.S., and the offender may be ordered to pay a fine up to \$250,000. s. 893.135(6)(d)2., F.S.

<sup>58</sup> This class of controlled substances includes hallucinogenic drugs such as MDMA (Ecstasy), MDA, and MDEA. FLORIDA DEPARTMENT OF LAW ENFORCEMENT, *Drugs Identified in Deceased Persons by Florida Medical Examiners, 2015 Annual Report*, September 2016, at 52, available at <http://www.fdle.state.fl.us/cms/MEC/Publications-and-Forms/Documents/Drugs-in-Deceased-Persons/2015-Annual-Drug-Report.aspx>.

<sup>59</sup> Cathinones are drug “cousins” of phenethylamines and include drugs such as “Molly” and “Flakka”. *Id.*

<sup>60</sup> This offense is punishable as provided in ss. 775.082 and 921.142, F.S., and the offender may be ordered to pay a fine up to \$250,000. s. 893.135(6)(k)2., F.S.

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

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

The bill adds s. 893.135(1)(m), F.S., to create the offense of trafficking in synthetic cannabinoids, for the possession of certain threshold amounts of the following controlled substances and create penalties as follows:

- Approximately 56 controlled substances identified as synthetic cannabinoids;
- Synthetic cannabinoids as described in s. 893.03(1)(c)190., F.S.; or
- Any mixture thereof.

Amount	280 <500 grams	500 < 1,000 grams	1,000 grams < 30 kilograms	30+ kilograms
Minimum Mandatory Sentence and Fine	3 years \$50,000	7 years \$100,000	15 years \$200,000	25 years \$750,000

The bill adds s. 893.135(1)(n), F.S., to create the offense of trafficking in n-benzyl phenethylamines, for the possession of certain threshold amounts of the following controlled substances and create penalties as follows:

- Eleven controlled substances identified as n-benzyl phenethylamines;
- N-benzyl phenethylamine compounds as described in s. 893.03(1)(c)193., F.S.; or
- Any mixture thereof.

Amount	14 <100 grams	100 < 200 grams	200 < 400 grams	400+ grams
Minimum Mandatory Sentence and Fine	3 years \$50,000	7 years \$100,000	15 years \$500,000	Capital Importation or Manufacture

The bill amends s. 921.0022, F.S., the Criminal Punishment Code Offense Severity Ranking chart, to include rankings for the trafficking offenses either amended or created by the bill. The following offenses will be classified as a Level 7 offense:

- Trafficking in phencyclidine, 28 g. or more < 200 g.
- Trafficking in phenethylamines, 10 g. or more < 200 g.
- Trafficking in fentanyl, 4 g. or more < 14 g.
- Trafficking in synthetic cannabinoids, 280 g. or more < 500 g. and 500 g. or more < 1,000 g.
- Trafficking in n-benzyl phenethylamines, 14 g. or more < 100 g.

The following trafficking offenses amended or created by the bill will be classified as Level 8 offenses:

- Trafficking in phencyclidine, 200 g. or more < 400 g.
- Trafficking in phenethylamines, 200 g. or more < 400 g.
- Trafficking in fentanyl, 14 g. or more < 28 g.
- Trafficking in synthetic cannabinoids, 1,000 g. or more < 30 kg.
- Trafficking in n-benzyl phenethylamines, 100 g. or more < 200 g.

The remaining trafficking offenses amended or created by the bill will be classified as Level 9 offenses and include:

- Trafficking in phencyclidine, 400 g. or more
- Trafficking in phenethylamines, 400 g. or more
- Trafficking in fentanyl, 28 g. or more
- Trafficking in synthetic cannabinoids, 30 kg. or more
- Trafficking in n-benzyl phenethylamines, 200 g. or more

#### *Felony Murder by Drug Distribution*

Currently, if a person 18 years of age or older unlawfully distributes certain controlled substances that are later proven to be the proximate cause of the death of a drug user, the distributor commits murder in the first degree, constituting a capital felony. The controlled substances currently included in the felony murder law include:

- Any substance controlled under s. 893.03(1), F.S.;
- Cocaine<sup>61</sup>;
- Opium or any synthetic or natural salt, compound, derivative, or preparation of opium; or
- Methadone.<sup>62</sup>

Florida courts have held that under s. 782.04(1)(a)3., F.S., a defendant does not need to intend an act of homicide, have knowledge of a drug overdose, or be present when it occurs. In order to be guilty of this offense, the defendant need only intend to unlawfully distribute one of the prohibited drugs that results in a death caused by the drug.<sup>63</sup>

#### *Effect of the bill on Felony Murder by Drug Distribution*

The bill amends s. 782.04(1)(a)3., F.S., to add additional controlled substances for which a distributor may be guilty of felony murder if the distribution of the drug results in the death of a user. The bill adds the following fentanyl-related controlled substances:

- Alfentanil;<sup>64</sup>
- Carfentanil;<sup>65</sup>
- Fentanyl;<sup>66</sup>
- Sufentanil;<sup>67</sup>
- Fentanyl derivatives;<sup>68</sup>
- An analog thereto;<sup>69</sup> or
- Any mixture thereof.

A drug distributor who unlawfully distributes any of these Schedule I or II controlled substances will be subject to the provisions of s. 782.04(1)(a)3., F.S., if such distribution causes death, regardless of whether he or she intended such a result.

#### *Emergency Treatment for Suspected Opioid Overdose*

In addition to being deadly to drug users, fentanyl related drugs pose a dangerous threat to first responders and law enforcement, as a lethal dose can be accidentally inhaled or absorbed through the skin.<sup>70</sup> In September 2016, the DEA issued a warning to first responders, medical, treatment, and

<sup>61</sup> As described in s. 893.03(2)(a)4., F.S.

<sup>62</sup> s. 782.04(1)(a)3., F.S.

<sup>63</sup> *Pena v. State*, 829 So. 2d 289, 294 (Fla. 2d 2002), *see also Aumuller v. State*, 944 So. 2d 1137, 1142 (Fla. 2d 2006).

<sup>64</sup> As described in s. 893.03(2)(b)1., F.S.

<sup>65</sup> As described in s. 893.03(2)(b)6., F.S.

<sup>66</sup> As described in s. 893.03(2)(b)9., F.S.

<sup>67</sup> As described in s. 893.03(2)(b)29., F.S.

<sup>68</sup> As described in s. 893.03(1)(a)62., F.S.

<sup>69</sup> As described in s. 893.0356, F.S.

<sup>70</sup> DRUG ENFORCEMENT AGENCY, *DEA Issues Carfentanil Warning to Police and Public*, <http://www.dea.gov/divisions/hq/2016/hq092216.html> (last visited February 23, 2017).

laboratory personnel about the serious danger posed in handling fentanyl and fentanyl related compounds.<sup>71</sup> The agency warned these personnel to take measures to protect themselves from accidental exposure and to immediately administer Naloxone, a drug used to treat opioid overdoses, in the event of exposure.<sup>72</sup>

Currently, Florida law contains an exception to the general requirement to possess a prescription for an emergency opioid antagonist, like Naloxone, to permit the emergency administration of the medication to a person believed to be experiencing an opioid overdose. Section 381.887, F.S., authorizes certain emergency responders to “possess, store, and administer emergency opioid antagonists as clinically indicated.”<sup>73</sup> Section 381.887, F.S., does not currently authorize crime laboratory personnel to possess, store, and administer opioid antagonists.

#### *Effect of the bill on Emergency Treatment for Suspected Opioid Overdose*

The bill amends s. 381.887, F.S., to add certain crime laboratory personnel to the group of persons authorized to possess, store, and administer emergency opioid antagonists as clinically indicated. These crime laboratory personnel include, but are not limited to:

- Analysts;
- Evidence intake personnel; and
- Their supervisors.

Crime laboratory personnel will be authorized to administer the medication without a prescription, allowing them to respond in the event of accidental exposure in the course of their job performance.

#### *Cross-References to the Florida Comprehensive Drug Abuse Prevention and Control Act*

There are two types of statutory cross-references, general and specific. A general reference is a cross-reference to a general body of law, e.g., a reference in a statute to the “Florida Comprehensive Drug Abuse Prevention and Control Act” would be considered a general reference. A specific reference is a cross-reference to a specific section of law, e.g., a reference to s. 893.03, F.S., would be considered a specific reference.

Under case law, a general reference in statute incorporates the referenced law and any subsequent amendments of that law.<sup>74</sup> A specific reference in statute, however, incorporates the referenced statute as it existed at the time the cross-reference was adopted. Such specific reference is unaffected by subsequent amendments to the incorporated statute,<sup>75</sup> unless the specific reference is reenacted by the legislation that amends the incorporated statute.

To avoid the necessity of reenacting specific references to sections within certain chapters of law, the Legislature has codified provisions that allow for all specific references to sections of law within certain chapters to automatically incorporate all subsequent amendments. Such chapters of law include ch. 435, F.S., entitled “Employment Screening,” and ch. 938, F.S., entitled “Court Costs.”<sup>76</sup>

Currently, there are hundreds of specific references to sections contained in ch. 893, F.S. There is no statutory authority allowing such specific references to automatically incorporate subsequent amendments.

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Such emergency responders include: law enforcement officers, paramedics, and emergency medical technicians. s. 381.887(4), F.S.

<sup>74</sup> See *Williams v. State ex rel. Newberger*, 100 Fla. 1567, 125 So. 358 (1930), rev’d on other grounds on rehearing, 100 Fla. 1570, 131 So. 864 (1930); *State ex rel. Springer v. Smith*, 189 So. 2d 846 (Fla. 4th D.C.A. 1966); *Reino v. State*, 352 So. 2d 853 (Fla. 1977).

<sup>75</sup> See *Overstreet v. Blum*, 227 So. 2d 197 (Fla. 1969); *Hecht v. Shaw*, 112 Fla. 762, 151 So. 333 (1933); *Van Pelt v. Hilliard*, 75 Fla. 792, 78 So. 693 (1918); and *State ex rel. Springer v. Smith*, *ibid.*

<sup>76</sup> See ss. 435.01 and 983.31, F.S.

### *Effect of the Bill on Cross-References to the Act*

The bill creates s. 893.015, F.S., to specify that the purpose of ch. 893, F.S., is to comprehensively address drug abuse prevention and control in this state, and, as such, unless expressly provided otherwise, a specific reference to ch. 893, F.S., or any section thereof incorporates all subsequent amendments to ch. 893, F.S., or any section thereof.

The bill provides it shall take effect upon becoming law.

## **B. SECTION DIRECTORY:**

Section 1: Amends s. 381.887, F.S., providing that certain crime laboratory personnel may possess, store, and administer emergency opioid antagonist.

Section 2: Amends s. 782.04, F.S., providing that unlawful distribution of specified controlled substances and analogs or mixtures thereof which proximately cause a death is murder; providing criminal penalties.

Section 3: Creates s. 893.015, F.S., specifying the chapter's purpose; providing that a reference to ch. 893, F.S., or to any section or portion thereof, includes all subsequent amendments.

Section 4: Amends s. 893.03, F.S., adding certain synthetic opioid substitute compounds to the list of Schedule I controlled substances.

Section 5: Amends s. 893.13, F.S., prohibiting possession of more than 10 grams of specified substances; providing criminal penalties.

Section 6: Amends s. 893.135, F.S., revising the substances that constitute the offenses of trafficking in hydrocodone, trafficking in oxycodone, trafficking in phencyclidine and capital importation of phencyclidine, trafficking in phenethylamines and capital importation of phenethylamines; creating the offense of trafficking in fentanyl; creating the offenses of trafficking in n-benzyl phenethylamines and capital manufacture or importation of a n-benzyl phenethylamine compound; providing specified minimum terms of imprisonment and fines based on the quantity involved in the offense.

Section 7: Amends s. 921.0022, F.S., ranking offenses on the offense severity ranking chart of the Criminal Punishment Code; reenacting multiple sections of law to incorporate the amendments made by the bill in cross-references to amended provisions; providing an effective date.

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

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

1. Revenues: This bill does not appear to have an impact on state revenues.
2. Expenditures: The Criminal Justice Impact Conference met on March 2, 2017 and estimates this bill will have a positive significant impact on the Department of Corrections (i.e., an increase of more than 25 prison beds), as the bill creates new felony trafficking offenses and sets minimum mandatory sentencing requirements. Per the Department of Corrections (DOC), in Fiscal Year (FY) 2015-2016, 694 offenders were sentenced for trafficking offenses similar to fentanyl. Of that total, 529 or just over 76 percent were sentenced to prison. The DOC indicates that only one person was arrested for selling fentanyl while two people received an adjudication or an adjudication withheld; however, the agency does not currently track the number of admissions to prison for fentanyl, so that population is unknown.

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

1. Revenues: The bill does not appear to have an impact on local government revenues.

2. Expenditures: The bill does not appear to have an impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: None.

D. FISCAL COMMENTS: None.

### **III. COMMENTS**

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision: The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other: None.

B. RULE-MAKING AUTHORITY: The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS: None.

### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On March 15, 2017, the Criminal Justice Subcommittee adopted a proposed committee substitute and reported the bill favorably as a committee substitute (CS). The CS differs from the bill as filed in that the CS:

- Adds a provision amending s. 381.887, F.S., to authorize crime laboratory personnel to possess, store, and administer emergency opioid antagonist;
- Increases the penalty for unlawful distribution of specified controlled substances that cause the death of a drug user from manslaughter to murder;
- Adds s. 893.015, F.S., to provide that a reference to ch. 893, F.S., or any section thereof, includes all subsequent amendments;
- Reorganizes and replaces the offense of trafficking in synthetic drugs by revising existing offenses related to hydrocodone, oxycodone, phencyclidine, and phenethylamines and creating offenses relating to fentanyl, synthetic cannabinoids, and n-benzyl phenethylamines;
- Revises ranking of offenses on the offense severity ranking chart.

This analysis is drafted to the CS as passed by the Criminal Justice Subcommittee.