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Committee on Criminal Justice

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## A POLICY ANALYSIS OF MINIMUM MANDATORY SENTENCING FOR DRUG TRAFFICKERS

### Issue Description

Section 893.135, F.S., punishes trafficking in certain controlled substances. Drug trafficking has historically been a matter of concern to the Legislature because of the prevalence of drug trafficking activity in Florida and Florida's geographical proximity to countries in which major drug trafficking organizations operate. In part, the Legislature's response to this concern has been to require "minimum mandatory" terms of imprisonment (abbreviated in this report as 'mandatory' or 'mandatories') for drug trafficking offenses in s. 893.135, F.S.<sup>1</sup> A mandatory provides for a minimum prison sentence but generally does not permit a sentence below the minimum. Many arguments have been raised for and against mandatories. This report presents some of these arguments and provides several options for sentencing offenders convicted of drug trafficking.

### Background

#### Florida's drug trafficking statute

According to the U.S. Drug Enforcement Administration, "[b]y the mid-1970s, Miami had become the drug capital of the Western Hemisphere because of its geography and cooperative international banks. Within a short time, South Florida was overwhelmed by violent cocaine and marijuana traffickers from Latin America."<sup>2</sup> In 1979, news reports described a "cocaine war" in Miami between rival Columbian cocaine traffickers. One incident in 1979 involving execution-style 'hits' with automatic weapons at the Dadeland Mall in Kendall, Florida, became "national news, introducing 'cocaine cowboys' into the language. More than any other single incident, it shaped a Wild West image of Miami that would later surface on *Miami Vice* and in innumerable national magazine stories."<sup>3</sup> It is in this milieu that the Legislature, in 1979, created s. 893.13, F.S.<sup>4</sup>

Section 893.135, F.S., has always applied to a select number of controlled substances. Cocaine appears to have been the predominant concern of legislators when the statute was enacted,<sup>5</sup> though the statute included several other controlled substances.<sup>6</sup> Subsequently, additional controlled substances were added.<sup>7</sup> The trafficking offenses

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<sup>1</sup> Although outside the scope of this report, there are mandatories for some other drug offenses in ch. 893, F.S.: selling, etc., certain controlled substances within 1,000 feet of the real property of schools and certain other places (s. 893.13(1)(c), F.S.); and manufacturing methamphetamine or phencyclidine, or possessing certain chemicals for such manufacturing, within a structure or conveyance where a child under 16 years of age is present or that causes great bodily harm to such child (s. 893.13(1)(g), F.S.).

<sup>2</sup> DEA History Book, 1975-1980 (<http://www.usdoj.gov/dea/pubs/history/1975-1980.html>).

<sup>3</sup> Guy Gugliotta and Jeff Leen. *Kings of Cocaine* (New York: Simon and Schuster 1989), p. 15.

<sup>4</sup> Ch. 79-1, L.O.F.

<sup>5</sup> When 'crack' cocaine emerged in the 1980s, Florida did not punish 'crack' cocaine differently than powdered cocaine as some states and Congress did. Section 893.135, F.S., has never made any weight/penalty distinctions between 'crack' cocaine and powdered cocaine.

<sup>6</sup> The other substances were cannabis, heroin, morphine, and opium.

<sup>7</sup> The following substances were added: phencyclidine (PCP) and methaqualone (quaaludes) (ch. 80-70, L.O.F.); amphetamine and methamphetamine (ch. 89-281, L.O.F.); hydrocodone, oxycodone, and hydromorphone (ch. 95-415, L.O.F.); flunitrazepam (roofies) (ch. 97-1, L.O.F.); 3,4-Methylenedioxymethamphetamine (MDMA or ecstasy), gamma-hydroxybutyric acid (GHB), and 1,4-Butanediol (ch. 2000-320, L.O.F.); substances other than MDMA listed under the "trafficking in Phenethylamines" provision (chs. 2000-320 and 2001-57, L.O.F.); gamma-butyrolactone (GBL) and lysergic acid diethylamide (LSD) (ch. 2001-57, L.O.F.); and any mixture containing certain substances in conjunction with other

involve the possession, purchase, sale, manufacture, delivery, or importation into Florida of certain controlled substances within specified weight ranges.<sup>8</sup> A notable (and controversial) feature of s. 893.13, F.S., is that prosecutors are only required to prove knowing possession, not possession with intent to sell, etc.

There is a minimum weight threshold for trafficking in each controlled substance specified in s. 893.135, F.S. There are also escalating weight ranges. The mandatory term and fine to be imposed are determined by the weight range applicable to the quantity of the controlled substance possessed, sold, etc. For example, possession of less than 28 grams<sup>9</sup> of cocaine is not a trafficking offense (28 grams is the minimum weight threshold for cocaine trafficking). Typically, there are 3 or 4 trafficking offenses with escalating weight ranges and mandatory sentences and fines. For example, the mandatory penalties for some cocaine trafficking offenses are: a 3-year mandatory and \$50,000 fine for 28 grams or more, but less than 200 grams; a 7-year mandatory and \$100,000 fine for 200 grams or more, but less than 400 grams; and a 15-year mandatory and \$250,000 fine for 400 grams or more. If the controlled substance appears in a mixture, the mixture is weighed and treated as the weight of the controlled substance. For example, “street cocaine” is frequently adulterated (cut) with other agents, which increases the quantity of cocaine available for sale and the seller’s profits. In the case of painkillers for which trafficking is proscribed, like hydrocodone, the weight of the tablets/pills containing the hydrocodone, etc., is the total weight of a tablet/pill (which includes everything that makes up the tablet/pill) multiplied by the number of tablets/pills possessed.<sup>10</sup>

Convictions for a violation of s. 893.135, F.S., are almost always the result of a plea rather than a trial.<sup>11</sup> Although a prosecutor may charge a trafficking offense, the case may be dropped or the original trafficking charge may be dropped or dropped in exchange for a plea to a trafficking charge with a lesser mandatory, a non-mandatory drug charge (attempted trafficking<sup>12</sup> or some other non-mandatory drug charge), or another non-mandatory charge.

The Criminal Punishment Code (Code)<sup>13</sup> is Florida’s framework or mechanism for determining permissible sentencing ranges for noncapital felonies. Non-capital felonies sentenced under the Code receive an offense severity level ranking (Levels 1-10). Points are assigned and accrue based upon the level assigned (sentence points escalate as the level escalates). Level rankings are assigned to the primary offense, additional offenses, and prior offenses. Typically, trafficking offenses are first degree felonies<sup>14</sup> but levels assigned to these trafficking offenses vary depending on the offense. For example, trafficking in 28 grams or more, but less than 200 grams of cocaine is a Level 7 offense; trafficking in 200 grams or more, but less than 400 grams of cocaine is a Level 8 offense. Points may also be assigned and accrue for other factors. Additionally, the Code authorizes the sentencing court to multiply subtotal sentence points by 1.5 for a Level 7 or Level 8 trafficking primary offense.

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chemicals and equipment utilized in the manufacture of amphetamine or methamphetamine (chs. 89-281 and 2005-128, L.O.F.).

<sup>8</sup> There are capital felony provisions in s. 893.135, F.S., but these provisions are not discussed in this report as it appears likely that prosecutions for these offenses are rare relative to prosecutions for other trafficking offenses.

<sup>9</sup> As a point of comparison, the approximate weight of a U.S. currency note, regardless of denomination, is one gram (<http://www.bep.treas.gov/document.cfm/18/106>).

<sup>10</sup> Hydrocodone is generally a Schedule II controlled substance but is a Schedule III controlled substance in relatively minute quantities as specified in s. 893.03(3)(c)3. and 4., F.S. However, hydrocodone, regardless of scheduling, is weighed as a mixture as specified in s. 893.135(6), F.S. *Id.*

<sup>11</sup> According to case data received on September 11, 2009, from the Office of the State Courts Administrator (OSCA), for FY 2007-08, 6,050 cases were filed under s. 893.135, F.S., even if ultimately disposed of under a different statute. There were 2,877 cases that resulted in a conviction for a violation of s. 893.135, F.S., of which 2,796 involved before-trial pleas. There were 101 jury trials and 4 non-jury trials. (Note: Counts do not include cases from the following counties: DeSoto, Duval, Flagler, Nassau, Osceola, St. Lucie, Seminole, and Suwannee. These counties do not provide data to OSCA’s Criminal Transaction System. For cases involving multiple charges meeting the selection criteria, the charge defining the most serious disposition was selected for counting. Conviction and trial counts include all cases disposed of under s. 893.135, F.S., including cases that may have been filed under a different statute. After-trial counts include cases disposed of by jury and non-jury trials.)

<sup>12</sup> Attempted trafficking does not call for a mandatory sentence, though conspiracy to traffic does. ss. 777.04 and 893.135(5), F.S. See *Suarez v. State*, 635 So. 2d 154 (Fla. 2d DCA 1994) and *Chudeausz v. State*, 508 So.2d 418 (Fla. 5th DCA 1987).

<sup>13</sup> Sections 921.002 - 921.0027, F.S. All information in this report regarding details or provisions of the Code comes from ss. 921.0022, 921.0023, 921.0024, 921.0026, or 921.00265, F.S., unless otherwise indicated.

<sup>14</sup> The maximum penalty for a first degree felony is generally 30 years in state prison. s. 775.082(3)(b), F.S.

Total sentence points are entered into a mathematical calculation to determine the lowest permissible sentence. The permissible sentencing range is generally the lowest permissible sentence scored up to and including the maximum penalty provided under s. 775.082, F.S., for the primary offense and any additional offenses before the court for sentencing. The court is permitted to impose sentences concurrently or consecutively. The Code requires a mandatory to be imposed, unless the lowest permissible sentence scored is greater than the mandatory.<sup>15</sup>

The Code includes a list of ‘mitigating’ factors. If a mitigating factor is found by the sentencing court, the court may decrease an offender’s sentence below the lowest permissible sentence. A mandatory is not subject to these mitigating factors.<sup>16</sup> Florida law authorizes a sentence below the mandatory in two instances: the defendant is sentenced as a youthful offender;<sup>17</sup> or the primary offense is a Level 7 or Level 8 trafficking offense and the judge approves the State’s motion to reduce or suspend the defendant’s sentence based upon the defendant providing substantial assistance.<sup>18</sup>

### **The policy debate over minimum mandatory sentencing for drug trafficking**

Perhaps the most notable feature of a mandatory is that it generally curtails judicial discretion to impose a sentence below the mandatory. The ‘Findings’ section of this report discusses some of the arguments raised for and against mandatories, including this limitation on judicial discretion. The ‘Findings’ section also discusses two concerns that have been raised about trafficking in certain painkillers, like hydrocodone. The first concern is that unlawful possession or purchase of relatively small numbers of tablets/pills containing these substances may result in trafficking penalties, including mandatories. The second concern is that there is the potential for trafficking penalties to be applied to unlawful possession or purchase of these substances by chronic pain management patients (a concern that received significant attention because of the Richard Paey case, which is discussed in this report).

Typically, prosecutors prefer trafficking mandatories and public defenders and judges do not prefer them. Responses to a survey of prosecutors and defenders prepared as background information for this report generally followed this typical division. However, concerns about mandatories were raised by some prosecutors. Two prosecutors’ offices indicated some concern about the trafficking provision relating to painkillers. One prosecutor’s office indicated that the “threshold amount for some mandatories is comparatively small” and also indicated that “the application of mandatories based on presumptive trafficking because of the amount involved rather than evidence of actual dealing can pose ethical concerns.”<sup>19</sup>

### **Responses of state legislatures to drug trafficking**

Depending upon the state, legislatures may or may not support mandatories. Current s. 893.135, F.S., requires mandatory sentencing. Mandatory penalties for drug trafficking offenses are not uniform across the states that use them. For example, in Florida, trafficking in 2000 pounds of cannabis has a 7-year mandatory;<sup>20</sup> in Nevada, trafficking in 2,000 pounds of cannabis has a 2-year mandatory.<sup>21</sup> Another sentencing option used by some states is sentencing trafficking offenses under the state’s sentencing guidelines or sentencing code. Adopting this

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<sup>15</sup> A trafficking mandatory is a minimum sentencing ‘floor’ for the court and there is no prohibition to gain-time. If the court only sentences the defendant to the mandatory term specified by statute, the Department of Corrections (DOC) establishes a 85% minimum service date on the term and the offender is subject to s. 944.275(4)(b)3., F.S., which does not allow release prior to serving a minimum of 85% of the sentence. If the court imposes a sentence that exceeds the mandatory term specified by statute, the department establishes an 85% minimum service date on the sentence. Information received on August 27, 2009, from DOC. See *Mastay v. McDonough*, 928 So.2d 512 (Fla. 1st DCA 2006) (Section 893.135, F.S., does not preclude earning gain-time during the mandatory term as long as it does not result in the prisoner’s release prior to serving a minimum of 85% of the sentence).

<sup>16</sup> See e.g., *State v. Vanderhoff*, --- So.3d ----, 2009 WL 1703267 (Fla. 5th DCA 2009).

<sup>17</sup> Section 958.04, F.S. See *State v. Dishman*, 5 So.3d 773 (Fla. 4th DCA 2009) and *Inman v. State*, 842 So.2d 862 (Fla. 2d DCA 2003).

<sup>18</sup> Section 893.135(4), F.S. This mitigation cannot occur without the State’s motion. *State v. Agerton*, 523 So.2d 1241 (Fla. 5th DCA 1988), *rev. den.*, 531 So.2d 1352 (Fla.1988).

<sup>19</sup> Responses to *Senate Committee Survey on Drug Trafficking Mandatory Minimum Terms* (on file with the Committee).

<sup>20</sup> s. 893.135(1)(a)2., F.S.

<sup>21</sup> NRS § 453.339(1)(b).

approach may necessitate the repeal or partial repeal of previously adopted mandatories. From 1993 until 1999, Florida used this sentencing option. Mandatories for trafficking were repealed for lower-level trafficking offenses, but retained for higher-level trafficking offenses.<sup>22</sup> Michigan followed this same sentencing option when it repealed mandatories for Schedule 1 and 2 narcotics and cocaine and placed revised penalties in the corresponding section of its sentencing guidelines.<sup>23</sup> A further sentencing option is to make mandatories ‘presumptive,’ which means that courts can sentence below the mandatory if certain criteria are met. Connecticut is an example of a state that uses presumptive mandatories.<sup>24</sup>

## Findings and/or Conclusions

### The policy debate: Identifying some arguments in support of and against mandatory sentencing for drug trafficking

This report identifies some of arguments that have been raised for (pro) and against (con) mandatories for drug trafficking, based upon a review of the available sentencing literature. This report provides findings relevant to these arguments. Some of these arguments are framed in terms that do not appear to permit exceptions. Findings regarding these arguments can seldom be framed in such absolute terms. Further, some arguments identified as being raised by proponents of mandatories could conceivably be raised by opponents of mandatories, and vice versa. The identification of an argument with one side of the debate is based upon a judgment that that side is more likely to raise the argument, and is not intended to indicate that the argument is only representative of a proponent’s or opponent’s position.

*Pro: Mandatories provide for certainty in sentencing.* Drug trafficking mandatories are ‘certain’ to the extent they are imposed. However, they are clearly not imposed in a significant number of cases. Notably, for FY 2007-08, there were 1,034 supervision (probation, etc.) admissions with a trafficking primary offense.<sup>25</sup> Some of these supervision admissions may be cases in which an originally charged trafficking offense was dropped in exchange for a plea to attempted trafficking, which does not carry a mandatory. Other cases may involve a sentence reduction below the mandatory on the basis of substantial assistance rendered.

*Pro: Mandatories address sentencing disparities that may arise in similar fact cases by controlling sentencing discretion.* If the same mandatory is imposed in two similar fact cases, this only ensures that both receive a prison sentence that is at least as long as the mandatory. *Dissimilar fact cases may also be subject to the same mandatory.* Imposing a mandatory in similar fact cases or dissimilar fact cases does not require uniformity in actual sentence length. For example, the facts of a case in one judicial circuit may be similar to the facts of a case in another judicial circuit, but the judge in one circuit may only impose the mandatory while the judge in the other circuit may impose a greater sentence in which the mandatory is subsumed. Further, similar fact cases may not necessarily reach the judge for imposition of the mandatory. For example, two similar fact cases may involve a trafficking charge. In both cases the prosecutor may offer to drop the trafficking charge in exchange for a plea to a non-mandatory drug charge. The defendant in one case may take the plea while the defendant in the other case may not.

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<sup>22</sup> Most mandatories were repealed in 1993. ch. 93-406, L.O.F. Phencyclidine was an exception. Mandatories for this drug, except for the most serious trafficking offense, were removed in 1995. ch. 95-184, L.O.F. Mandatories reappeared as a result of ch. 99-188, L.O.F., but were reenacted in 2002 (ch. 2002-212, L.O.F.) in reaction to the holding in *Taylor v. State*, 818 So.2d 544 (Fla. 2d DCA 2002) (finding that ch. 99-188, L.O.F., violated the “single subject” rule), which was subsequently disapproved by the Florida Supreme Court in *Franklin v. State*, 887 So.2d 1063 (Fla.2004).

<sup>23</sup> Acts 665, 666, and 670, Michigan Public Acts of 2002. See Second Analysis of Acts 665, 666, and 670, Michigan Public Acts of 2002 (February 18, 2003), House Legislative Analysis Section, Michigan House of Representatives.

<sup>24</sup> C.G.S.A. § 21a-283a.

<sup>25</sup> Admissions data and information received on August 31, 2009, and September 1, 2009, from the Office of Economic and Demographic Research (EDR), The Florida Legislature (data prepared August 2009). Source: DOC’s Annual Report (various years). (Note: data exclude post-prison release supervision admissions.) For FY 2007-08, total supervision admissions increased by just 0.1% over the prior fiscal year, but supervision admissions with a trafficking primary offense increased by 28%. *Id.*

*Pro: Drug trafficking offenses warrant mandatory sentencing.* Of relevance to this report is the question of whether the Legislature believes trafficking mandatories are warranted. Certainly, since 1999, the Legislature has approved mandatories, or has not been persuaded to repeal them. The 1979 legislation creating s. 893.135, F.S., and the 1999 legislation that restored previously-repealed mandatories for some trafficking offenses, do not articulate why the Legislature endorsed mandatories. There is an extensive preamble to the 1999 legislation. It never specifically mentions drug trafficking but rather makes a number of findings regarding the need to incarcerate violent and repeat felons. One of the findings may suggest a reason for the trafficking mandatories: “[S]tudies such as the recent report issued by the National Center for Policy Analysis, ‘Does punishment deter?’, indicate that recent crime rates have declined because of the increasing number of incarcerated felons....”<sup>26</sup>

*Pro: Mandatories may deter those convicted of drug trafficking and others from committing future trafficking crimes.* It is uncertain if mandatories have a deterrent value beyond the incapacitation of those serving them. For example, prison admissions data indicate both declines and increases in prison admissions for trafficking, and arrest data indicate increases in arrest events for trafficking. However, data do not indicate whether or to what extent mandatories have impacted such declines or increases. For FY 2003-04 through FY 2007-08, prison admissions for trafficking generally increased (the exception was FY 2004-05).<sup>27</sup> For FY 2004-05 through FY 2008-09, there was a 36 percent increase in drug trafficking arrests.<sup>28</sup>

*Pro: Mandatories send a message to the public that the Legislature is seriously concerned about drug trafficking and intends to punish drug traffickers.* Even if the Legislature sent this message when it enacted mandatories, this does not necessarily mean that mandatories were enacted solely because of this concern and intent to punish. There is no reason to believe that the Legislature from 1993 to 1999 (the period in which mandatories existed only for the most serious trafficking offenses) was any less concerned about drug trafficking or any less intent on punishing drug traffickers. However, during this period the Legislature was faced with early release of prisoners due to prison bed space limitations, a problem that mandatories would have exacerbated. During this same period the Legislature, through a commitment to building more prison beds and other measures, worked to address this problem. By the time previously-repealed mandatories reappeared in 1999 the Legislature had sufficient prison bed space to accommodate those subject to the mandatories, even with a requirement that offenders serve at least 85 percent of their sentences.<sup>29</sup>

*Pro: Mandatories make it more likely that a conviction will be obtained, whether for drug trafficking or a non-mandatory drug charge.* It is plausible that a plea to a trafficking charge with a reduced sentence in exchange for substantial assistance rendered would be more readily accepted by a defendant who knows that the probable outcome of not accepting the plea is a mandatory prison sentence. Further, in cases not involving substantial assistance, it is plausible that a mandatory provides a greater incentive for a defendant to “play ball” and accept an offer to plea to a non-mandatory drug charge.<sup>30</sup>

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<sup>26</sup> Preamble to ch. 99-188, L.O.F.

<sup>27</sup> As a comparison, in FY 2003-04, there were 1,471 prison admissions; in FY 2007-08, there 1,877 prison admissions. Admissions data and information received on August 31, 2009, from EDR (data prepared August 2009). Source: DOC’s Annual Report (various years).

<sup>28</sup> As a comparison, in FY 2004-05, there were 3,990 arrest events; in FY 2008-09, there were 5,441 arrest events. Arrest event data and information received on August 24, 2009, and September 15, 2009, from the Florida Department of Law Enforcement (FDLE). An arrest event may consist of more than one arrest charge at the time of booking. “Florida Statute” is an optional field in Florida’s Computerized Criminal History (CCH). As such, 24% of arrest charges for this time period are missing. The CCH is fingerprint-based and, unless prints were taken at a later stage in the criminal justice process, does not include records involving a notice to appear, direct files, or sworn complaints where no physical arrest was made. Sealed and expunged information is also not included. The CCH data reflect information available on August 15, 2009. FDLE does not warrant that the records provided are comprehensive or accurate as of the date they are provided, but only that they contain information received by FDLE from contributing agencies, and that any errors or omissions brought to FDLE’s attention are investigated and, as needed, corrected.

<sup>29</sup> For an extensive discussion of early release, see Chet Kaufman, *A Folly of Criminal Justice Policy-Making: The Rise and Demise of Early Release in Florida, and Its Ex Post Facto Implications*, 26 *Fla. St. U. L. Rev.* 361 (Winter 1999).

<sup>30</sup> For example, a defendant may be reluctant to plea to attempted trafficking, even though this offense does not involve a mandatory, because attempted trafficking does not even require the existence of the relevant controlled substance. See *Campbell v. State*, 935 So.2d 614 (Fla. 3d DCA 2006).

*Pro: Mandatories aid prosecutors in persuading some offenders to provide information or testify against drug traffickers.* Mandatories may provide such aid to prosecutors, but the repeal of mandatories would not mean that offenders would cease providing information or testifying against drug traffickers. The “substantial assistance” provision was part of s. 893.135, F.S., when the Legislature repealed mandatories for most trafficking offenses. The possibility of a reduction or suspension of sentence is a significant incentive to provide information or testify, regardless of whether mandatories are provided.

*Con: Under mandatory sentencing, the crime, not the individual, is sentenced.* The mandatory rather than the particular facts of the case may be the determinative factor for the sentence imposed in some cases, but it is not possible to determine in which cases or in how many cases this is true. There is no record compiled in every case in which a mandatory is imposed that indicates whether the judge would have preferred a lesser sentence based upon the facts of the case. Further, in some cases the sentence exceeds the mandatory, which means the mandatory is not the determinative factor for the sentence imposed.

*Con: Mandatories prevent judges from considering the individual circumstances of each case, including the defendant’s culpability.* This is true in cases in which the judge believes the facts of the case warrant a sentence below the mandatory and such sentence would be permitted under the Code but for the mandatory.<sup>31</sup> This limitation on judicial discretion may contravene or be an exception to one of the Code’s principles, which promotes sentencing of the primary offense that is commensurate with the circumstances surrounding that offense: “The penalty imposed is commensurate with the severity of the primary offense *and the circumstances surrounding the primary offense.*”<sup>32</sup> Repeal of mandatories does not mean unfettered judicial discretion in the sentencing decision. Judges do not determine the lowest permissible sentence scored under the Code, which may be a prison sentence, and circumstances for mitigating the lowest permissible sentence are limited.<sup>33</sup>

Data on the inmate population as of September 4, 2009, may suggest that limitations on judicial discretion as a result of mandatories affect sentence length for some cases involving lower-level trafficking offenses, though such data do not indicate how many inmates received a trafficking mandatory or how many received a greater sentence. Data indicate that inmates who have a trafficking offense (as the primary offense or an additional offense) for which a 3-year mandatory is provided by statute have an average sentence of 6 years. If the trafficking offense provides for a 7-year mandatory, the inmates’ average sentence is 9 years. If the trafficking offense provides for a 15-year mandatory, the inmates’ average sentence is 12 years. If the trafficking offense provides for a 25-year mandatory, the inmates’ average sentence is 11.1 years. This pattern generally holds regardless of the number of trafficking offenses.<sup>34</sup>

*Con: The judge is removed from the mandatory sentencing decision, which magnifies the importance of the prosecutor’s charging decision.*<sup>35</sup> With or without trafficking mandatories, “the discretion of a prosecutor in deciding whether and how to prosecute is absolute in our system of criminal justice.”<sup>36</sup> However, without a mandatory and depending upon the offenses for which the offender was convicted and the circumstances of the case, the judge might have a broader sentencing range than with a mandatory.

<sup>31</sup> The mandatory does not preclude the judge from considering that the facts of the case warrant a sentence greater than the mandatory.

<sup>32</sup> s. 921.002(1)(c), F.S. (emphasis provided).

<sup>33</sup> Notably, substance abuse or addiction is not a mitigating circumstance. s. 921.0026(3), F.S.

<sup>34</sup> Inmate population data received on September 22, 2009, from DOC (data prepared September 18, 2009).

<sup>35</sup> An adjunct to this argument is the argument of transparency: “While a judge’s sentencing actions are in public view, the charging discretion of prosecutors is a behind-the-scenes, secretive process.” Christopher Mascharka, *Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences*, 28 *Fl. St. U. L. Rev.* 935, 943 (Summer 2001).

<sup>36</sup> *State v. Cain*, 381 So.2d 1361, 1367 (Fla.1980) (footnote omitted). It has been argued that “judges were intended to serve as community arbiters to balance the power between prosecutors and defense attorneys in our adversarial system.” Aaron M. Clemens and Judge Hale R. Stancil, *Unhandcuffing Justice: Proposals to Return Rationality to Criminal Sentencing*, 83 *Fla. B.J.* 54 (February 2009). However, “[a] prosecutor is expected at times to step out of this conventional adversarial role and to act as a monitor both of substantive and procedural justice in ways not expected of criminal defense lawyers....” Peter Joy and Kevin McMunigal, *Why Should Prosecutors “Seek Justice”?*, 20 *Criminal Justice Magazine*, Issue 2 (Summer 2005), Criminal Justice Section, American Bar Association (<http://www.abanet.org/crimjust/cjmag/20-2/ethics.html>).

Data do not indicate in how many cases the lowest permissible sentence is greater than the mandatory. In those cases in which it occurs, the mandatory does not magnify the importance of the charging decision. The charging decision may also result in a reduced sentence below the mandatory, such as charging attempting trafficking or charging trafficking but eventually offering a plea to an attempted trafficking charge. For example, the inmate population as of September 4, 2009, contains 1,458 inmates who have a trafficking offense (primary or additional) that provides for a 25-year mandatory, but the average sentence for these inmates is 11.1 years. Clearly, mandatories are not being imposed in every case, even though the statute provides for them. Some of these inmates may be receiving a sentence reduction based upon substantial assistance rendered. Others may be sentenced for attempted trafficking, which does not carry the mandatory.<sup>37</sup>

*Con: Offenders with drug trafficking mandatories are disproportionately minorities.* Data received do not indicate the number of offenders, by race, who received a mandatory for a trafficking offense. However, data received on new commitments<sup>38</sup> do indicate that offenders identified as ‘black’ are a significant percentage of new commitments sentenced for a trafficking primary offense, and are the greatest percentage or a significant percentage of new commitments sentenced for some trafficking primary offenses. For FY 2007-08, black offenders were 38.6 percent of new commitments with a trafficking primary offense. The greatest number of new commitments for a trafficking primary offense was for trafficking in 28 grams or more, but less than 200 grams of cocaine (669 of 1,756 new commitments), and black offenders were 58.1 percent of new commitments for that offense. Black offenders also comprised the following percentage of new commitments sentenced for these trafficking primary offenses: 200 grams or more, but less than 400 grams of cocaine (50 percent); conspiracy to traffic (49.2 percent); and 10 grams or more, but less than 200 grams of MDMA/phenethylamines (46.7 percent).<sup>39</sup>

*Con: Mandatories can capture low-level drug dealers, those with a peripheral connection or involvement in drug trafficking activities, and persons who only possess drugs for self-use.* Persons in this group can potentially fall within the pool subject to trafficking mandatories. A prosecutor could determine that a person in this group had a peripheral role in the trafficking or possessed the trafficking substance for self-use only and find that either of these circumstances does not warrant pursuing a trafficking charge. However, if a trafficking charge is pursued and the person is convicted of this charge, the judge is precluded from sentencing below the mandatory based upon either of these circumstances.

It has been argued that many of these low-level dealers or peripheral actors have little, if any, information, about higher-level operatives in the drug trafficking organization, and therefore, are unlikely to receive the benefit of a “substantial assistance” reduction. Previously noted data for the inmate population as of September 4, 2009, may suggest this argument is correct as the average sentence of inmates who have a lower-level trafficking offense is above the mandatory, while the average sentence of inmates with a higher-level trafficking offense is below the mandatory.

*Con: Mandatories have an impact on correctional resources.* Mandatories may have an impact on correctional resources but this cannot be quantified based on available data. As previously noted, data on the inmate population as of September 4, 2009, may suggest that limitations on judicial discretion as a result of mandatories affect sentence length for some cases involving lower-level trafficking offenses, though such data do not indicate how many inmates received a mandatory or how many received a greater sentence.<sup>40</sup> Prison admissions data also do not disaggregate offenders who received a mandatory.<sup>41</sup>

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<sup>37</sup> Inmate population data received on September 22, 2009, from DOC (date prepared September 18, 2009).

<sup>38</sup> According to EDR staff, “new commitments,” a term used by the Criminal Justice Estimating Conference, include those sentenced to prison with new sentences (including technical probation violators).

<sup>39</sup> New commitments data received on August 31, 2009, from EDR (data prepared July 2009). Source: DOC’s monthly status file.

<sup>40</sup> As of September 4, 2009, there are 6,197 inmates with a trafficking offense (primary or additional). *This number is not limited to those serving a mandatory, and includes those who did not receive a mandatory for a trafficking offense (e.g. attempted trafficking and sentence reductions based upon substantial assistance rendered) and those who received a sentence greater than the mandatory.* Inmate population data received on September 22, 2009, from DOC (data prepared

The strongest indicator of the impact of mandatories on correctional resources may be data indicating that a significant number of offenders were sentenced to just the mandatory. In general, new commitments data, like prison admissions data, are not useful in providing information on offenders receiving a mandatory. However, such data are available for new commitments who were sentenced for the primary offense of trafficking in 28 grams or more, but less than 200 grams of cocaine, which is the largest group of offenders currently incarcerated for a trafficking offense.<sup>42</sup> In FY 2007-08, there were 452 new commitments for this offense. The average prison sentence for those receiving the mandatory was 62.9 months (median: 40 months); the average prison sentence for those not receiving the mandatory was 46.6 months (median: 36 months). Of the 452 new commitments, 286 were matched to records in the Code sentencing database. Of the 286 new commitments, 140 (49 percent) had a 36-month (3 year) prison sentence. Of this 140, 95 (67.9 percent) scored less than 36 months.<sup>43</sup> This data may suggest that, but for the mandatory, some of these offenders might have received a lesser sentence. However, as previously noted, there is no record compiled in every case in which a mandatory is imposed that indicates whether the judge would have preferred a lesser sentence based upon the facts of the case.

### **Punishing trafficking in painkillers**

Hydrocodone, oxycodone, and hydromorphone, which are listed in s. 893.135, F.S., are powerful opioid analgesics. Section 893.135, F.S., punishes trafficking in these controlled substances. The minimum weight threshold for trafficking in these substances is 4 grams. The minimum weight threshold as well as applicable weight ranges and mandatories have raised a concern that unlawful possession of relatively small numbers of tablets/pills containing these substances may result in trafficking penalties, including mandatories. For example, 6.25 tablets of Vicodin® that contain 10 milligrams per tablet weigh 4 grams.<sup>44</sup> A person who unlawfully possesses 7 such tablets could be subject to a 3-year mandatory. The 28 gram threshold (potentially triggering a 25-year mandatory) for hydrocodone trafficking can be reached by possession of 44 of these tablets (43.75 of these tablets equals 28 grams).<sup>45</sup> As a point of comparison, a person trafficking in 149 kilograms of cocaine or 10,000 pounds or more of cannabis is subject to a 15-year mandatory. As another point of comparison, a person who commits lewd molestation on a child less than 12 years of age and who is sentenced under the statutory split-sentence option receives a minimum 25-year prison sentence.<sup>46</sup>

The case of Richard Paey, who received a pardon in 2007 for his 1996 conviction and sentence to a 25-year mandatory for oxycodone trafficking, has raised a different concern about the trafficking mandatories: their potential application to unlawful possession or purchase of certain painkillers by chronic pain management patients. Mr. Paey suffered from “severe and unremitting back pain” from a “calamitous automobile accident” in 1986 and “subsequent failed back surgeries,” for which he had received treatment in New Jersey, including opioid

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September 18, 2009).

<sup>41</sup> For FY 2007-08, there were 1,877 prison admissions with a trafficking primary offense, which were 64.5% of the 2,911 trafficking admissions. Average sentence length of trafficking admissions was 5.6 years. For FY 2007-08, total prison admissions increased by 8.4% over the prior fiscal year, but prison admissions with a trafficking primary offense increased by 24.5%. Admissions data and information received on August 31, 2009, and September 1, 2009, from EDR (data prepared August, 2009). Source: DOC’s Annual Report (various years).

<sup>42</sup> As of September 4, 2009, there were 1,799 inmates incarcerated for trafficking in 28 grams or more, but less than 200 grams of cocaine. Of this group, 1,190 inmates have a combination of offenses and at least one of the offenses is a trafficking offense and one is not a trafficking offense. The trafficking offense may or may not be the primary offense. Inmate population data received on September 22, 2009, from DOC (data prepared September 18, 2009).

<sup>43</sup> However, it should be noted that a significant number of the 286 new commitments received a sentence longer than the mandatory. Of the 286, 146 (51%) had a sentence longer than 36 months. Of the 146, 107 (73.3%) scored less than the sentence imposed and 29 (20%) scored less than 36 months. New commitments data and information received on August 31, 2009, and September 1, 2009, from EDR. Sentence length data was prepared August 2009. Source: DOC’s monthly status file.

<sup>44</sup> As a point of comparison, two newly minted U.S. nickels weigh 5 grams ([http://www.usmint.gov/faqs/circulating\\_coins/index.cfm?flash=yes](http://www.usmint.gov/faqs/circulating_coins/index.cfm?flash=yes)).

<sup>45</sup> Information received on August 24, 2009, from FDLE. The tablet/pill weights were provided by a local pharmacy and the calculations were done by an FDLE chemist in the Tallahassee laboratory. (Note: Actual numbers will vary slightly by dosage and manufacturer.)

<sup>46</sup> Section 775.082(3)(a)4.a.(II), F.S.

analgesics, prior to moving to Pasco County, Florida in 1994.<sup>47</sup> Mr. Paey returned to New Jersey on several occasions for treatment by his New Jersey physician. The last office visit was in December of 1996, during which time he was prescribed oxycodone and hydrocodone to be used in January of 1997. Mr. Paey came to the attention of law enforcement in Pasco County in February of 1997 after a local pharmacist expressed concern that Mr. Paey might be abusing prescription drugs. Mr. Paey was arrested and prosecuted for multiple prescription transactions that occurred during February and March of 1997. “[T]here was no evidence that he was knowingly selling, manufacturing, or delivering oxycodone.”<sup>48</sup> He was ultimately convicted of seven counts of oxycodone trafficking (based upon prescriptions filled for 700 oxycodone pills), as well as other counts of hydrocodone possession and fraudulently procuring prescription drugs. The jury found that Mr. Paey knowingly possessed without a legitimate prescription more than 28 grams of oxycodone (rejecting Mr. Paey’s defense that the prescriptions he submitted were authorized by the New Jersey physician). This offense carries a 25-year mandatory, which was the sentence imposed (other sentences were designated to be served concurrently).

Important to understanding the concern about the potential application of mandatories to chronic pain management patients is an understanding of some of the issues involving the use of opioid analgesics for chronic pain management. Expanded use of opioid analgesics in the treatment of chronic or acute pain has “magnified opportunities for diversion and abuse.”<sup>49</sup> However, “[e]fforts to address prescription opioid abuse may have the undesirable consequence of diminishing legitimate access to opioids; conversely, actions to improve access to opioids for legitimate pain may fuel the prescription opioid abuse problem.”<sup>50</sup> Medical information indicates that chronic pain management patients are rarely addicted to the opioid analgesics prescribed them for pain<sup>51</sup> but over time may develop a tolerance to and physical dependence upon opioid analgesics that may be misperceived as addiction rather than the “normal consequences of sustained opioid use.”<sup>52</sup> Some practitioners may be reluctant to treat chronic management cases for fear that regulatory and law enforcement agencies may not understand or appreciate this distinction.

This report presents several options for legislators to consider if they believe that the current provision on trafficking in these painkillers needs revision. The Paey case also has some bearing on other options presented such as repeal of mandatories, uniform mandatories, or presumptive mandatories because it is an example of the exercise of prosecutorial discretion in the charging decision and its limits. It is reported that Mr. Paey rejected a plea offer to attempted trafficking with a nonprison sanction, and a subsequent plea offer of 7.5 years in prison.<sup>53</sup> When the pleas were rejected, the prosecutor proceeded forward with the trafficking charge carrying the 25-year mandatory. At this point the die was cast; if the judge believed the mandatory was inappropriate, it didn’t matter.

### **Are presumptive mandatories a middle ground?**

Both sides of the debate on mandatories appear to be in agreement that drug trafficking is a serious crime and that sentences for drug trafficking should be appropriate; differences are over the question of whether mandatories provide for appropriate sentencing. The truth is that no sentencing option will ensure appropriate sentencing in all cases. As one commentator has noted, “a proposal for sentencing standards that are constraining enough to assure that like cases are treated alike and flexible enough to assure that different cases are treated differently is a counsel of unattainable perfection.”<sup>54</sup>

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<sup>47</sup> *Paey v. State*, 943 So.2d 919, 920 (Fla. 2d DCA 2006), *rev. den.*, 954 So.2d 28 (Fla.2007). Specific page references to the case are to quoted material in the case, but all facts in this paragraph are from the appellate court opinion, unless otherwise noted.

<sup>48</sup> *Id.* at 921.

<sup>49</sup> Nathaniel P. Katz, et al, Foundations of Opioid Risk Management, 23 *Clin J Pain* 2 (February 2007), p. 103.

<sup>50</sup> *Id.* at 104.

<sup>51</sup> See e.g., Pain Management Staff Development & Education, Part 4: Adult Pain Management Staff Education, University of Michigan Health System (<http://www.med.umich.edu/pain/apainmgt.htm>).

<sup>52</sup> June L. Dahl, How to Reduce Fears of Legal/Regulatory Scrutiny in Managing Pain in Cancer Patients, 3 *Journal of Supportive Oncology* 5 (September - October 2005), p. 386.

<sup>53</sup> Cary Davis, Pain not enough to tip scale (July 21, 2002), *St. Petersburg Times*.

<sup>54</sup> Michael Tonry. *Sentencing Matters* (New York: Oxford Univ. Press, 1996), pp. 185-186.

This report presents several options to address sentencing of person convicted of drug trafficking, including retention of the current mandatories, repeal or partial repeal of mandatories, and presumptive mandatories. Presumptive mandatories may be a “middle ground” option in this debate but they will not likely appeal to those who strongly believe that mandatories, presumptive or not, are inappropriate or those who strongly believe that mandatories are appropriate in all drug trafficking cases. Presumptive mandatories are an attempt to partially accommodate both sides by retaining mandatory sentencing but allowing judges some discretion (based upon legislatively-prescribed limits) to impose a sentence below the mandatory.

## Options and/or Recommendations

There are numerous options for addressing minimum mandatory sentencing in s. 893.135, F.S. This report provides some options for legislators to consider. Some of these options can be combined with other options, e.g., presumptive mandatories can be combined with reductions in some mandatories.

1. Retain current law (no changes to s. 893.135, F.S.).
2. Repeal all or some drug trafficking mandatories and sentence drug trafficking offenses under the Code. Repeal of all mandatories would mean that the lowest permissible sentence under the Code would be the ‘floor’ for sentencing, absent mitigation. This sentencing option accords with the sentencing of almost all non-capital felonies. Further, the Code authorizes judges to impose a drug trafficking multiplier for Level 7 and 8 trafficking offenses. Alternatively, the Legislature could, for example, repeal mandatories for the lowest two trafficking offenses but retain mandatories for higher trafficking offenses. This sentencing option accords with the sentencing of trafficking offenses from 1993-1999. An even more narrow repeal would be the repeal of only mandatories for the lowest trafficking offenses.
3. Retain minimum mandatory sentencing but apply a uniform mandatory sentencing scheme. For example, the mandatory penalties for the first three weight ranges relevant to cocaine trafficking are 3, 7, and 15 years. These mandatories could be applied to all trafficking offenses.
4. Retain mandatories for trafficking offenses in the highest weight range(s) but make mandatories presumptive for the two lowest or lowest trafficking offenses. The Legislature could provide judges with broad or narrow authority to impose a sentence below the mandatory. For example, criteria could exclude offenders with a prior conviction for a violation of s. 893.135, F.S., offenders who threatened to use or used physical violence or a weapon in the commission of the trafficking primary offense or trafficking additional offenses, or offenders whose trafficking primary offense or trafficking additional offenses involved sale, manufacture, distribution, or importation, or alternatively, manufacture and importation. Trafficking in hydrocodone, oxycodone, and hydromorphone could be made a special case in which the judge is also authorized to impose a sentence below the highest mandatory, if the offender meets the criteria applicable to other presumptive mandatories and the court finds that at the time the offense was committed, the defendant suffered from chronic pain as a result of a debilitating disease or medical condition.
5. Retain mandatories for trafficking offenses but provide that the prosecutor must prove intent to sell, etc., for the two lowest trafficking offenses or the lowest trafficking offense if the offenses involve possession or purchase.
6. Repeal mandatories for some or all trafficking offenses involving hydrocodone, oxycodone, and hydromorphone.
7. Retain mandatories for trafficking offenses involving hydrocodone, oxycodone, and hydromorphone but provide that the prosecutor must prove intent to sell, etc., for the two lowest trafficking offenses or the lowest trafficking offense if the offenses involve possession or purchase.
8. Increase weight thresholds/ranges for trafficking in hydrocodone, oxycodone, and hydromorphone.
9. Provide that mandatories for trafficking involving purchase or possession of hydrocodone, oxycodone, and hydromorphone are only allowed if the weight of the substance possessed or purchased meets a specified weight threshold.