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Opinions Are Mixed About Sentencing Laws for Painkiller Trafficking

at a glance

Recent increases in prison admissions for opioid trafficking are primarily due to convictions for the prescription painkiller oxycodone. The majority of offenders admitted to prison for painkiller trafficking sold prescription painkillers to a confidential informant or undercover law enforcement officer. Most of these offenders have substance abuse problems and minimal prior criminal involvement.

Criminal justice stakeholders, including judges, prosecutors, public defenders, and law enforcement officials, have mixed opinions about the statute that addresses painkiller trafficking. Some are in favor of continuing the statute as written. Others have concerns about the impact of trafficking weight thresholds and minimum mandatory sentences, particularly as they relate to lower potency hydrocodone.

If the Legislature wishes to modify the statutory provisions for trafficking in prescription painkillers, options include

- reclassifying hydrocodone offenses;
- allowing courts to commit certain addicted offenders to treatment rather than prison;
- increasing weight thresholds for trafficking in prescription painkillers or changing how weights are calculated; and
- aligning minimum mandatory sentence lengths with those for most other drugs.

Scope

The Legislature directed OPPAGA to examine sentencing laws for trafficking in prescription opioids such as oxycodone and hydrocodone. This report presents analyses of prison admissions for opioid trafficking, describes issues raised by criminal justice stakeholders about the statutory weight thresholds and sentences for trafficking in prescription opioids, and provides options for the Legislature to consider if it wishes to modify the drug trafficking statute.

Background

Prescription drugs such as oxycodone and hydrocodone are opioids and often referred to as painkillers.¹ These drugs are classified as controlled substances in s. 893.03, *Florida Statutes*, which groups controlled substances based on the extent to which they have accepted medical uses and potential for abuse, physical or psychological dependence, and/or physical damage. Controlled substances are subject to stringent statutory provisions for sale, manufacture, delivery, and possession.

People who illegally possess, sell, or otherwise distribute controlled substances can be punished under either s. 893.13, *Florida*

¹Opioids include opiates such as morphine, heroin, and codeine, which are derived from opium. Opioids also include synthetic drugs that have similar properties, such as oxycodone and hydrocodone. These drugs are commonly used for pain-relieving or euphoric effects.

Statutes (prohibited acts), or s. 893.135, *Florida Statutes* (trafficking). The length of sentence and severity of the charge depends on the type of drug and whether the amount of drug possessed or sold meets weight thresholds in the drug trafficking statute. Offenses involving lower amounts are second or third degree felonies punishable under sentencing guidelines in the Criminal Punishment Code.² For example, offenders with less than an ounce of cocaine could be charged with possession and sentenced to probation, jail, or prison depending on their criminal histories.

If the amount of drugs exceeds statutory weight thresholds, the offense is considered trafficking. Trafficking offenses are first degree felonies punishable by minimum mandatory prison sentences. For example, an offender with a pound of cocaine could be charged with trafficking.

The thresholds for trafficking in opioids, including prescription painkillers, are based on the weight of the entire mixture or pills containing the controlled substance. As shown in Exhibit 1, possession or sale of amounts between 4 and 14 grams is subject to a minimum mandatory sentence of three years.³ For the second threshold, the sentence is 15 years. Offenses involving 28 grams to 30 kilograms (approximately 1 ounce to over 60 pounds), result in a 25-year sentence.

**Exhibit 1
Four or More Grams of Opioids Meet Weight
Thresholds for Minimum Mandatory Sentences**

Weight Threshold	Minimum Mandatory Sentence
4 grams to less than 14 grams	3 years
14 grams to less than 28 grams	15 years
28 grams to less than 30 kilograms	25 years
Over 30 kilograms	Life in prison ¹

¹ In Fiscal Year 2010-11, there were no offenders imprisoned for life for trafficking in opioids.

Source: Section [893.135\(1\)\(c\)](#), *F.S.*

² Section 775.082, *F.S.*

³ Four grams is equal to 0.14 ounces.

Although trafficking offenses are subject to minimum mandatory sentences, prosecutors have discretion on whether to prosecute a case as drug trafficking or a lesser drug offense. For example, if the defendant cooperates and assists in the investigation of others responsible for distributing drugs, a prosecutor may choose to charge the defendant with another drug offense, such as possession or selling, or seek a prison sentence for a lower trafficking threshold.

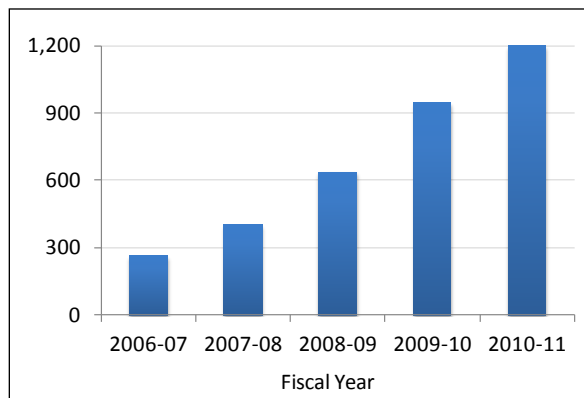
Findings

Prison admissions for opioid trafficking

Department of Corrections data shows that prison admissions for trafficking in opioids have more than quadrupled over the past five years, from 262 admissions in Fiscal Year 2006-07 to 1,200 in Fiscal Year 2010-11. (See Exhibit 2.) This data does not distinguish among the types of opioids, and as a result, offenses involving heroin are grouped with those involving prescription painkillers. This is because these two controlled substances are addressed in the same section of the drug trafficking statute, and thus subject to the same weight thresholds and minimum mandatory sentences.⁴

⁴ Section [893.135\(1\)\(c\)](#), *F.S.*

**Exhibit 2
Prison Admissions for Trafficking in Opioids
Have Quadrupled Over the Last Five Years**



Source: Information compiled by the Office of Economic and Demographic Research based on Department of Corrections data.

To evaluate the factors leading to the recent increase in prison admissions for trafficking in opioids, we reviewed data for a statewide random sample of 194 offenders admitted to prison for this offense during Fiscal Year 2010-11.^{5, 6} We determined the type and amount of drugs involved in their offenses and the circumstances surrounding their arrests and convictions.

Our analyses found that the recent increase in prison admissions for opioid trafficking was primarily due to convictions for prescription painkillers rather than heroin. The majority of these offenders sold prescription painkillers to a confidential informant or undercover law enforcement officer. In addition, most offenders who were involved in opioid trafficking had substance abuse problems and minimal prior criminal involvement.

⁵ We reviewed data from various documents, including arrest reports, affidavits for arrest, state attorneys' charging documents, and sentencing score sheets. We also analyzed Department of Corrections data on offenders' prior criminal histories, substance abuse treatment needs, and risk of recidivism.

⁶ With a sample size of 194, we had a 90% confidence level that the sample was representative of statewide prison admissions for opioid trafficking.

Most offenders admitted to prison for opioid trafficking were arrested for selling prescription painkillers

Our review of arrest reports for sampled offenders admitted to prison for opioid trafficking found that almost all (93%) were convicted of trafficking in prescription painkillers. As shown in Exhibit 3, arrests most commonly involved oxycodone (73%) or hydrocodone (28%). In comparison, 6% of the offenders were convicted of trafficking in heroin.

**Exhibit 3
In Fiscal Year 2010-11, Most Arrests Leading to Prison Admissions for Opioid Trafficking Involved Prescription Painkillers**

Controlled Substance	Percentage of Sample Cases ¹
Oxycodone	73%
Hydrocodone	28%
Heroin	6%

¹ Percentages add to more than 100% because some offenders were trafficking in more than one opioid. For example, 13% were trafficking in two opioids, primarily oxycodone and hydrocodone, and 1% were trafficking in three opioids.

Source: OPPAGA analysis of arrest reports for a sample of 194 offenders admitted to prison in Fiscal Year 2010-11.

Most offenders in our sample (62%) were arrested for selling prescription painkillers to an undercover law enforcement officer or confidential informant. (See Exhibit 4.) In these cases, officers worked undercover to buy drugs from known dealers or monitored confidential informants during meetings they arranged to make purchases. In other cases, offenders were arrested for trafficking after a traffic stop or other law enforcement contact, or after being reported by a pharmacist for possible prescription fraud.

**Exhibit 4
Sale to an Undercover Officer or Confidential Informant Was the Most Common Reason for an Arrest**

Reason for Arrest	Percentage
Selling to undercover law enforcement officer or confidential informant	62%
Search during law enforcement contact	16%
Prescription fraud	11%
Traffic stop	8%

Source: OPPAGA analysis of arrest reports for a sample of 194 offenders admitted to prison in Fiscal Year 2010-11.

The majority of the offenders illegally possessed or sold 30 to 90 pills. For most of the offenders convicted of trafficking in oxycodone or hydrocodone, their convictions were based on the illegal possession or sale of a number of pills equivalent to one or two prescriptions. For those offenders sentenced for trafficking in hydrocodone, 50% were arrested for possessing or selling fewer than 30 pills and 25% were arrested for fewer than 15 pills. For offenders sentenced for trafficking in oxycodone, offenders possessed or sold a median number of 91 pills at the time of their arrests.

Following accepted medical practice, physicians may prescribe 30 or more prescription painkillers for patients with chronic pain or recovering from surgery. For example, a patient recovering from surgery may receive a one-time prescription of 30 to

60 hydrocodone or oxycodone pills, often in forms that also contain acetaminophen. Illegal possession of such an amount could trigger a minimum mandatory sentence.⁷

The majority of offenders had minimal prior criminal involvement and substance abuse problems

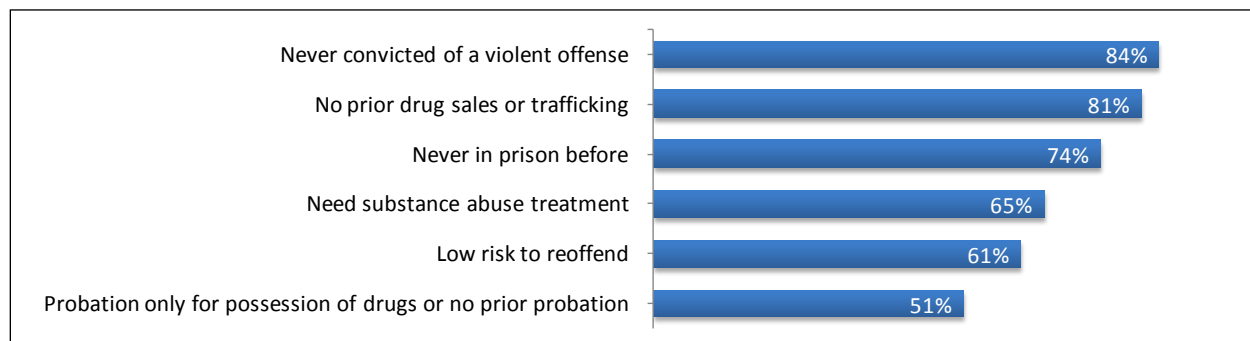
Our analysis of Department of Corrections data on the 1,200 offenders admitted to prison for opioid trafficking in Fiscal Year 2010-11 found that 74% had not previously been admitted to prison. (See Exhibit 5.) Half had either never been on probation or had been on probation solely for drug possession, and 81% did not have a prior history of offenses involving selling or trafficking drugs. Most (84%) had no current or past violent offenses.

These offenders tended to have substance abuse problems and were at low risk for recidivism. Prison staff assessments determined that 65% of these offenders needed substance abuse treatment and 61% were at low risk for recidivism.⁸

⁷ Law enforcement and other stakeholders reported that pain clinics they would consider as being ‘pill mills’ routinely prescribe much higher amounts of prescription painkillers, such as 180 oxycodone pills per month.

⁸ Prison staff assessed offenders’ risk of recidivism using the risk assessment instrument developed by the Department of Corrections. Recidivism is defined as return to prison within three years of release.

**Exhibit 5
Offenders Recently Admitted to Prison for Opioid Trafficking Tended to Have Substance Abuse Problems and Minimal Criminal Histories**



Source: OPPAGA analysis of data from the Florida Department of Corrections.

Issues raised by stakeholders

To gain the perspective of criminal justice stakeholders about prescription painkiller trafficking and the current trafficking statute, we interviewed judges, prosecutors (state attorneys and statewide prosecutors), public defenders, and law enforcement officials. Some of these stakeholders were in favor of continuing the trafficking statute as written. They cited the statewide problem with abuse of prescription painkillers and the need to address this problem by prosecuting pain clinics and physicians who overprescribe these medications, as well as offenders who sell painkillers to addicts. For example, some prosecutors said the trafficking statute provides them with leverage by giving those who are arrested the incentive to cooperate in investigations of more serious offenders.

However, other stakeholders had concerns about the impact of the current weight thresholds and sentences. For example, some said that the statutes may impose harsh penalties for lower potency prescription painkillers and pointed out differences between the sentences for painkillers compared to other controlled substances such as cocaine and methamphetamine.

Fewer hydrocodone than oxycodone pills are needed to meet thresholds for trafficking

The current method of calculating weights for prescription painkillers includes the weight of the entire pill, which often contains other ingredients such as

acetaminophen (a common over-the-counter pain medication), binders, and coating. As a result, offenders can meet the trafficking weight thresholds with a relatively small number of lower potency pills that include other ingredients.

A notable example is hydrocodone, which is only available in a pill form that combines the controlled substance with acetaminophen. The acetaminophen makes the pill heavier, so fewer pills are needed to meet the thresholds. As illustrated in Exhibit 6, it takes 7 pills of 10 milligram hydrocodone, which are large pills with 325 to 750 milligrams of acetaminophen, to reach the threshold of 4 grams for a minimum mandatory prison sentence of three years.

In comparison, it takes approximately 31 pills of 30 milligram oxycodone to reach the threshold of 4 grams since this type of oxycodone is a smaller pill and does not include acetaminophen. Thus, it takes more oxycodone pills than hydrocodone pills to trigger a minimum mandatory sentence, even though oxycodone is more potent and likely to lead to adverse outcomes, such as addiction and overdose. For example, a 2010 Medical Examiners Commission report cited oxycodone as the drug that caused the most deaths in Florida. Stakeholders also told us that this high strength oxycodone pill is in the most demand by addicts. In addition, our review of sampled offender arrest records found that 30 milligram oxycodone was the predominant drug involved in trafficking offenses.

Exhibit 6

Fewer Hydrocodone than Oxycodone Pills Are Needed to Meet Trafficking Weight Thresholds

Prescription Drug	Pill Weight	Number of Pills to Meet Weight Threshold		
		4 grams	14 grams	28 grams
Hydrocodone, 10 mg	0.65 grams	7	22	44
Oxycodone, 30 mg	0.13 grams	31	108	215

Source: OPPAGA analysis of information in arrest reports contained in court case files.

**Exhibit 7
Minimum Mandatory Sentences Are Shorter for Many Other Controlled Substances than for Prescription Painkillers**

Controlled Substance	Minimum Mandatory Sentence		
	1 st Threshold	2 nd Threshold	3 rd Threshold
Prescription Painkillers	3 years (4 to 14 grams)	15 years (14 to 28 grams)	25 years (28 grams to 30 kg)
Cocaine	3 years (28 to 200 grams)	7 years (200 to 400 grams)	15 years (400 grams to 150 kg)
Methamphetamine	3 years (14 to 28 grams)	7 years (28 to 200 grams)	15 years (200 grams or more)

Source: Section 893.135, F.S.

Minimum mandatory sentences for prescription opioid trafficking are longer than for most other controlled substances

The current drug trafficking statutes can result in longer sentences for trafficking in prescription painkillers than for other controlled substances, most of which cannot be legally prescribed or possessed. According to some stakeholders we interviewed, the sentences and weight thresholds for opioid trafficking were established based on those for trafficking in heroin.

Minimum mandatory sentences are the same for the lowest weight thresholds for prescription painkillers and most other controlled substances. However, sentences for the majority of other controlled substances are shorter for the two higher thresholds.⁹ For example, as shown in Exhibit 7, the first three levels of sentences for cocaine and methamphetamine are 3 years, 7 years, and 15 years. In comparison, the sentences for prescription painkillers are 3 years, 15 years, and 25 years.

⁹ The first three levels of minimum mandatory sentences for trafficking are 3 years, 7 years, and 15 years for cannabis, cocaine, methaqualone, amphetamine and methamphetamine, phencyclidine (PCP), gamma-hydroxybutyric (GHB), gamma-butyrolactone (GBL), butanediol, 3,4-methylenedioxymethamphetamine (MDMA) and similar substances, and lysergic acid (LSD).

Options for Legislative Consideration

Based on stakeholder input and other research, we developed six options the Legislature could consider if it wishes to revise the sentencing structure for prescription painkillers.

Option 1. Address weight thresholds and sentences for offenses involving hydrocodone by revising Florida statutes so that these offenses will be prosecuted in the same manner as offenses involving other Schedule III drugs. This would require

- removing provisions from s. 893.03(3)(c)7, *Florida Statutes*, that specify for purposes of charging trafficking, offenses involving hydrocodone pills that meet the requirements for Schedule III drugs will be charged under the drug trafficking statute as if these were Schedule II drugs. The requirements for Schedule III are that the pills contain 15 milligrams or less of hydrocodone in a dosage unit that includes another active ingredient that is not a controlled substance; and
- modifying s. 893.135(1)(c), *Florida Statutes*, to state that it does not apply to hydrocodone in a mixture that meets the requirements in s. 893.03(3)(c), *Florida Statutes*.

Controlled substances that are subject to drug trafficking penalties are generally Schedule I or Schedule II drugs, which have a high potential for abuse and addiction. Hydrocodone is an exception because it is classified as both a Schedule II and Schedule III drug; Schedule III drugs have less potential for abuse than Schedule I and II drugs. Schedule II includes hydrocodone, but the pills are Schedule III drugs if they contain less than 15 milligrams of hydrocodone and include another active ingredient that is not a controlled substance. All hydrocodone pills currently available from U.S. manufacturers meet these requirements.¹⁰

Although medical practitioners tend to prescribe hydrocodone more frequently than oxycodone, data from the Medical Examiners Commission shows that oxycodone was the drug that caused the most deaths in Florida in 2010. According to a medical expert, the acetaminophen in hydrocodone pills is more likely to cause harm with an overdose than the hydrocodone. In addition, addicts often want higher potency drugs such as oxycodone.

This option would address issues raised about lower potency hydrocodone and reduce the number of offenders admitted to prison for minimum mandatory sentences, while not precluding penalties for illegal possession or sale. If the statutes were modified to no longer make offenses involving Schedule III hydrocodone subject to trafficking provisions, illegal possession or sale of these pills would become a third degree felony, subject to the normal provisions of the controlled substance

statute and the Florida Criminal Punishment Code. This change would also allow the courts to consider post-adjudicatory drug courts for offenders who otherwise met eligibility criteria under current statutes. However, some prosecutors would not support imposing different penalties for various opioids.

Option 2. Allow courts to consider committing addicted offenders with minimal prior criminal histories to secure community-based residential drug treatment programs as an alternative to prison. Florida has experienced a substantial increase in substance abuse treatment admissions resulting from prescription drug abuse. According to stakeholders we interviewed, they frequently encounter defendants whose criminal activities are the result of addiction to prescription painkillers.

According to Department of Corrections staff, a program similar to the department's secure residential treatment and work release program, with an average length of stay of 12 months, would be the most appropriate for these offenders. This program provides four months of intensive residential treatment followed by work release during the day and treatment at night. Offenders convicted of trafficking in prescription painkillers could be eligible for commitment to treatment as an alternative to prison if they met certain criteria. Such criteria could include

- substance abuse treatment needs;
- no prior prison admissions;
- no prior convictions for violent offenses and drug sales; and
- a low-risk of recidivism.

Of the 1,200 offenders sentenced to prison for opioid trafficking during Fiscal Year 2010-11, an estimated 310 offenders would have met all of these criteria.

¹⁰ Currently, manufactured hydrocodone pills contain from 5 to 10 milligrams of hydrocodone and 325 or more milligrams of acetaminophen. However, drug manufacturers are developing a new version of hydrocodone pills that does not include acetaminophen; if approved for sale, this medication would be considered a Schedule II drug.

One advantage of allowing treatment as an alternative to prison is cost avoidance. The average cost of the department’s residential treatment and work release program is \$19,130 for an average stay of 12 months. If a similar program were implemented for offenders convicted of prescription painkiller trafficking, the state could avoid an estimated \$39,280 per offender successfully diverted from prison compared to the cost of housing an offender in prison for a three-year minimum mandatory prison sentence (approximately \$58,400).¹¹ If half of the 310 offenders meeting potential criteria for treatment were diverted from prison and successfully completed a treatment program, the total costs avoided over a three-year period would be approximately \$6 million.¹² For those diverted from longer sentences, cost savings would be greater. In addition, treatment could help reduce the likelihood that offenders will commit future crimes and thus decrease future prison costs.

However, offering treatment to additional offenders may require an investment or redirection of state funds. The number of available secure residential treatment beds is limited. In Fiscal Year 2011-12, the Department of Corrections was authorized to fund 1,061 residential beds statewide, which are being used for other criminal justice programs. Although federal funds are currently available for post-adjudicatory drug courts, these funds are time-limited and will expire March 2013.

Another disadvantage is that prosecutors are generally opposed to allowing the courts to depart from minimum mandatory sentences. Some prosecutors said they have already considered factors such as addiction when exercising their discretion to prosecute cases as trafficking instead of lesser offenses.

Option 3. Revise Florida statutes to increase the weight thresholds for prescription painkillers so that it would take more pills to be charged with drug trafficking offenses subject to minimum mandatory sentences. Exhibit 8 presents a hypothetical example of the effect of higher thresholds on the number of pills considered trafficking. This example increases the first threshold to 28 grams and creates a wider range between the second and third thresholds. Making this change would increase the number of hydrocodone pills needed to reach the first threshold from 7 to 44.

**Exhibit 8
Raising the Weight Thresholds Would Increase the Number of Pills Needed for a Trafficking Charge**

Minimum Mandatory Sentence	Hypothetical Higher Threshold	Number of Pills	
		10 mg Hydrocodone	30 mg Oxycodone
3 years	28 grams	44	215
15 years	50 grams	77	386
25 years	200 grams	308	1,539

Source: OPPAGA analysis.

As with some of the other options, increasing the weight thresholds would increase the number of hydrocodone pills that meet trafficking levels. Illegal possession or sale of amounts that do not meet the thresholds would be second degree felonies punishable under normal sentencing guidelines in the Criminal Punishment Code.

Although some prosecutors would oppose this option, increasing the weight thresholds had more support from prosecutors than other options presented in this report.

¹¹ Convictions for the lowest weight threshold of 4 to 14 grams are subject to a three-year minimum mandatory sentence. Offenses meeting the higher weight thresholds result in longer sentences.

¹² A 2009 [OPPAGA report](#) on Florida’s post-adjudicatory drug courts found that 49% of program participants admitted to drug courts in 2004 successfully completed drug court while 51% were terminated before completion. Program completion rates for individual drug courts ranged from 39% to 74%. Participants in these drug courts may be addicted to prescription painkillers or other types of controlled substances.

Prosecutors we talked with generally favored minimum mandatory sentences, but some thought the thresholds were too low for prescription painkillers. Others said they were not in favor of any changes to the trafficking statute, but if the Legislature were to make revisions, they would be most amenable to small increases in the thresholds.

Option 4. Reduce the minimum mandatory sentence lengths for prescription painkillers so that they are consistent with the penalties for most other drug trafficking offenses, which are 3, 7, and 15 years rather than 3, 15, and 25 years. This option would create more uniformity within the drug trafficking statute while retaining the current weight thresholds, method of calculating weights, and the types of prescription painkillers for which minimum mandatory sentences would apply. However, there may still be opposition to reducing the severity of penalties for trafficking in painkillers, given their addictive properties and fatalities from oxycodone overdoses.

Option 5. Modify the method used to calculate the weight of prescription painkillers to only include the weight of the controlled substance rather than the weight of the entire pill. This would have the effect of raising the thresholds and result in longer sentences for higher potency oxycodone than for hydrocodone and other drugs that contain a higher percentage of active ingredients that are not controlled substances. Some stakeholders have suggested using an approved pharmacological reference to determine the weight of the controlled substance.

Exhibit 9 illustrates the effect this option would have on the number of pills that meet trafficking weight thresholds. As shown in the exhibit, it would take 400 pills of 10 milligram hydrocodone to meet the threshold of 4 grams compared to 133 pills of 30 milligram oxycodone.

Exhibit 9
Basing Weight Calculations on the Weight of the Controlled Substance Would Increase the Number of Pills Needed for a Trafficking Offense

Prescription Drug	Number of Pills Required to Meet Weight Threshold		
	4 grams (3 years)	14 grams (15 years)	28 grams (25 years)
Hydrocodone, 10 mg	400	1,400	2,800
Oxycodone, 30 mg	133	467	933

Source: OPPAGA analysis.

This option has the advantage of aligning thresholds with the potency of painkillers. It would take significantly more hydrocodone and other pills containing acetaminophen to meet trafficking thresholds. As with some of the other options, this option would also reduce the number of offenders admitted to prison for minimum mandatory sentences, while not precluding penalties for illegal possession or sale of painkillers.

However, this option would also increase the number of higher strength pills that would meet thresholds, including 30 milligram oxycodone. As shown in Exhibit 9, it would take 133 of these pills to reach the first threshold of 4 grams, compared to the current number of 31 pills. (See Exhibit 6.)

In addition, prosecutors have raised concerns about whether this method of calculating pill weights would meet court requirements for ‘proof beyond a reasonable doubt’ without expensive laboratory testing of every pill to prove that each one contains the same amount of controlled substance stated in a pharmaceutical reference. Currently, when the pills seized at arrest are of uniform size and appearance, laboratories test a sample of the pills to determine the type of controlled substance and then weigh all of the pills to prove the amount meets a trafficking threshold. According to Florida

Department of Law Enforcement officials, more complex and costly analyses may be needed to verify the weight of the controlled substance if this option were adopted.

Option 6. For illegal possession of an amount of prescription painkillers weighing less than 28 grams, require proof of intent to sell to be charged with trafficking; without proof, sanctions for possession would apply. This option also could be limited to first offenses. The current trafficking statute does not require proof of intent to sell the drugs when defendants illegally possess an amount that meets weight thresholds.

As with the other options, this option would reduce the number of offenders admitted to prison for minimum mandatory sentences,

while not precluding other sanctions. Illegal possession of painkillers weighing between 4 and 28 grams would become a third degree felony, subject to the normal provisions of the controlled substance statute and the Florida Criminal Punishment Code. This change would also allow courts to consider post-adjudicatory drug courts for offenders who otherwise met eligibility criteria under current statutes.

However, prosecutors we interviewed are opposed to requiring proof of intent to sell in order to charge a defendant with trafficking in cases where only illegal possession has been established. They said it would make it more difficult to prosecute cases and create a precedent for other controlled substances included in the drug trafficking statute.

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