

THE APPLICATION OF FLORIDA’S DRUG TRAFFICKING STATUTE TO PRESCRIPTION OPIOIDS: IS IT TIME FOR A NEW APPROACH?

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INTRODUCTION

Prescription painkillers containing opioids such as oxycodone burst onto the scene in 1996.¹ Due to the highly addictive nature of these prescription opioids, reports surfaced claiming that opioid pills were being stolen, abused, and causing overdose fatalities.² As more people became addicted to prescription opioids, opioid misuse and abuse became an epidemic.³ From 2003 to 2009, opioid-related overdoses in Florida saw dramatic increases.⁴ Unlike the 1990s, where half of the opioid-related deaths were attributable to heroin, new opioid-related deaths were almost entirely due to the prescription opioids oxycodone and hydrocodone.⁵ By 2012, prescription opioid abuse was “Florida’s fastest-growing and deadliest public safety issue.”⁶

To deal with the opioid epidemic and its continued threats, federal and state governments alike regularly use drug trafficking laws to curb opioid misuse.⁷ While there is not one definition for drug trafficking,⁸ the most recognizable definition is the “illicit trade involving the cultivation, manufacture, distribution and sale of substances which are subject to drug prohibition laws.”⁹ Florida enacted mandatory minimum sentences for drug trafficking in 1999.¹⁰ These mandatory minimums were among the harshest penalties in the nation.¹¹ The bill’s sponsor, State Representative Victor Crist, assured house committee members that these penalties were only going to affect the worst of the worst drug offenders and would exclude low-level offenders and drug

1. See Jan Hoffman, *Purdue Pharma Is Dissolved and Sacklers Pay \$4.5 Billion to Settle Opioid Claims*, N.Y. TIMES, (Sept. 1, 2021), <https://www.nytimes.com/2021/09/01/health/purdue-sacklers-opioids-settlement.html>.

2. See *id.*

3. See *What is the Opioid Epidemic?*, U.S. DEPT. OF HEALTH AND HUMAN SERV., <https://www.hhs.gov/opioids/about-the-epidemic/index.html>, (last visited December 20, 2021).

4. See Bethany Bailey, FAMILIES AGAINST MANDATORY MINIMUMS FLORIDA PROJECT, FLORIDA’S MANDATORY MINIMUM DRUG LAWS: INEFFECTIVE, EXPENSIVE, AND COUNTERPRODUCTIVE 2 (May 30, 2017).

5. Roger B. Handberg, *The Opioid Epidemic in Florida: 2000 to 2017*, 94 FLA. BAR J., no. 3, May-June 2020, at 18, <https://www.floridabar.org/the-florida-bar-journal/the-opioid-epidemic-in-florida-2000-to-2017/>.

6. See *Prescription Drug Diversion and Abuse Road Map 2012-2015*, FLA. OFF. OF ATTY GEN., April 2, 2012, at 6, [http://myfloridalegal.com/webfiles.nsf/wf/kgrg-St8l5k/\\$file/prescriptiondrugdiversionandabuseroadmap.pdf](http://myfloridalegal.com/webfiles.nsf/wf/kgrg-St8l5k/$file/prescriptiondrugdiversionandabuseroadmap.pdf).

7. See JOANNA R. LAMPE, CONG. RSCH. SERV., R45948, THE CONTROLLED SUBSTANCES ACT (CSA): A LEGAL OVERVIEW FOR THE 117TH CONGRESS 14, 17-20 (2021), <https://sgp.fas.org/crs/misc/R45948.pdf>.

8. See *id.* at 17.

9. *Drug Trafficking*, UNITED NATIONS OFFICE ON DRUGS AND CRIME, <https://www.unodc.org/unodc/en/drug-trafficking/index.html> (last visited Nov. 24, 2021) [hereinafter *Drug Trafficking*, UNITED NATIONS].

10. See BAILEY, *supra* note 4, at 1.

11. See *id.*

users.¹² As a result, drug trafficking mandatory minimums passed with bipartisan support.¹³ However, Representative Crist's vision for the drug trafficking bill would not reflect Florida's implementation of drug trafficking laws over the next decade.¹⁴

In the mid-2000s, Florida saw yearly increases in drug trafficking charges related to prescription opioids.¹⁵ By 2010, opioid-related trafficking charges had more than quadrupled as compared to five years earlier.¹⁶ Although mandatory minimums were never intended to be used against drug addicts and other low-level offenders,¹⁷ this demographic represents an overwhelming majority of people convicted of trafficking in prescription opioids.¹⁸ Data shows that most opioid offenders who received mandatory prison time have never previously been to prison, have no violent offenses on their record, and are in need of substance abuse treatment.¹⁹ Because controlled substances such as fentanyl²⁰ continue to drive the opioid epidemic,²¹ little has been done to change the way Florida treats prescription opioids under the drug trafficking statute.²²

This note seeks to provide a critical analysis of the development of Florida's drug trafficking scheme and its application to prescription opioids. Part II of this note lays out Florida's drug criminalization scheme and its development at law. Part III discusses the problems and inconsistencies that arise when Florida's drug trafficking scheme is applied to the possession of pills containing the prescription opioid oxycodone. Part IV analyzes how other jurisdictions enforce

12. See Emily L. Mahoney, *Hundreds languish in Florida prisons under outdated mandatory minimum drug sentences*, MIAMI HERALD (Jan. 16, 2020), <https://www.miamiherald.com/article237117309.html>.

13. *Id.*

14. See BAILEY, *supra* note 4, at 2

15. *Opinions Are Mixed About Sentencing Laws for Painkiller Trafficking*, OFF. OF PROGRAM POL'Y ANALYSIS GOV'T ACCOUNTABILITY, REP. 12-02, 2-3 (Jan. 2012), <https://oppaga.fl.gov/Documents/Reports/12-02.pdf> [hereinafter, OPPAGA, PAINKILLER TRAFFICKING].

16. See *id.*

17. Emily L. Mahoney, *Hundreds of Florida inmates are serving drug sentences no longer in state law*, TAMPA BAY TIMES (Nov. 25, 2019), <https://www.tampabay.com/special-reports/2019/11/13/hundreds-of-florida-inmates-are-serving-drug-sentences-no-longer-in-state-law/> [hereinafter Mahoney, Florida Inmates].

18. OPPAGA, PAINKILLER TRAFFICKING, *supra* note 15, at 4.

19. See *id.*

20. See generally *Fentanyl*, U.S. DRUG ENF'T ADMIN., <https://www.dea.gov/fact-sheets/fentanyl> (last visited Nov. 28, 2021). (explaining that fentanyl is a potent synthetic opioid that is commonly added to heroin).

21. NATIONAL DRUG THREAT ASSESSMENT, DRUG ENFORCEMENT AGENCY, DEA-DCT-DIR-007-20, at 9, (2019), https://www.dea.gov/sites/default/files/2020-01/2019-NDTA-final-01-14-2020_Low_Web-DIR-007-20_2019.pdf. As of December 2019, fentanyl is responsible for more U.S. deaths than any other illicit drug. *Id.* Accord NATIONAL DRUG THREAT ASSESSMENT, DRUG ENFORCEMENT AGENCY, DEA-DCT-DIR-008-21, at 7, (2021), https://www.dea.gov/sites/default/files/2021-02/DIR-008-21%202020%20National%20Drug%20Threat%20Assessment_WEB.pdf.

22. See Mahoney, Florida Inmates, *supra* note 17 (explaining that minimal raises to weight thresholds have had little impact).

prohibitions on prescription opioids and other controlled substances. Part V offers recommendations to help alleviate the problems and inconsistencies with Florida's drug trafficking scheme. Part VI provides a brief conclusion.

I. FLORIDA DRUG LAWS

A. *The Florida Comprehensive Drug Abuse Prevention and Control Act*

Chapter 893 of the Florida Statutes is Florida's Comprehensive Drug Abuse Prevention and Control Act.²³ This act contains laws related to drug crimes and houses Florida's drug schedules.²⁴ Because oxycodone and hydrocodone are opioids, they are controlled substances within the meaning of Florida's drug schedules and are contemplated in Florida's drug trafficking statute.²⁵ Florida has three main methods of punishing illegal drug possession and distribution: felony drug trafficking,²⁶ felony possession with intent to sell,²⁷ and felony possession.²⁸

1. *Florida Drug Schedules*

Florida classifies certain drugs as controlled substances and places them into five separate categories known as schedules.²⁹ A controlled substance's classification in Florida's drug schedules can determine criminal penalty severity.³⁰ A Schedule I substance has a high potential for abuse, has no currently accepted medical uses, and its use under medical supervision does not meet acceptable safety standards.³¹ A Schedule II substance has a high potential for abuse but also has recognized, albeit very restricted, medical treatment uses.³² A Schedule III substance has a moderate or low potential for abuse and has recognized medical treatment uses.³³ Schedules IV and V both have low potentials for abuse and have accepted medical treatment uses.³⁴ Schedule V substances represent the lowest risk category.³⁵ Florida's drugs schedules are detailed; for example, Schedule I lists out hundreds of drug variations.³⁶ Various prescription opioids, such as

23. FLA. STAT. § 893.01 (2021).

24. *See id.*

25. *See* FLA. STAT. §§ 893.135(1)(c)(2), (1)(c)(3) (2021).

26. *See* FLA. STAT. § 893.135.

27. *See* FLA. STAT. § 893.13(1)(a) (2021).

28. *See* FLA. STAT. § 893.13(6)(a).

29. *See* FLA. STAT. § 893.03 (2021).

30. *See e.g.* FLA. STAT. § 893.13(1)(a) (2021).

31. FLA. STAT. § 893.03(1) (2021).

32. FLA. STAT. § 893.03(2).

33. FLA. STAT. § 893.03(3).

34. FLA. STAT. §§ 893.03(4a), (5).

35. *See* FLA. STAT. § 893.03(5) (2021).

36. *See* FLA. STAT. § 893.03 (2021).

Oxycodone, are classified under Schedule II.³⁷

2. Drug Trafficking

Florida criminalizes drug trafficking in Section 893.135 of the Florida Statutes.³⁸ Any person who “knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of” any of the listed controlled substances is subject to the drug trafficking statute.³⁹ Nowhere in the drug trafficking statute is there a requirement that a person be involved in drug trafficking activities.⁴⁰ The statute only requires “actual or constructive possession.”⁴¹ For a drug trafficking charge to apply, the controlled substance must be listed in either Schedule I or II.⁴² Drug trafficking is a first-degree felony offense and carries with it mandatory minimum prison sentences.⁴³ Depending on the controlled substance, mandatory minimums range from three years to life in prison.⁴⁴ The statute outlines weight thresholds to trigger mandatory minimums for each controlled substance.⁴⁵ Notably, weight is the only threshold consideration.⁴⁶

For most controlled substances, a trafficking charge is appropriate when a person possesses any mixture containing that controlled substance.⁴⁷ Trafficking in oxycodone is no different.⁴⁸ A mixture includes, but is not limited to, a solution or dosage unit (which includes a gelatin capsule, pill, or tablet) that contains the controlled substance.⁴⁹ To trigger a three-year mandatory minimum prison sentence for trafficking in oxycodone, a person must be caught with a minimum of seven grams of any mixture containing oxycodone.⁵⁰ All substances contained in the mixture are included and aggregated to see whether the threshold weight has been met.⁵¹ It does not matter if the dosage unit contains other non-controlled substances.⁵² However, all dosage units must

37. See FLA. STAT. § 893.03(2)(a)(1).

38. See FLA. STAT. § 893.135 (2021).

39. See FLA. STAT. § 893.135(1)(a).

40. See FLA. STAT. § 893.135 (2021).

41. See FLA. STAT. § 893.135(1)(a) (2021).

42. See e.g. FLA. STAT. § 893.135(1)(c)(2); OPPAGA, PAINKILLER TRAFFICKING, *supra* note 15, at 7 (explaining that hydrocodone is an exception because it is listed as both a Schedule II and III controlled substance).

43. See e.g. FLA. STAT. § 893.135(1)(c)(3).

44. See e.g. FLA. STAT. §§ 893.135(1)(b)(1), (1)(b)(2).

45. See e.g. FLA. STAT. §§ 893.135(1)(c)(3)(a), (1)(c)(3)(b), (1)(c)(3)(c), (1)(c)(3)(d).

46. See e.g. *id.*

47. See e.g. FLA. STAT. § 893.135(1)(c)(1) (2021). However, cannabis does not contemplate mixtures. See FLA. STAT. § 893.135(1)(a).

48. FLA. STAT. § 893.135(1)(c)(3).

49. See FLA. STAT. § 893.135(6).

50. See FLA. STAT. § 893.135(1)(c)(3)(a).

51. See *infra* Part II.

52. See *id.*; see also *Chapman v. United States*, 500 U.S. 453 (1991).

contain the same controlled substance.⁵³

3. *Felony Drug Possession with Intent to Sell*

When the weight threshold is not met for a trafficking charge but the person is engaged in drug dealing, Florida will charge under felony possession with intent to sell.⁵⁴ Under Section 893.13(1)(a) of the Florida Statutes, “a person may not sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance.”⁵⁵ Possession with intent to sell can be a second-degree or third-degree felony depending on the controlled substance.⁵⁶ Unlike the drug trafficking statute, Section 893.13 does not require possession of a minimum amount of the controlled substance for a person to be charged with possession with intent to sell.⁵⁷ Although the statute lists several aggravating factors,⁵⁸ mandatory minimums are only appropriate in a few limited circumstances.⁵⁹

4. *Felony Drug Possession*

When the weight threshold is not met for a trafficking charge and there is no proof of intent to sell, Florida will charge under felony possession of a controlled substance.⁶⁰ Under Section 893.13(6)(a) of the Florida Statutes, a person may not unlawfully possess any amount of a controlled substance, and depending on the substance, third-degree felony possession will apply.⁶¹ Third-degree felony possession is the lowest felony punishment for unlawful possession.⁶² Under Subsection 6(c), the penalty can be elevated to a first-degree felony if a person possesses ten grams of any combination of certain listed Schedule I or II controlled substances.⁶³ A charge under Subsection 6(c) can be based on the aggregate weight of all controlled substances combined regardless of whether they are the same controlled substance.⁶⁴ This

53. See FLA. STAT. § 893.135 (2021); Cf. FLA. STAT. § 893.13(6)(c) (2021) (specifically allowing any combination of different controlled substances that weigh more than ten grams in the aggregate to trigger first degree felony possession).

54. See FLA. STAT. § 893.13(1)(a).

55. *Id.*

56. See FLA. STAT. §§ 893.13(1)(a)(1), (1)(a)2.

57. Compare, e.g., FLA. STAT. § 893.135(1)(c)(3) with *id.* § 893.13(1)(a) (the trafficking statute specifies weight thresholds).

58. Aggravators can include possession with intent to sell near publicly-owned land, educational institutions, childcare facilities, places of worship, and public housing. FLA. STAT. §§ 893.13(1)(c), (1)(d), (1)(e), (1)(f) (2021).

59. Mandatory minimums are triggered for selling methamphetamine or phencyclidine near a childcare facility, inside a building with minors under the age of 16, or when the commission of the crime injures a child under 16. FLA. STAT. § 893.13(1)(g).

60. See FLA. STAT. §§ 893.13(6)(a) (2021).

61. See *id.*

62. See *id.*; Cf. FLA. STAT. §§ 893.13(1)(a)(3), 6(d) (showing that less serious conduct becomes a misdemeanor).

63. FLA. STAT. § 893.13(6)(c) (2021).

64. See *id.*

provision is used when a person is caught with multiple controlled substances that, when combined, add up to ten grams but do not trigger a trafficking charge for any of the controlled substances individually.⁶⁵

A. *Development and Application of Florida's Drug Trafficking Statute in the Law*

1. *Defining What Constitutes a "Mixture" for Drug Trafficking Purposes*

The U.S. Supreme Court paved the way for Florida's drug trafficking scheme in the 1991 case *Chapman v. United States*.⁶⁶ In *Chapman*, the issue was whether the hallucinogenic drug LSD should be weighed based on its carrier or based on the weight of the drug itself when considering if a mandatory minimum sentence is triggered.⁶⁷ LSD in its pure form weighed almost nothing and was regularly distributed on blotter paper that added significantly to the total weight.⁶⁸ This blotter paper was then cut into doses and sold to the end user.⁶⁹ The Court held that the blotter paper used to distribute LSD was a "mixture or substance" within the meaning of the federal statute.⁷⁰ The Court reasoned that "mixture" and "substance" had no common law meaning and therefore should be read in terms of their ordinary meaning.⁷¹ As a result, drug statutes can be crafted to include the weight of the carrier medium, even if it is not a controlled substance, to establish the total weight for sentencing purposes.⁷² Florida's drug trafficking statute allows drug trafficking to be based upon the controlled substance or any mixture containing that controlled substance.⁷³

2. *Florida's Aggregation Theory to Establish Threshold Weight*

When a controlled substance is part of a mixture, the next hurdle is figuring out how to weigh that mixture for the drug trafficking weight threshold determination.⁷⁴ Prior to the Florida Supreme Court decision in *Hayes v. State*⁷⁵ and Florida's subsequent statutory revision,⁷⁶ it was unclear how to determine the threshold weight for certain opioids in the drug trafficking context.⁷⁷ Under the Florida Statutes, hydrocodone was classified as both a Schedule II and Schedule III

65. *See id.*

66. *See Chapman v. United States*, 500 U.S. 453 (1991).

67. *Id.* at 455-56.

68. *Id.* at 457.

69. *Id.*

70. *Id.* at 461.

71. *Id.* at 462.

72. *See id.* at 468.

73. *See e.g.* FLA. STAT. § 893.135(1)(c)3.a (2021).

74. *See* Heather A. Perry, *Drug Trafficking Sentencing in Florida: Can Seven Pills Turn a Defendant into a First-Degree Felon*, 23 NOVA L. REV. 525, 527-28 (1998).

75. *Hayes v. State*, 750 So. 2d 1 (Fla. 1999).

76. FLA. STAT. § 893.135(7) (2022).

77. *See Perry, supra* note 74, at 527-28.

drug.⁷⁸ According to the 1997 version of the Florida Statutes, if a person was caught with a mixture containing four grams or more of hydrocodone, it was a Schedule II drug punishable as first-degree felony drug trafficking.⁷⁹ However, if the hydrocodone contained less than “15 milligrams per dosage unit, with recognized therapeutic amounts of one or more active ingredients, which are not controlled substances, then the substance is considered a [Schedule] III substance.”⁸⁰ From the statute’s wording, it was not clear whether pills containing less than fifteen milligrams of hydrocodone should be classified as a Schedule III substance and not be subject to the drug trafficking statute.⁸¹

The statute’s ambiguity led to two different ways to interpret it: the aggregation theory and the dosage unit theory.⁸² Under the aggregation theory, if a person was caught with pills containing an aggregate of four grams of hydrocodone even if each pill contained less than fifteen milligrams of hydrocodone, the trafficking charge was appropriate.⁸³ This is how Florida’s Fifth District Court of Appeal read the statute in *State v. Braxley*.⁸⁴ The *Braxley* court held that if the total weight of tablets, including substances other than the hydrocodone, aggregates four grams or more, then the trafficking statute applies.⁸⁵

The second way to interpret the statute was based on the amount of the controlled substance per dosage unit.⁸⁶ Florida’s First District Court of Appeal adopted this approach in *State v. Holland*.⁸⁷ The *Holland* court explicitly rejected the *Braxley* aggregation theory.⁸⁸ The court stated that a “mixture” under the statute is limited to each dosage unit.⁸⁹ Therefore, as long as each dosage unit contained less than fifteen milligrams of hydrocodone, it should be classified as a Schedule III controlled substance and not be subject to the trafficking statute.⁹⁰ Critics of this approach pointed out that a person could, in theory, traffic an unlimited amount of a controlled substance as long as each pill contained less than fifteen milligrams of the controlled substance and not face drug trafficking penalties.⁹¹

In 1999, the Florida Supreme Court attempted to resolve this

78. *See id.*

79. *See id.*

80. *Id.* (internal quotes omitted).

81. *See id.*

82. *See id.* at 528-30.

83. Perry, *supra* note 74, at 528-29.

84. *See State v. Braxley*, 684 So. 2d 831 (Fla. 5th DCA 1996), overruled by *Hayes v. State*, 750 So. 2d 1 (Fla. 1999).

85. *Id.* at 833.

86. *See Perry, supra* note 74, at 529-30.

87. *State v. Holland*, 689 So. 2d 1268 (Fla. 1st DCA 1997).

88. *Id.* at 1270.

89. *Id.*

90. *See Id.*

91. *See Perry, supra* note 74, at 529-30.

District Court of Appeal split in *Hayes v. State*.⁹² On the heels of Florida's Fourth District Court of Appeal agreeing with the *Braxley* aggregation approach, the Florida Supreme Court took up the question of whether a "mixture" contemplates each dosage unit or the weight in the aggregate.⁹³ The Court rejected the *Braxley* approach in favor of the *Holland* approach.⁹⁴ The Court reasoned that the statute did not specify or contemplate "aggregate weight."⁹⁵ As a result, applicable opioids needed to contain over fifteen milligrams in the dosage unit rather than have a total aggregate weight of four grams to be considered a Schedule II controlled substance for drug trafficking purposes.⁹⁶

In direct response to the Supreme Court's decision in *Hayes*, the Florida Legislature added Subsection (7) to Florida's drug trafficking statute during the 2001 legislative session.⁹⁷ The Legislature rebuked the holding in *Hayes* and clarified that the aggregation theory first adopted in *Braxley* is the correct way to interpret the drug trafficking statute.⁹⁸ As articulated years later by Florida's First District Court of Appeal, the adoption of Subsection (7) reflected the Legislature's intent for trafficking charges to be "based on the aggregate weight of the tablets in the defendant's possession, regardless of the dosage of [the controlled substance] in each tablet."⁹⁹ Ever since the Legislature adopted Subsection (7), Florida has allowed the weight in the aggregate of a mixture containing a controlled substance to count toward the threshold weight determination.¹⁰⁰ As harsher mandatory minimums sentences were adopted just two years prior,¹⁰¹ the Legislative endorsement of the aggregation theory marked another step toward making drug trafficking charges for opioids easier to attain.

3. Drug Trafficking Can be Based on Possession Alone

As trafficking charges for prescription opioids continued to rise,¹⁰² the drug trafficking statute faced a constitutional challenge on the basis of cruel and unusual punishment.¹⁰³ Because Florida's drug trafficking statute only requires possession of a threshold amount of a controlled substance, some argued that long mandatory minimum sentences, absent a finding that the person engaged in drug trafficking activities, violated the Florida Constitution.¹⁰⁴ The Florida Supreme

92. *Hayes v. State*, 750 So. 2d 1 (Fla. 1999).

93. *See id.*

94. *Id.* at 5.

95. *Id.* at 4.

96. *Id.* at 5.

97. FLA. STAT. § 893.135(7) (2021).

98. *See id.*

99. *Wilder v. State*, 194 So. 3d 1050, 1053 (Fla. 1st DCA 2016).

100. *See id.*

101. *See* BAILEY, *supra* note 4, at 1.

102. *See* OPPAGA, PAINKILLER TRAFFICKING, *supra* note 15, at 2 (Beginning in 2006, opioid trafficking would see yearly increases).

103. *See Paey v. State*, 943 So. 2d 919 (Fla. 2d DCA 2006).

104. *See id.*

Court addressed this issue in *Paey v. State*.¹⁰⁵ In *Paey*, the defendant was charged with seven counts of trafficking in oxycodone.¹⁰⁶ The defendant became addicted to oxycodone after suffering a car accident and filed various false prescriptions.¹⁰⁷ As the basis for the trafficking charges, the State only proved that the defendant possessed oxycodone.¹⁰⁸ Because of the large quantities of oxycodone pills in his possession, the defendant was convicted and sentenced to a twenty-five year mandatory minimum sentence for each count of drug trafficking.¹⁰⁹ Florida's Second District Court of Appeal upheld the convictions.¹¹⁰

In dissent, Judge Seals explained that the state all but conceded that the defendant was not a drug dealer and was instead an end user.¹¹¹ He further stated that when Florida labeled the statute as trafficking it “implic[ed] an attack on illegal commerce in drugs, not the consumption by the end user.”¹¹² As trafficking is a term of commerce and not consumption, the judge argued that the mandatory minimums were entering the realm of cruel and unusual punishment absent a finding that the person engaged in drug trafficking activities.¹¹³ To date, no Florida court has accepted this reasoning. Therefore, Florida is authorized to convict defendants for drug trafficking without making any finding that they participated in the drug trade.¹¹⁴

4. Limiting Mens Rea for Chapter 893 Drug Crimes

Most crimes require some form of criminal intent or “*mens rea*” before a person can be found guilty of committing that crime.¹¹⁵ While the text of Florida's drug criminalization statutes did not have a clear *mens rea* requirement, the Florida Supreme Court explained that without clear Legislative intent to the contrary, *mens rea* was a required element.¹¹⁶ As a result, *mens rea* applied to all drug charges under Chapter 893, including drug trafficking.¹¹⁷ To prove this *mens rea* element, the State had to prove that the person knew that he or she possessed the controlled substance and knew the illicit nature of

105. *See id.*

106. *Id.* at 921

107. *Id.* at 920-21

108. *Paey*, 943 So. 2d at 920-21.

109. *Id.*

110. *Id.* at 927.

111. *Id.* at 930 (Seals, J., dissenting).

112. *Id.*

113. *Id.* at 929.

114. *See id.* at 927.

115. LEGAL INFORMATION INSTITUTE, MENS REA, (last visited Nov. 26, 2021), https://www.law.cornell.edu/wex/mens_rea.

116. *See Chicone v. State*, 684 So. 2d 736 (Fla. 1996); *see also* *Scott v. State*, 808 So. 2d 166 (Fla. 2002).

117. *See State v. Adkins*, 96 So. 3d 412, 415 (Fla. 2012) (explaining that *mens rea* was required prior to the legislative enactment).

the substance.¹¹⁸ However, in 2011, the Legislature enacted Section 893.101 and removed the *mens rea* requirement from all Chapter 893 drug crimes.¹¹⁹ The Legislature clarified that “knowledge of the illicit nature of a controlled substance is not an element” of any drug offense under Chapter 893, but lack of knowledge of the illicit nature is an affirmative defense.¹²⁰ Additionally, the Legislature made clear that actual or constructive possession will give rise to the presumption that the possessor knew the illicit nature of the controlled substance.¹²¹

In 2012, the Florida Supreme Court acknowledged that the Legislature has broad authority to define elements of a crime and endorsed the Legislature’s intent to partially remove the *mens rea* element from drug possession crimes.¹²² Although the majority indicated that the availability of the affirmative defense did not unconstitutionally shift the burden of proof to defendants,¹²³ the dissent voiced concerns that this legislative change took away a defendant’s presumption of innocence.¹²⁴ As Section 893.101 was ultimately deemed constitutional,¹²⁵ it allows Florida to charge a person with drug trafficking even if the person does not know that he or she possessed a controlled substance.¹²⁶ Florida is the only jurisdiction in the nation to allow this limitation on *mens rea* for drug crimes.¹²⁷

II. PROBLEMS WITH THE FLORIDA DRUG TRAFFICKING SCHEME

Drug enforcement during the opioid epidemic has exposed serious flaws with the evolution of Florida’s drug trafficking scheme.¹²⁸ Instead of being a craftsman’s tool to punish the worst of the worst offenders, drug trafficking became a dragnet ensnaring low level offenders and drug addicts.¹²⁹ As applied to prescription opioids, drug trafficking enforcement creates significant concerns. Most notably, the weight of the legal substances in each opioid pill is the single most important factor for determining whether a drug trafficking charge is appropriate.¹³⁰ Furthermore, the minimal threshold weights combined with only needing to prove actual or constructive possession has

118. *See id.* at 415.

119. *Id.* at 415-16; see also FLA. STAT. § 893.101 (2021).

120. FLA. STAT. § 893.101 (2021).

121. *Id.*

122. *Adkins*, 96 So. 3d at 423.

123. *Id.* at 422-23 (citing *Patterson v. New York*, 432 U.S. 197 (1977)).

124. *Id.* at 433 (Perry, J. Dissenting).

125. *Id.*

126. *See* FLA. STAT. § 893.101 (2021).

127. Marc B. Hernandez, *Guilt Without Mens Rea: How Florida’s Elimination of Mens Rea for Drug Possession is Constitutional*, 66 FLA. L. REV. 1697 (2015). (explaining that only Florida and Washington place limits on the *mens rea* element for drug crimes.) In 2021, the Washington Supreme Court Struck down strict liability drug possession. *See State v. Blake*, 197 Wash. 2d 170, 481 P.3d 521 (2021).

128. OPPAGA, PAINKILLER TRAFFICKING, *supra* note 15, at 2-3.

129. *See generally id.* at 4. (explaining that offenders admitted to prison for opioid trafficking had minimal criminal history and substance abuse problems).

130. *See infra*, Part III A.

turned addicts into traffickers and given prosecutors unchecked power to secure favorable plea deals.

A. Inflexible Aggregate Weight Threshold

Using aggregate weight for drug trafficking threshold determinations is a rigid and arbitrary metric. While aggregate weight is appropriate for some controlled substances, prescription opioids are commonly distributed in pill or tablet form.¹³¹ When doctors prescribe opioid pills or tablets, these prescriptions are issued by number of pills not total weight.¹³² As pill weight varies depending on what is mixed in with the controlled substance,¹³³ the drug trafficking threshold line is imprecise, confusing, and lacks uniformity for determining when a person crosses over from unlawful possession to drug trafficking.¹³⁴ As a result, citizens must figure out for themselves whether they are violating the drug trafficking statute.¹³⁵

One of the more commonly prescribed pain relief medications containing oxycodone is known by the brand name Percocet.¹³⁶ Percocet has two active ingredients: oxycodone and acetaminophen.¹³⁷ Acetaminophen, known more commonly by its brand name Tylenol, is a non-opioid, over-the-counter pain reliever that can be picked up in almost any pharmacy or grocery store.¹³⁸ As displayed in Figure 1,¹³⁹ Percocet can be prescribed in several different configurations.¹⁴⁰ Each configuration weighs a different amount. Because the trafficking statute only considers aggregate weight,¹⁴¹ pills with larger amounts of acetaminophen will trigger mandatory minimum sentences much faster. This means that for simply possessing Percocet without a valid prescription, one person may be charged with drug trafficking while another similarly situated person will only be subject to felony possession.¹⁴²

Figure 1: Common Percocet Pill Dose and Weight Configurations

131. See U.S. FOOD & DRUG ADMIN., PERCOCET, (2006), https://www.accessdata.fda.gov/drugsatfda_docs/label/2006/040330s015,040341s013,040434s003lbl.pdf [Hereinafter PERCOCET] (Percocet is distributed in tablet form).

132. See Evan M. Musselwhite, *One Tough Pill to Swallow: A Call to Revise North Carolina's Drug Trafficking Laws Concerning Prescription Painkillers*, 33 CAMPBELL L. REV. 451, 473 (2010).

133. PERCOCET, *supra* note 131.

134. See *infra* Figure 2.

135. See *id.*

136. See *id.* at 457.

137. U.S. DEP'T OF JUST. DRUG ENFORCEMENT ADMIN., OXYCODONE, (2020), https://www.deadiversion.usdoj.gov/drug_chem_info/oxycodone/oxycodone.pdf.

138. Valerie Gerriets et al., *Acetaminophen*, NAT'L CTR. FOR BIOTECHNICAL INFO., (last visited Nov. 26 2021), see also U.S. FOOD & DRUG ADMIN., ACETAMINOPHEN INFORMATION, (2017), <https://www.fda.gov/drugs/information-drug-class/acetaminophen-information>.

139. See also PERCOCET, *supra* note 131.

140. *Id.*

141. See FLA. STAT. §§ 893.135(1)(c)3., (7) (2021).

142. See *infra* Figure 2.

Percocet Pill	Oxycodone/mg	Acetaminophen/mg	Total Weight/mg
Configuration 1	2.5mg	325mg	327.5mg
Configuration 2	5mg	325mg	330mg
Configuration 3	7.5mg	325mg	332.5
Configuration 4	7.5mg	500mg	507.5mg
Configuration 5	10mg	325mg	335mg
Configuration 6	10mg	650mg	660mg

Figure 2: Number of Percocet Pills Required For Drug Trafficking In Florida

Percocet: Oxycodone/ Acetaminophen	Number of Pills To Trigger 3- year Mandatory Minimum	Aggregate Weight	Aggregate Weight Of Ox- ycodone
2.5/325mg	22	7.21 g	55mg
7.5/325mg	22	7.32 g	165mg
10/325mg	21	7.04 g	210mg
7.5/500mg	14	7.11 g	105mg
10/650mg	11	7.26 g	110mg

Figure 2 illustrates this point exactly. Depending on the configuration, a person without a Percocet prescription could face a three-year mandatory minimum if they have just eleven pills while someone else must have twenty-two pills to get the same mandatory minimum.¹⁴³ Although all configurations have an aggregate weight that is relatively similar, both the number of pills and the weight of the controlled substance are varied. In some circumstances, a person carrying pills with lower amounts of oxycodone will get the same penalty as someone carrying pills with two to four times the amount of oxycodone. Instead of punishing people based on the controlled substance, the aggregate weight model punishes by how much of the legal substance is in the mixture.

Furthermore, if stopping the illegal drug trade is the main focus of

143. See FLA. STAT. §§ 893.135(1)(c)3.a (2021) (seven grams is the weight threshold to trigger a three year mandatory minimum).

Florida's drug trafficking scheme,¹⁴⁴ the aggregation theory allows mandatory minimums to trigger for low returns. The street value of a Percocet pill is ten dollars.¹⁴⁵ Because aggregate weight is the threshold consideration for drug trafficking, a person can be considered a Percocet "trafficker" with just \$110 worth of Percocet pills.¹⁴⁶ A quick search of Florida news stories from 2021 related to drug trafficking paint a much different picture. In Volusia, deputies seized 500 grams of cocaine and \$38,000 in cash.¹⁴⁷ In Brevard, law enforcement seized enough fentanyl to "kill the whole county."¹⁴⁸ In Tallahassee, a drug ring was busted with thirty pounds of cocaine and \$330,000 in cash.¹⁴⁹ Yet under Florida's drug trafficking scheme, these criminal drug enterprises will be treated the same as a person with \$110 worth of Percocet pills.¹⁵⁰

B. Minimal Opioid Possession is Drug Trafficking

Perhaps the most salient criticism of Florida's drug trafficking scheme is the fact that minimal opioid possession turns otherwise mostly law abiding citizens into drug traffickers.¹⁵¹ The first half of each trafficking paragraph, "[a] person who knowingly sells, purchases, manufactures, delivers, or brings into this state" is negated by the second half "*or who is knowingly in actual or constructive possession....*"¹⁵² As soon as a person is in actual or constructive possession of seven grams of any mixture containing oxycodone, Florida considers him or her a drug trafficker.¹⁵³

When viewed in light of the motives behind the adoption of mandatory minimum sentences, the implementation of Florida's drug trafficking scheme has expanded beyond the statute's original

144. See BAILEY, *supra* note 4, at 2.

145. ADDICTION CTR., *How Much Drug Costs Affects Addiction*, <https://www.addiction-center.com/drugs/how-much-do-drugs-cost/>, (last visited Nov. 26, 2021).

146. Calculated as follows: 11 Percocet pills (10/650mg) * \$10 = \$110.

147. Adrienne Cutway, *Drug ring dismantled as Volusia deputies seize 500 grams of cocaine, \$38,000 cash*, WKMG CLICKORLANDO, (June 21, 2021), <https://www.click-orlando.com/news/local/2021/06/21/drug-ring-dismantled-as-volusia-deputies-seize-500-grams-of-cocaine-38000-cash/>.

148. Jeff Weiner, *Enough fentanyl seized in Brevard investigation to kill the whole county, sheriff says*, ORLANDO SENTINEL, (May 1, 2019), <https://www.orlandosentinel.com/news/breaking-news/os-ne-brevard-fentanyl-bust-ron-desantis-20190501-story.html>.

149. Karl Ethers, *30 pounds of cocaine, \$330,000 in cash seized, 27 charged in North Florida drug ring*, TALLAHASSEE DEMOCRAT, (April 6, 2021), <https://www.tallahassee.com/story/news/2021/04/06/north-florida-drug-ring-operation-no-warning-30-pounds-cocaine-heroin-meth-cash-fentanyl/7107604002/>.

150. See Mahoney, Florida Inmates, *supra* note 17. However larger amounts of drugs seized will carry higher mandatory minimum sentences. See e.g. FLA. STAT. § 893.135(1)(b)2., 3. (2021).

151. See OPPAGA, PAINKILLER TRAFFICKING, *supra* note 15, at 3.

152. See e.g. FLA. STAT. § 893.135(1)(c)3. (2021) (emphasis added).

153. See *id.* However, lack of knowledge can be asserted as an affirmative defense. *Id.*

intent.¹⁵⁴ Of the opioid traffickers admitted to prison in the fiscal year 2010-11, thirty-eight percent were convicted based on possession alone.¹⁵⁵ Even including the remaining sixty-two percent who were caught selling to undercover police or confidential informants, most offenders possessed between thirty and ninety pills, which is equivalent to one or two prescriptions.¹⁵⁶ Some received trafficking charges for having fewer than fifteen pills.¹⁵⁷ Although most of these convictions seem to fit more squarely with second-degree felony possession with intent to sell,¹⁵⁸ all of them were punished as drug trafficking.¹⁵⁹

While trafficking should be reserved for the worst offenders, it is mainly addicts and other low-level drug offenders who are getting bludgeoned with trafficking charges.¹⁶⁰ A 2009 case illustrated this reality.¹⁶¹ The man was convicted of drug trafficking when he falsified prescriptions to support his oxycodone dependence.¹⁶² At the man's sentencing hearing, the judge noted that addicts are treated the same as those involved in organized crime under the statute's wording.¹⁶³ Based on available data, this outcome is not an outlier.¹⁶⁴ Of opioid traffickers convicted in the fiscal year 2010-11, eighty-four percent had no current or past history of violent crime, eighty-one percent had no prior history of drug dealing, sixty-five percent needed substance abuse treatments, and sixty-one percent were low risk for recidivism.¹⁶⁵

In light of this data, the Florida Legislature raised the weight threshold to trigger long mandatory minimum sentences for oxycodone in 2014.¹⁶⁶ Even still, a mere eleven pills is enough to send a person away for three years.¹⁶⁷ While the Florida Legislature took a step toward relaxing some of the harsher drug trafficking penalties, minimal raises to the trafficking threshold amounts have done nothing to help oxycodone addicts who are in need of treatment.¹⁶⁸ The number of pills in a Percocet prescription can vary depending on the oxycodone

154. See BAILEY, *supra* note 4, at 2.

155. See OPPAGA, PAINKILLER TRAFFICKING, *supra* note 15, at 3 (explaining that 62% were caught selling prescription painkillers, while the rest were based on other contacts with law enforcement including traffic stops and reports from pharmacies regarding potential prescription fraud).

156. *Id.* at 4.

157. *Id.*

158. See FLA. STAT. § 893.13(1)(a)1. (2021).

159. See OPPAGA, PAINKILLER TRAFFICKING, *supra* note 15, at 4.

160. See *id.*; see also BAILEY, *supra* note 4.

161. See Mahoney, Florida Inmates, *supra* note 17.

162. See *id.*

163. See *id.*

164. See OPPAGA, PAINKILLER TRAFFICKING, *supra* note 15, at 4.

165. *Id.*

166. See Mahoney, Florida Inmates, *supra* note 17.

167. See *infra* Figure 2.

168. See Mahoney, Florida Inmates, *supra* note 17.

dosage, but a single Percocet prescription can easily surpass 100 pills.¹⁶⁹ Although 100 pills may seem like a lot, the maximum daily dose for Percocet ranges between six and twelve pills.¹⁷⁰ Under the current drug trafficking scheme, falsifying a single prescription in most cases will turn someone into a drug trafficker, even if they are an end user sustaining their drug addiction.

C. High Costs of Imprisoning Low Level Offenders

Drug offenders make up the third-largest population of offenders in Florida prisons behind only those charged homicide and burglary.¹⁷¹ The average sentence length for a drug offender is 7.7 years.¹⁷² In 2006, felony drug offenses “represented the single largest criminal category” in Florida.¹⁷³ Between 2006 and 2011, prison admission for opioid trafficking saw significant increases.¹⁷⁴ These prison admissions were primarily due to trafficking in oxycodone.¹⁷⁵ Despite a decline in prison admission for drug-related offenses in 2016, drug crimes still accounted for three of the top ten offenses leading to prison admission.¹⁷⁶ All three of these drug offenses, including drug trafficking, are considered nonviolent.¹⁷⁷ For the years where data was collected, prison admissions from drug trafficking offenses saw the lowest decrease as they carry mandatory minimums.¹⁷⁸ By 2019, drug offenses had once again claimed the top spot for prison admission.¹⁷⁹

According to the 2018-19 Annual Report from the Florida Department of Corrections (FDC), the FDC expended \$2.5 billion.¹⁸⁰ The annual cost per inmate in 2019 was \$22,688 and has steadily increased since 2014.¹⁸¹ Most of the budget goes toward security and institutional operation, which represents the largest expense per inmate.¹⁸² While court backlogs and the ongoing response to the COVID-19 pandemic has reduced Florida's prison population to its lowest numbers in

169. See Musselwhite, *supra* note 132, at 473; see also GOODRX, PERCOCET, ENDOCET, ROXICET, <https://www.goodrx.com/percocet?dosage> (last visited Nov. 26, 2021).

170. U.S. FOOD & DRUG ADMIN., PERCOCET, (2006), 2, https://www.accessdata.fda.gov/drugsatfda_docs/label/2006/040330s015,040341s013,040434s003lbl.pdf.

171. Felicity Rose et al., AN EXAMINATION OF FLORIDA'S PRISON POPULATION TRENDS, at 16 (Crime and Justice Institute), (2017), <https://www-media.floridabar.org/uploads/2018/04/Criminal-Justice-Data-Study.pdf>.

172. 2018-2019 FLA. DEP'T CORR. ANNUAL REP., at 16, http://www.dc.state.fl.us/pub/annual/1819/FDC_AR2018-19.pdf, [hereinafter FDC ANNUAL REP.].

173. *Id.* at 7.

174. OPPAGA, PAINKILLER TRAFFICKING, *supra* note 15, at 3.

175. *Id.* at 1.

176. Felicity Rose et al., *supra* note 171, at 14-15.

177. *Id.* at 15.

178. *Id.*

179. FDC ANNUAL REP, *supra* note 172 at 17, http://www.dc.state.fl.us/pub/annual/1819/FDC_AR2018-19.pdf

180. *Id.* at 11.

181. *Id.* at 12.

182. *See id.*

fifteen years,¹⁸³ the current trend does not accurately reflect Florida's incarceration over the past twenty-five years.¹⁸⁴ Since the mid-1990s, violent crime and property crime rates have steadily declined.¹⁸⁵ However, Florida's prison population grew from 63,000 inmates in 1995 to 96,000 inmates in 2019.¹⁸⁶ Because nonviolent drug offenses are a leading reason for prison admission and are one of the largest prison population categories,¹⁸⁷ incarceration of nonviolent drug offenders are a reasonable explanation for Florida's prison population growth and bloated prison budget despite falling crime rates.

Expensive drug incarceration is further evidenced by the fact that opioid traffickers who qualify for drug diversion programs are currently sitting in prison.¹⁸⁸ In a study of 1,200 opioid offenders admitted to prison in Florida, 310 met eligibility requirements for drug diversion programs and were not admitted.¹⁸⁹ To be eligible for drug court, a person cannot be in the business of selling drugs.¹⁹⁰ Paradoxically, because Florida drug trafficking convictions can be based on possession alone,¹⁹¹ drug traffickers in Florida qualify for drug court.¹⁹² If just half of the 310 qualified offenders were admitted into and completed drug diversion programs, the State of Florida would have saved at least \$6 million.¹⁹³ Despite the fact that most opioid offenders need substance abuse treatment and are deemed low risk for recidivism,¹⁹⁴ Florida spends millions of dollars incarcerating them.¹⁹⁵

D. Lopsided Prosecutorial Power

Among other things, Florida's sentencing reforms in the 1980s and 1990s marked an unprecedented power grab for prosecutors, who were a primary driving force behind their adoption.¹⁹⁶ Not surprisingly, Prosecutors generally favor the mandatory minimums tied to drug trafficking.¹⁹⁷ Although drug trafficking penalties are mandatory, prosecutors have the discretion to prosecute cases that qualify for drug

183. See Gracy Toohey, *Florida's prison population lowest in 15 years as intakes slow due to coronavirus*, ORLANDO SENTINEL, (Oct. 14, 2020), <https://www.orlandosentinel.com/coronavirus/os-ne-coronavirus-florida-prisons-population-drop-20201014-qo54amk6rre3hit17f35a74mp4-story.html>.

184. See Felicity Rose et al., *supra* note 171, at 6.

185. *Id.*

186. THE SENTENCING PROJECT, STATE-BY-STATE DATA, <https://www.sentencingproject.org/the-facts/#map?dataset-option=SIR>, (last visited Nov. 26, 2021).

187. See Felicity Rose et al., *supra* note 171, at 14-15.

188. OPPAGA, PAINKILLER TRAFFICKING, *supra* note 15, at 7-8.

189. *Id.* at 1, 2, 7.

190. See FLA. STAT. §948.08(6)(c)2. (2021).

191. See e.g. FLA. STAT. § 893.135(1)(c)3 (requiring only "actual or constructive possession" for drug trafficking provisions to apply).

192. See OPPAGA, PAINKILLER TRAFFICKING, *supra* note 15, at 7-8.

193. *Id.* at 8.

194. See *id.* at 4.

195. See *id.* at 8.

196. See Heather Schoenfeld, *The War on Drugs, the Politics of Crime, and Mass Incarceration in the United States*, 15 J. GENDER RACE & JUST., 315, 345 - 46 (2012).

197. See OPPAGA, PAINKILLER TRAFFICKING, *supra* note 15, at 9.

trafficking as possession with intent to sell or felony possession so that no mandatory sentence is required.¹⁹⁸ This is an enormous bargaining chip, and it is not subject to meaningful oversight.¹⁹⁹ Prosecutors regularly use the threat of mandatory minimum sentences to get favorable plea deals.²⁰⁰ Of criminal cases in Florida, 96.7% are settled before trial with a majority of those settlements resulting from plea deals.²⁰¹ Prosecutors openly admit that Florida's drug trafficking statute gives them leverage over defendants during plea bargaining.²⁰² With mandatory minimum prison sentences serving as the punishment for not cooperating, defendants regularly take plea deals to avoid tougher penalties.²⁰³

The further development of Florida's trafficking provision through case law and legislative revisions has benefitted prosecutors because the only required element for drug trafficking is actual or constructive possession of a threshold weight of the controlled substance.²⁰⁴ Prosecutors are not even required to prove that a defendant knew that he or she possessed the controlled substance.²⁰⁵ As a result, there is little difficulty in proving a drug trafficking charge once possession is established. In the case of oxycodone, the low weight threshold and aggregation theory creates increased exposure to the drug trafficking statute.²⁰⁶ Although it became clear that the evolution of Florida's drug trafficking statute allowed for low level offenders to be targeted, prosecutors have opposed changes that would upset their power balance.²⁰⁷

III. DRUG TRAFFICKING IN OTHER JURISDICTIONS

Every state criminalizes the unlawful manufacture, distribution,

198. See *id.* at 2.

199. See HUMAN RIGHTS WATCH, *An Offer You Can't Refuse: How U.S. Federal Prosecutors Force Drug Defendants to Plead Guilty*, (Dec. 5, 2013), <https://www.hrw.org/report/2013/12/05/offer-you-cant-refuse/how-us-federal-prosecutors-force-drug-defendants-plead#>. ("Prosecutors have discretion, largely unreviewable by judges, as to what charges to bring, what promises or threats to make in plea bargaining, and whether to carry out those threats if the defendant does not plead.")

200. *Cf. id.* (explaining that federal prosecutors use the threat of mandatory minimums during plea bargaining).

201. See LAWSUIT.ORG, *Criminal Charges and Guilty Pleas in Florida's 20 Circuit Courts: Heading to Trial*, (2020), <https://lawsuit.org/legal-statistics/charges-and-pleas-in-floridas-courts/> (Last visited Nov. 26, 2021).

202. See OPPAGA, PAINKILLER TRAFFICKING, *supra* note 15, at 5.

203. See Deirnesa Jefferson, *Overworked and Underpaid: A public defender crisis*, WGFL CBS4 NEWS, (Feb. 12, 2019), <https://mycbs4.com/news/local/overworked-and-underpaid-a-public-defender-crisis>.

204. See FLA. STAT. § 893.135 (2021).

205. See FLA. STAT. § 893.101.

206. See OPPAGA, PAINKILLER TRAFFICKING, *supra* note 15, at 4, 6-7 (Because aggregate weight does not contemplate legal substances, prescription opioid traffickers are mostly low level offenders).

207. See *id.* at 8, 10.

or possession of controlled substances.²⁰⁸ Although many states model their drug laws after the federal system, states are free to create their own drug laws.²⁰⁹ Many states have adopted a similar drug trafficking scheme to Florida.²¹⁰ However, a handful of states take a different approach.

A. Maine

In Maine, a person is guilty of drug trafficking when that person “intentionally or knowingly trafficks in what the person knows or believes to be a scheduled drug, which is in fact a scheduled drug”²¹¹ A trafficking charge for oxycodone is appropriate when a person traffics “[a]ny quantity of pills, capsules, tablets, units, compounds, mixtures or substances that, in the aggregate, contains 800 milligrams or more of oxycodone”²¹² Unlike Florida, Maine’s trafficking in oxycodone statute ties the trafficking weight threshold to the aggregate weight of oxycodone.²¹³ Although mixtures are contemplated in the statute, the mixture must contain 800 milligrams of oxycodone, not weigh 800 milligrams in total.²¹⁴ This means Maine’s trafficking statute targets the controlled substance for threshold weight determinations instead of the total weight of the pill including the other substances.

When the Maine approach is applied to opioid pills, such as Percocet, a different trend from Florida emerges.²¹⁵ As shown in Figure 3,²¹⁶ the amount of oxycodone in each pill is inversely related to the number of pills required to trigger the trafficking provision. As the amount of oxycodone per pill goes up, the number of pills required to trigger the trafficking provision goes down. In all circumstances, the aggregate amount of oxycodone remains relatively constant.

Figure 3: Number of Pills Required for Trafficking in Oxycodone (Percocet) in Maine

Percocet: Oxycodone/ Acetaminophen	Number of Pills	Aggregate Weight of Oxycodone
2.5/325mg	320	800mg
5/325mg	160	800mg

208. See FINDLAW, *Drug Trafficking and Drug Distribution: State Drug Trafficking Charges*, (Feb 4, 2020), <https://www.findlaw.com/criminal/criminal-charges/drug-trafficking-distribution.html>.

209. See LAMPE, *supra* note 7, at 4.

210. See Perry, *supra* note 74, at 531.

211. ME. REV. STAT. TIT. 17-A, § 1103 1-A. (West, Westlaw through Oct. 18, 2021).

212. ME. REV. STAT. TIT. 17-A, § 1103 3.G.

213. See *id.*

214. See *id.*

215. Compare *infra* Figure 2 with *infra* Figure 3.

216. Figure 3 is based on Maine’s trafficking threshold weight. Calculations are as follows: 800mg / weight of oxycodone per pill configuration =

7.5/500mg	107	802.5mg
10/325mg	80	800mg
10/650mg	80	800mg

B. North Carolina

North Carolina has a more detailed trafficking provision than Maine.²¹⁷ However, North Carolina does not have a specific provision for prescription opioids.²¹⁸ Through North Carolina case law, oxycodone has been treated as an opium derivative like heroin for trafficking purposes.²¹⁹ As such, oxycodone is treated the same in North Carolina as it is in Florida.²²⁰ However, with prescription opioids being the unfortunate exception,²²¹ North Carolina's trafficking thresholds adjust based on the common medium of the controlled substance.²²² For the most part, a drug in powder form will be sold by its weight while a drug in pill or tablet form will be sold by dosage unit.²²³ Under the North Carolina scheme, if the controlled substance is distributed in powder form, a weight threshold is used.²²⁴ If the controlled substance is distributed by dosage unit, a dosage unit threshold is used.²²⁵ This allows North Carolina to better target the harm associated with controlled substances, instead of classifying every controlled substance by weight. Using North Carolina's scheme, members of the public are provided with better notice as to the consequences associated with the amount of a controlled substance in their possession.²²⁶

C. California

California's drug trafficking scheme is based upon the actions and intent of the actor, not the weight or dosage of the controlled

217. Compare ME. REV. STAT. TIT. 17-A, § 1103 1-A. (West, Westlaw through Oct. 18, 2021) with N.C. GEN. STAT. § 90-95 (Westlaw through 2020 legislation).

218. See N.C. GEN. STAT. § 90-95 (Westlaw through 2020 legislation); see also, Musselwhite, *supra* note 132, at 458.

219. See Perry, *supra* note 74, at 460-62.

220. Compare N.C. GEN. STAT. § 90-95(h)(4) (Westlaw through 2020 legislation) with FLA. STAT. § 893.135(1)(c)3. (2021). For a trafficking charge to be appropriate a person must possess a threshold weight in grams of the controlled substance. See FLA. STAT. § 893.101 (2021).

221. See Musselwhite, *supra* note 132, at 472-73.

222. See *id.*

223. See *id.*

224. See *id.*

225. See *id.*

226. See *id.* at 473 (explaining the problems with a drug trafficking scheme that requires citizens to perform calculations and unit conversions when it is sold by dosage unit but a weight threshold is used).

substance.²²⁷ It does not list out all the different controlled substances or have threshold requirements for someone to be convicted of drug trafficking.²²⁸ Instead, any person who unlawfully “transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport [] any controlled substance” within the specified drug schedules is guilty of drug trafficking in California.²²⁹ California treats an offer to transport or sell a controlled substance the same as actually transporting or selling, even if the person does not actually possess the controlled substance.²³⁰ Drug trafficking penalties are enhanced if the person travels across multiple counties.²³¹

Unlike many other jurisdictions, transporting drugs within the state or crossing the border into California with drugs are the main features of California’s trafficking scheme.²³² The statute defines “transport” to mean transport for sale.²³³ As California shares a border with Mexico, it is a hotbed for drug trafficking.²³⁴ Because of this, the statute treats crossing any border into California as importing into the state instead of transporting.²³⁵ This gives California broader authority to use the trafficking provision to punish drug possession without the intent to sell whenever the drugs enter the state.²³⁶ However, crossing a border into California is required for mere possession to result in drug trafficking.²³⁷ Because California tethers its trafficking scheme to a minimum of transporting for sale or importing into the state,²³⁸ in most circumstances, prosecutors must prove that a person was transporting a controlled substance with the intent to sell or distribute it.²³⁹ As drug trafficking implies that a person engage in some form of drug commerce,²⁴⁰ California’s scheme punishes people for drug trafficking only when there is a measurable indication that drug commerce has or will take place.

227. SAN DIEGO ATTORNEY, *State and Federal Laws on Drug Trafficking*, (Jan. 20, 2021), <https://jdlaw.law/blog/state-and-federal-laws-on-drug-trafficking/> (last visited Nov. 27, 2021).

228. See CAL. HEALTH & SAFETY CODE § 11352 (Westlaw through 2021 Reg. Sess.).

229. CAL. HEALTH & SAFETY CODE § 11352(a).

230. See *People v. Jackson*, 59 Cal. 2d 468, 381 P.2d 1 (Cal. 1963); See also *People v. Brown*, 55 Cal. 2d 64, 357 P.2d 1072 (Cal. 1960).

231. CAL. HEALTH & SAFETY CODE § 11352(b).

232. See CAL. HEALTH & SAFETY CODE § 11352.

233. CAL. HEALTH & SAFETY CODE § 11352(c).

234. See generally Gustavo Solis, *Drug smuggling, and the endless battle to stop it*, USA TODAY, (2017), <https://www.usatoday.com/border-wall/story/drug-trafficking-smuggling-cartels-tunnels/559814001/>.

235. See CAL. HEALTH & SAFETY CODE § 11352(a) (Westlaw through 2021 Reg. Sess.).

236. See *id.*; see also SAN DIEGO ATTORNEY, *supra* note 227.

237. See CAL. HEALTH & SAFETY CODE § 11352(a) (Westlaw through 2021 Reg. Sess.).

238. See *id.*

239. See SAN DIEGO ATTORNEY, *supra* note 227. (Prosecutors will bring trafficking charges based on what they can prove).

240. See *Paey v. State*, 943 So. 2d 919, 930 (Fla. 2d DCA 2006) (Seals, J., dissenting); see also, *Drug Trafficking*, UNITED NATIONS, *supra* note 9 (defining drug trafficking).

D. Oregon

On February 1, 2021, Oregon made “minimal” drug possession a civil infraction instead of a criminal penalty.²⁴¹ Oregon allows for a person to possess up to forty oxycodone pills before a criminal penalty is assessed.²⁴² Although Oregon’s decriminalization is only for minimal drug possession, the amount of oxycodone a person can possess without fear of criminal prosecution is enough for a person to receive a drug trafficking charge in Florida.²⁴³ Even with the lightest Percocet configuration (2.5/325mg),²⁴⁴ twenty-two pills will meet Florida’s drug trafficking threshold.²⁴⁵ This means that a minimal drug possessor in Oregon could be a drug trafficker in Florida.²⁴⁶

Oregon is an outlier among all other jurisdictions when it comes to drug laws.²⁴⁷ However, several jurisdictions, including Maine, Massachusetts, Rhode Island, and Vermont, have put forth drug decriminalization bills in 2021.²⁴⁸ Advocacy groups are looking to put more decriminalization initiatives on the ballot in Washington in 2022 and California in 2024.²⁴⁹ Even as more jurisdictions seemingly support decriminalization, Oregon’s decriminalization has had unclear results and mixed feelings.²⁵⁰ Because broad-based drug decriminalization in Oregon is still a relatively new concept, more data is needed for experts to determine whether decriminalization has worked as intended.²⁵¹

IV. RECOMMENDATIONS

Prescription opioids like oxycodone do not pose the same danger to the public as they did a decade ago.²⁵² Yet, drug offenders who possess prescription opioids like oxycodone can serve long and expensive

241. See Noelle Crombie, *Here are the drug limits under Oregon’s first-of-its-kind decriminalization law*, OREGON LIVE THE OREGONIAN, (Nov. 27, 2020), <https://www.oregonlive.com/politics/2020/11/here-are-the-drug-limits-under-oregons-first-of-its-kind-decriminalization-law.html/>.

242. See *id.*

243. See *infra* Figure 2.

244. See U.S. FOOD & DRUG ADMIN., PERCOCET, (2006), at 1, https://www.accessdata.fda.gov/drugsatfda_docs/label/2006/040330s015,040341s013,040434s003lbl.pdf.

245. See *infra* Figure 2.

246. See *id.*

247. See Andrew Selesky, *Oregon 1st state to decriminalize possession of drugs*, THE ASSOCIATED PRESS NEWS, (Feb. 1, 2021), <https://apnews.com/article/oregon-decriminalize-drug-possession-6843f93c3d55212e0ffbdd8b93be9196>.

248. See Sophie Quinton, *Oregon Drug Decriminalization May Spread, Despite Unclear Results*, PEW STATELINE, (Nov. 3, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/11/03/oregons-drug-decriminalization-may-spread-despite-unclear-results>.

249. See *id.*

250. See *id.*

251. See *id.*

252. See DRUG ENFORCEMENT AGENCY, DEA-DCT-DIR-007-20, NATIONAL DRUG THREAT ASSESSMENT, at 9, (2019), https://www.dea.gov/sites/default/files/2020-01/2019-NDTA-final-01-14-2020_Low_Web-DIR-007-20_2019.pdf (explaining that fentanyl is the primary driver of the opioid epidemic).

prison sentences for drug trafficking, even without engaging in drug trafficking activities.²⁵³ Additionally, the current scheme does not provide citizens with notice or clarity on drug trafficking thresholds and punishes low level offenders.²⁵⁴ These issues combined with Florida's current legislation to deal with low level offenders²⁵⁵ necessitate amending the drug trafficking scheme to better align with its intended purpose.²⁵⁶ As the drug trafficking scheme is a legislative creation, legislative revision is the most appropriate avenue for change.

Because Florida's aggregate weight theory is an arbitrary, one-size-fits-all threshold determination, it should be abandoned in favor of a more flexible threshold. Based on other jurisdictions, there are two directions Florida could take. The first approach could consider the aggregate weight of the controlled substance,²⁵⁷ and the second approach could consider the number of dosage units.²⁵⁸ Both of these approaches are better suited for prescription opioid threshold determinations. Furthermore, as drug trafficking implies that a person engages in drug commerce,²⁵⁹ Florida should consider adopting language that requires proof of that fact.

A. *Drug Trafficking Based on the Aggregate Weight of the Controlled Substance*

Florida's aggregation theory creates arbitrary boundaries separating a drug trafficker from someone who is merely in unlawful possession of a controlled substance.²⁶⁰ As prescription opioids are regularly mixed with legal substances,²⁶¹ the number of pills to meet the trafficking threshold weight can vary greatly depending on the weight of filler contained in each pill.²⁶² This means that Florida is not basing harsh criminal penalties on the supposedly dangerous controlled substances but instead on the other substances like over-the-counter acetaminophen.²⁶³ As a result, Florida's current drug trafficking scheme does not put average citizens on sufficient notice that they are in

253. See *infra*, Part III B. and C.

254. See *infra*, Part III A.

255. See FLA. STAT. § 893.13 (2021) (unlawful possession with intent to sell and unlawful possession are both felonies but do not carry mandatory minimum prison sentences in most circumstances).

256. See BAILEY, *supra* note 4, at 2 (Drug trafficking mandatory minimums were intended to exclude minor players and drug users).

257. See *infra*, Part IV A.

258. See *infra*, Part IV B.

259. See *Paey v. State*, 943 So. 2d 919, 930 (Fla. 2d DCA 2006) (Seals, J., dissenting).

260. See *infra*, Part III A.

261. See e.g. U.S. DEP'T OF JUST. DRUG ENFORCEMENT ADMIN., OXYCODONE, (2020). https://www.deadiversion.usdoj.gov/drug_chem_info/oxycodone/oxycodone.pdf.

262. See *infra* Figure 2.

263. See e.g. U.S. FOOD & DRUG ADMIN., PERCOCET, (2006), https://www.accessdata.fda.gov/drugsatfda_docs/label/2006/040330s015_040341s013_040434s003lbl.pdf (showing that a majority of the pill's weight comes from the acetaminophen not oxycodone).

danger of being considered a drug trafficker.²⁶⁴ To solve these issues, Florida could adopt a weight threshold based on the aggregate weight of the controlled substance similar to the Maine aggregation approach.

If Florida adopted a similar drug trafficking threshold scheme to the Maine threshold scheme, the problems created by Florida's aggregation theory would be resolved. The key difference between the two approaches is that the Maine approach targets the potency of the controlled substance whereas Florida targets the total weight of the pill, including over-the-counter substances. In adopting weight thresholds based solely on the controlled substance, the important metric (the controlled substance) determines when a trafficking charge is appropriate, rather than an arbitrary metric (total weight). This aligns the weight threshold with the potency and associated danger of the controlled substance.²⁶⁵ It further prevents Florida from inadvertently criminalizing legal substances.²⁶⁶ The weight threshold to trigger the drug trafficking statute also becomes much clearer as complex calculations are not required. Instead, citizens must only know the dose of the controlled substance in their possession.

Prosecutors and law enforcement stakeholders have opposed this option, citing concerns of expensive laboratory testing.²⁶⁷ They believe that if a system like this were adopted each pill would need to be examined to meet the "proof beyond a reasonable doubt" standard.²⁶⁸ However, current procedures already require laboratory testing.²⁶⁹ When pills appear to be the same size and weight, the laboratory only tests one pill then weighs all of the pills to prove the weight threshold.²⁷⁰ In the current system, the result from the analysis of one pill is imputed to each of the other pills.²⁷¹ Nothing indicates that procedure would change if the weight was based on the aggregate of the controlled substance. When the laboratory tests the first pill and it appears to be of equal size and weight to the rest of the pills, the analysis from that pill can be imputed to the remaining pills.²⁷² The only functional difference would be one extra calculation. The laboratory would count the remaining pills and multiply the number of pills by the amount of the controlled substance per pill to figure out if the

264. See generally *infra* Part III A (explaining that drug trafficking threshold determinations are unclear).

265. See OPPAGA, PAINKILLER TRAFFICKING, *supra* note 15, at 9.

266. See *infra* Part III A (the weight of the legal substance is what triggers mandatory minimums).

267. See OPPAGA, PAINKILLER TRAFFICKING, *supra* note 15, at 9-10.

268. See *id.*

269. See *id.*

270. See *id.*

271. See *id.*; See also FLA. STAT. § 893.105(1) ("Any controlled substance or listed chemical seized as evidence may be sample tested . . . [a]ny such sample and the analysis thereof shall be admissible into evidence").

272. Cf. FLA. STAT. § 893.105 (As sampling is allowed under Florida law, testing the sample should suffice).

threshold requirement is met.

B. Drug Trafficking Based on the Common Medium for Distribution

Another option Florida could implement is tying drug trafficking thresholds to the carrier medium of that controlled substance. In the case of prescription opioids that are commonly distributed in pill or tablet form, the number of pills or tablets (dosage unit) will trigger the trafficking provision instead of aggregate weight. Under a scheme that contemplates the dosage unit in this way, the concerns in response to *Holland* are alleviated.²⁷³ The total number of pills is the important factor instead of the amount of the controlled substance per dosage unit. For other substances that are not distributed in pill or tablet form, their threshold determination would still be considered using aggregate weight.

One of the drawbacks of a dosage unit threshold is the fact that the controlled substance's potency is not considered.²⁷⁴ However, even without this consideration, a dosage unit threshold for controlled substances like oxycodone would still be a significant improvement over the current scheme because it sets a uniform standard.²⁷⁵ Under Florida's current scheme, citizens must figure out for themselves if they are in danger of becoming a drug trafficker.²⁷⁶ In the case of a false prescription, the aggregate weight is not readily apparent.²⁷⁷ Pill weight can vary greatly, even among different configurations of the same prescribed medication.²⁷⁸ As such, average citizens must take it upon themselves to calculate the aggregate weight of all the pills for them to know if they are in danger of violating Florida's drug trafficking statute.²⁷⁹ When a dosage unit threshold is used, the threshold is consistent and gives the average citizen a clear picture of the line delineating drug trafficking from unlawful possession.

C. Drug Trafficking Based on Proof of Intent to Engage in the Drug Trade

Florida's drug trafficking scheme has become all but indistinguishable from unlawful drug possession.²⁸⁰ Florida should consider amending its drug trafficking scheme to require some element involving sale

273. See *infra* Part II B.2.; see also Perry, *supra* note 74, at 529.

274. See *infra* Part V A (explaining that a threshold contemplating aggregate weight of the controlled substance targets the potency of that controlled substance).

275. See *infra* Part IV A.

276. See generally, Musselwhite, *supra* note 132, at 473 (applying reasoning from similar North Carolina statutes where citizens must figure out for themselves if they have violated the weight thresholds to trigger trafficking provisions through complex calculations).

277. See *infra* Part III A. (explaining that doctors prescribe by number of pills not total weight).

278. See *infra* Figure 2.

279. Musselwhite, *supra* note 132, at 473.

280. See *infra* Part III B.

or distribution similar to California. This could be achieved with an intent to sell or transport for sale requirement. As drug trafficking implies that a person is engaged in the illicit drug trade,²⁸¹ statutes that target drug trafficking should reflect that fact. Furthermore, this requirement could be limited to the lowest thresholds. In the case of oxycodone, the seven-to-fourteen-gram threshold category²⁸² would require proof of intent to engage in the drug trade, while higher threshold categories would see no change as the concerns regarding low level offenders are largely alleviated with higher threshold categories.

CONCLUSION

Florida's drug trafficking scheme was intended to punish high level drug activity.²⁸³ However, through its various evolutions, it heavily penalizes low level drug offenders because the rigid threshold determinations are not crafted in a way that distinguishes minimal possession from drug trafficking. Specifically, Florida's drug trafficking statute arbitrarily ties all controlled substance thresholds to any mixture that meets the described aggregate weight. Because opioids are commonly prescribed in pill or tablet form and mixed with legal substances, Florida's rigid system makes opioid trafficking vary depending on how much of the legal substance is mixed in with the pill. This has allowed a handful of pills to trigger costly mandatory minimum prison sentences, and in effect, has turned wide swaths of low-level offenders and opioid addicts into drug traffickers. However, when mandatory minimum prison sentences were enacted for drug trafficking, they were never intended to be used in this way.²⁸⁴

The existence of felony possession with intent to sell and felony possession indicate that lower-level drug activities already have an appropriate place within Florida's broader drug criminalization scheme. Because of this, Florida should adopt a new way to determine drug trafficking thresholds and add proof of intent to engage in the drug trade to the drug trafficking statute. These changes would mark significant improvements to the statute's implementation as lower-level drug activity would no longer qualify as drug trafficking. Instead, these activities would fall into their appropriate category. Above all, the drug trafficking statute will be dispatched only against the worst drug offenders, as was originally intended.²⁸⁵

Most of the available data regarding opioid incarceration in Florida

281. UNITED NATIONS OFFICE ON DRUGS AND CRIME, DRUG TRAFFICKING, <https://www.unodc.org/unodc/en/drug-trafficking/index.html>, (last visited Nov. 24, 2021) (defining drug trafficking).

282. See FLA. STAT. § 893.135(1)(c)3.a (representing the lowest weight threshold).

283. Bailey, *supra* note 4, at 2 (explaining that the trafficking scheme was drafted to exclude minor players and drug users).

284. Bailey, *supra* note 4, at 2.

285. Bailey, *supra* note 4, at 2.

is a decade old. As such, the conclusions drawn from this data could benefit from new research. While the available data for opioid-related prison admissions in Florida were somewhat limited, the data highlighted the problems that can and do arise when Florida's drug trafficking scheme is applied to the unlawful possession of prescription opioids. Further research should examine how other controlled substances commonly distributed by dosage unit are affected under Florida's drug trafficking scheme.