

HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: CS/CS/HB 365 Controlled Substances
SPONSOR(S): Judiciary Committee and Criminal Justice Subcommittee, Plakon and others
TIED BILLS: IDEN./SIM. **BILLS:** CS/CS/CS/SB 280

FINAL HOUSE FLOOR ACTION: 85 Y's 28 N's **GOVERNOR'S ACTION:** Pending

SUMMARY ANALYSIS

CS/CS/HB 365 passed the House on April 26, 2023, and subsequently passed the Senate on May 2, 2023.

In 1972, facing an increase in illicit heroin use, Florida criminalized the unlawful distribution of a controlled substance (heroin) causing death as first degree murder. Under s. 782.04(1)(a)3., F.S., a person 18 years of age or older who unlawfully distributes specified controlled substances commits first degree murder by causing the death of a victim by the unlawful distribution of a controlled substance if the proximate cause of his or her death was the use of such controlled substance. A defendant's conduct is the proximate cause of another's death if the conduct was the primary or moving cause of the death, the death would not have occurred but for the defendant's conduct, and the death was a natural and reasonably anticipated consequence of the defendant's conduct. Prosecutors have reported difficulty in prosecuting such cases under the proximate cause standard where a victim has multiple controlled substances or alcohol in his or her system. In these cases, a medical examiner may not be able to determine the primary or moving cause of a victim's death and may be unable to determine a victim's death would not have occurred but for ingestion of one of the enumerated controlled substances.

The bill amends s. 782.04(1)(a)3., F.S., to revise the causation standard for death caused by the unlawful distribution of a controlled substance to require that such distribution is proven to "have caused, or is proven to have been a substantial factor in producing the death of the user." "Substantial factor" is defined to mean the "use of the substance or mixture alone is sufficient to cause death, regardless of whether any other substance or mixture used is also sufficient to cause death."

The bill creates s. 893.131, F.S., to prohibit a person 18 years of age or older from distributing heroin, alfentanil, carfentanil, fentanyl, sufentanil, fentanyl derivatives, or an analog or mixture containing such substances, when such substances cause or are a substantial factor in causing an overdose or serious bodily injury to the user. A person commits a violation regardless of whether the distribution is made directly or indirectly through another person to the person who overdosed or suffered serious bodily injury. A violation is punishable as a second degree felony. A second or subsequent conviction is punishable as a first degree felony.

The administration of medical care, including the administration of an emergency opioid antagonist, by an emergency responder, including, but not limited to, a law enforcement officer, a paramedic, or an emergency medical technician is prima facie evidence that the person receiving medical care experienced an overdose or serious bodily injury.

The bill amends s. 921.0022(3)(f), F.S., to rank the offense of distributing a controlled substance that results in an overdose or serious bodily injury, a second degree felony, as a Level 6 offense on the offense severity ranking chart. The enhanced penalty for a second conviction for distributing a controlled substance that results in an overdose or serious bodily injury which is a first degree felony is unranked, and as such, the first degree felony defaults to a Level 7 offense.

The bill may have a positive indeterminate impact on prison beds by revising the causation standard for death caused by the unlawful distribution of a controlled substance and creating new felony offenses for distribution of a controlled substance that results in an overdose or serious bodily injury.

Subject to the Governor's veto powers, the effective date of this bill is July 1, 2023.

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 substances¹ 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”² of the substance and whether there is a currently accepted medical use for the substance.³

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.⁴
- 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.⁵
- 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.⁶
- 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.⁷
- 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.⁸

Federal Law

The Federal Controlled Substances Act⁹ 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:¹⁰

- 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;

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

² “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.

³ See s. 893.03, F.S.

⁴ S. 893.03(1), F.S.

⁵ S. 893.03(2), F.S.

⁶ S. 893.03(3), F.S.

⁷ S. 893.03(4), F.S.

⁸ S. 893.03(5), F.S.

⁹ 21 U.S.C. § 812.

¹⁰ 21 U.S.C. § 811(c).

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

Death Caused by the Unlawful Distribution of a Controlled Substance

Murder

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

- A substance controlled under s. 893.03(1), F.S.;¹¹
- 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.;
- Methamphetamine, as described in s. 893.03(2)(c)5.; or
- A controlled substance analog¹² of any of the substances specified above.

First degree murder is a capital felony¹³, punishable by a sentence of death or life imprisonment without the possibility of parole.¹⁴

A person commits third degree murder if he or she unlawfully kills a human being, without any design to effect death, while perpetrating or attempting to perpetrate any felony *other* than a felony listed in s. 782.04(4), F.S.¹⁵ One of the felonies listed is death caused by the unlawful distribution of any controlled substance listed in s. 782.04(1)(a)3.a.-j., F.S.¹⁶ As such, a person who causes another's death by distributing one of these controlled substances cannot be prosecuted for third degree murder because he or she can already be prosecuted for first degree murder under s. 782.04(1)(a)3., F.S.

Causation Standard

Under the Florida Standard Jury Instructions for death caused by unlawful distribution of a controlled substance, "[a] defendant's conduct is the proximate cause of another's death if the conduct was the primary or moving cause of the death; the death would not have occurred but for the defendant's conduct; and the death was a natural and reasonably anticipated consequence of the defendant's conduct."¹⁷ Prosecutors have reported difficulty in prosecuting cases under the proximate cause standard where a victim has multiple controlled substances or alcohol in his or her system. In these cases, a medical examiner may not be able to determine the primary or moving cause of a victim's

¹¹ Section 893.03(1), F.S., contains Schedule I controlled substances.

¹² 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, F.S.; and
- Has a stimulant, depressant, or hallucinogenic effect on the central nervous system or is represented or intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than that of a controlled substance listed in Schedule I or Schedule II of s. 893.03, F.S. S. 893.0356(2)(a), F.S.

¹³ S. 782.04(1)(a), F.S.

¹⁴ S. 775.082(1)(a), F.S.

¹⁵ S. 782.04(4), F.S.

¹⁶ S. 782.04(4)(l), F.S.

¹⁷ Fla. Std. Jury Instr. (Crim.) 7.3(a). See also *Aumuller v. State*, 944 So.2d 1137 (Fla. 2d DCA 2006).

death and may be unable to determine that a victim's death would not have occurred but for ingestion of one of the enumerated controlled substances.¹⁸ In circumstances where a medical examiner is unable to provide a definitive opinion that one of the enumerated substances was the proximate cause of a victim's death, prosecution under the current law is virtually impossible.

Sale of a Controlled Substance

Section 893.13, F.S., prohibits a person from selling, manufacturing¹⁹, or delivering²⁰ 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 felony²¹ or third degree felony.²² Under current law, selling, manufacturing, or delivering heroin, alfentanil, carfentanil, fentanyl, sufentanil, fentanyl derivatives, or an analog or mixture of such substances is punishable as a second degree felony.

Medical Assistance for Overdose - Immunity from Arrest and Prosecution

Section 893.21, F.S., prohibits a person from being arrested, charged, prosecuted, or penalized for committing the offense of possession of drug paraphernalia under s. 893.147(1), F.S., or possession of a controlled substance under s. 893.13(6), F.S.,²³ if the evidence that a person committed such an offense was obtained as a result of such person seeking medical assistance for himself or herself or another person arising from a good faith belief that he or she was experiencing, or another person was experiencing, an alcohol-related or drug-related overdose.

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.²⁴ If an offense is unranked, the CPC specifies a default level on the OSRC depending on the felony degree of the offense.²⁵

Effect of the Bill

¹⁸ Letter from Daniel E. Faggard, Assistant State Attorney, Eighteenth Judicial Circuit, HB 325, Re: Substantial Factor Test (Feb. 5, 2021).

¹⁹ "Manufacture" means the production, preparation, propagation, compounding, cultivating, growing, conversion, or processing of a controlled substance, either directly or indirectly, by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging of the substance or labeling or relabeling of its container, except that this term does not include the preparation, compounding, packaging, or labeling of a controlled substance by:

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

²⁰ "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.

²¹ 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.

²² 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.

²³ Section 893.13(6)(c), F.S., prohibits a person from possessing more than 10 grams of specified Schedule I or Schedule II controlled substances or any combination or mixture thereof, a violation of which is punishable as a first degree felony. The prohibition against prosecution in s. 893.21, F.S., does not apply to a person who possesses more than 10 grams of such specified controlled substances.

²⁴ S. 921.0022, F.S.

²⁵ S. 921.0023, F.S.

Death Caused by the Unlawful Distribution of a Controlled Substance

Murder

The bill amends s. 782.04(1)(a)3., F.S., to revise the causation standard for death caused by the unlawful distribution of a controlled substance to require that such distribution is proven to “have caused, or is proven to have been a substantial factor in producing the death of the user.” “Substantial factor” is defined to mean the “use of the substance or mixture alone is sufficient to cause death, regardless of whether any other substance or mixture used is also sufficient to cause death.” Revising the causation standard simplifies the prosecution of such cases by requiring a prosecutor to prove only that a victim had a lethal amount of an enumerated controlled substance in his or her system. This eliminates the current requirement that a prosecutor prove such a substance caused a victim’s death to the exclusion of other possible combinations of controlled substances or alcohol.

The bill amends s. 782.04(4)(l), F.S., third degree murder by unlawful drug distribution, to conform with the revisions to the causation standard for first degree murder made by the bill.

Sale of a Controlled Substance

The bill creates s. 893.131, F.S., to prohibit a person 18 years of age or older from distributing heroin, alfentanil, carfentanil, fentanyl, sufentanil, fentanyl derivatives, or an analog or mixture containing such substances, when such substances are a substantial factor in causing an overdose or serious bodily injury to the user. A person commits a violation regardless of whether the distribution is made directly or indirectly through another person to the person who overdosed or suffered serious bodily injury. A violation is punishable as a second degree felony and a second or subsequent conviction is punishable as a first degree felony.²⁶

The administration of medical care, including the administration of an emergency opioid antagonist, by an emergency responder, including, but not limited to, a law enforcement officer, a paramedic, or an emergency medical technician is prima facie evidence that the person receiving medical care experienced an overdose or serious bodily injury.

Under the bill, a person who experiences, or has a good faith belief that he or she is experiencing, an alcohol-related or a drug-related overdose and receives medical assistance, or a person acting in good faith who seeks medical assistance for an individual experiencing, or believed to be experiencing, an alcohol-related or drug-related overdose, is afforded the protections provided in s. 893.21, F.S., and thus may not be arrested or prosecuted for possession of drug paraphernalia or possession of a controlled substance.

The bill defines the following terms:

- “Distribute” is defined in accordance with s. 893.02, F.S., to mean to deliver, other than by administering or dispensing, a controlled substance, and includes the direct or indirect delivery of a controlled substance.
- “Emergency opioid antagonist” is defined in accordance with s. 381.887, 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.
- “Overdose or serious bodily injury” means drug toxicity or a physical condition that creates a substantial risk of death or substantial loss or impairment of the function of any bodily member or organ.
- “Medical care” means the administration of treatment for the purposes of preserving or sustaining life or the administration of an emergency opioid antagonist.

²⁶ 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.

- “Substantial factor” means that the use of a substance or mixture alone is sufficient to cause an overdose or serious bodily injury, regardless of whether any other substance or mixture used is also sufficient to cause an overdose or serious bodily injury.

The bill amends s. 921.0022(3)(f), F.S., to rank the offense of distributing a controlled substance that results in an overdose or serious bodily injury, a second degree felony, as a Level 6 offense on the OSRC. The bill does not rank the enhanced penalty for a second or subsequent conviction for distributing a controlled substance that results in an overdose or serious bodily injury which is a first degree felony. As such, the first degree felony defaults to a Level 7 offense on the OSRC.

Subject to the Governor’s veto powers, the effective date of this bill is July 1, 2023.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill may have a positive indeterminate impact on prison beds by revising the causation standard for death caused by the unlawful distribution of a controlled substance and creating new felony offenses for distribution of a controlled substance that results in an overdose or serious bodily injury.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.