

STORAGE NAME: h0113s1.cp
DATE: January 8, 1999

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
CRIME AND PUNISHMENT
BILL ANALYSIS & ECONOMIC IMPACT STATEMENT**

BILL #: HB 113

RELATING TO: Punishment of Felons

SPONSOR(S): Representative Crist, Representative Feeney and others

COMPANION BILL(S): SB 194

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) CRIME AND PUNISHMENT YEAS 6 NAYS 1
 - (2) CORRECTIONS
 - (3) CRIMINAL JUSTICE APPROPRIATIONS
 - (4)
 - (5)
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I. SUMMARY:

HB 113 amends section 775.087(2), F.S., to require a judge to impose a minimum term of imprisonment of **10** years, instead of the current 3 years, for any person who possesses a firearm at any time during the course of an enumerated offense or during an attempt to commit any of the enumerated offenses.

The bill adds trafficking in illegal drugs and capital importation of illegal drugs to the enumerated crimes that can qualify an offender for the new 10 year minimum mandatory.

The bill provides that a minimum sentence of **20** years must be imposed if the firearm that an offender possesses is discharged during the course of one of the enumerated felonies.

The bill further provides that a minimum sentence of **25** years, and up to a life sentence, must be imposed if the firearm that an offender possesses during the course of an enumerated felony is discharged causing death or great bodily harm. These minimum mandatory sentences do not prohibit a judge from imposing a greater sentence as authorized by law (such as the death penalty).

In a similar manner the bill increases the penalty for the possession of semiautomatic firearm and its high-capacity detachable box magazine or a machine gun during the course of an enumerated felony.

The bill provides that the legislature intends for the new minimum mandatory sentences to be imposed for each qualifying count, and the court is required to impose the minimum mandatory sentences consecutive to any other term of imprisonment imposed for any other felony offense.

The state attorneys are required to prepare a report relating to the sentencing of offenders to the minimum mandatory terms, and the report must be sent annually by the state attorneys to the Speaker of the House, the President of the Senate, and the Executive Office of the Governor.

The bill takes effect upon becoming law.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

The Florida Punishment Code

The Florida Punishment Code came into effect for crimes committed after October 1, 1998. The Code establishes a lowest permissible sentence for felony offenses by establishing a method of scoring the severity of the offense and the severity of an offender's criminal history. A judge may not sentence a person below the lowest permissible sentence without a mitigating reason which is authorized by statute or case law. An example of a mitigating reason to impose a sentence below the lowest permissible sentence is the young age of the offender. Under the new Florida Punishment Code, a judge has complete discretion to sentence an offender to any sentence that is above the lowest permissible sentence and below the statutory maximum. Thus, the Punishment Code sets a floor to a judge's sentencing options, but not a ceiling, and even a first offender could receive the statutory maximum. The statutory maximum periods of incarceration established in section 775.082 F.S., are as follows:

Second degree misdemeanor - 60 days in jail.

First degree misdemeanor - 1 year in jail

Third degree felony - 5 years in prison

Second degree felony - 15 years in prison

First degree felony - 30 years in prison

Life felony or first degree felony punishable by life - life in prison.

The Punishment Code does not apply to the sentencing of an offender for a misdemeanor, and a judge may impose any sentence for a misdemeanor up to the statutory maximum.

Minimum Mandatory Sentences for Crimes with Firearms

Section 775.087(2), F.S., requires a judge to impose a minimum term of imprisonment of 3 years for any person who possess a firearm at any time during the course of one of the following offenses or during an attempt to commit any of the following offenses:

(a) Murder;

(b) Sexual battery;

(c) Robbery;

(d) Burglary;

(e) Arson;

- (f) Aggravated assault;
- (g) Aggravated battery;
- (h) Kidnaping;
- (l) Escape;
- (j) Aircraft piracy;
- (k) Aggravated child abuse;
- (l) Aggravated abuse of an elderly person or disabled adult;
- (m) Unlawful throwing, placing, or discharging of a destructive device or bomb;
- (n) Carjacking;
- (o) Home-invasion robbery; or
- (p) Aggravated stalking.

Section 775.087(3)(a), F.S., requires a court to impose an 8 year minimum mandatory sentence if a person commits any of the above enumerated offenses and during the course of the offense the person possessed a semiautomatic firearm and its high-capacity magazine or a machine gun.

Minimum mandatory sentences are not reduced by gain time and the offender must spend the entire mandatory term in prison.

Other Enhanced Penalties

Habitual Felony Offender

A judge has the complete discretion under section 775.084 F.S., to sentence a person as a habitual felony offender if the following criteria are met:

1. The offender has been convicted of two prior felonies. [A withhold of adjudication counts as a conviction for the purposes of enhanced penalties.]
2. The prior convictions were sentenced on separate occasions.
3. The charge for which the offender is being sentenced is a felony.
4. The crime for which the offender is being sentenced was committed within 5 years of the date of the conviction for the offender's last prior felony, or within 5 years of the defendant's release from prison whichever was later.
5. The pending offense and one of the priors were not third degree felonies for possess on controlled substances such as cocaine. [Possession with intent to sell or trafficking are qualifying offenses.]

If a judge designates a qualifying person as a habitual felony offender, the judge may impose a sentence which is double the statutory maximum. For example, a habitual offender being sentenced for a third degree felony such as auto theft may be sentenced to ten years in prison. A habitual offender may be sentenced for a maximum of thirty years in prison for a second degree felony such as burglary of a dwelling or possession of cocaine with intent to sell. A habitual offender may receive a life sentence for committing a first degree felony.

Habitual Violent Felony Offender

A judge has the complete discretion under section 775.084 F.S., to sentence a person as a habitual violent felony offender if the following criteria are met:

1. A person has previously been convicted for one of the following crimes or for an attempt to commit one of the following crimes:

Arson; sexual battery; robbery; kidnaping; aggravated child abuse; aggravated abuse of an elderly person or disabled adult; aggravated assault; murder; manslaughter; unlawful throwing, placing, or discharging of a destructive device or bomb; armed burglary; aggravated battery; or aggravated stalking.
2. The crime for which the offender is being sentenced is any felony that was committed within 5 years of the date of the conviction for the offender's last prior felony, or within 5 years of the defendant's release from prison whichever was later.

If a judge designates a qualifying person as a habitual violent felony offender, the judge may impose a sentence that is double the statutory maximum; thus, the enhanced penalty authorized by the habitual violent felony offender statute is the same as the enhanced penalty authorized by the habitual felony offender law. State v. Hudson, 698 So.2d 831 (Fla.1997).

Section 775.084(3)(a)6., F.S., provides that a judge must sentence a qualifying person as habitual felony offender or habitual violent felony offender if unless the judges finds that such a sentence is not necessary for the protection of the public. The statute further requires a judge to file a report every time a qualifying offender is not sentenced as a habitual felony offender or a habitual violent felony offender. The State Court Administrator's Office has indicated that these reporting requirements are rarely complied with. Furthermore, it is lawful for a judge to designate a person as a habitual felony offender or as a habitual violent felony offender and sentence the person to probation with no term of incarceration.

Violent Career Criminal

A judge must sentence a person as a violent career criminal if the offender meets the following criteria:

1. The offender has been previously been convicted three or more times of any of the following offenses:

Burglary; aggravated assault; aggravated battery aggravated stalking; aggravated child abuse; aggravated abuse of an elderly person or disabled adult; lewd lascivious or indecent conduct; escape; possession of a concealed firearm; possession of a firearm by a convicted felon; possession of a short-barrel shotgun; robbery carjacking sexual battery; manslaughter; murder; treason; home invasion robbery; and any other felony which involves the use or threat of physical force or violence against any individual;

2. The offense for which the offender is to be sentenced is for one of the crimes enumerated above;
3. The prior convictions were sentenced on separate occasions;
4. The crime for which the offender is being sentenced was committed within 5 years of the date of the conviction for the offender's last prior felony, or within 5 years of the defendant's release from prison whichever was later; and
5. The offender has previously been incarcerated in state or federal prison.

If a judge elects to designate an offender as a violent career criminal, then the court must sentence the violent career criminal as follows:

1. In the case of a life felony or a felony of the first degree, for life;
2. In the case of a felony of the second degree, for a term of years not exceeding 40, with a mandatory minimum term of 30 years' imprisonment; and
3. In the case of a felony of the third degree, for a term of years not exceeding 15, with a mandatory minimum term of 10 years' imprisonment.

Section 775.084(4)(d) F.S., gives judges discretion to decide whether a person should be designated as a habitual offender, habitual violent offender, or violent career criminal:

(d) If the court finds ... that it is not necessary for the protection of the public to sentence a defendant who meets the criteria for sentencing as a habitual felony offender, a habitual violent felony offender, or a violent career criminal, with respect to an offense committed on or after October 1, 1995, sentence shall be imposed without regard to this section.

Prison Releasee Reoffender

A judge must sentence a person to the statutory maximum if:

1. A state attorney decides to seek to have a person sentenced as a prison releasee reoffender;
2. The offender has committed or attempted to commit one of the following crimes:

Treason; murder; Manslaughter; sexual battery; carjacking; home-invasion robbery; robbery arson; kidnaping; aggravated assault; aggravated battery; aggravated stalking; aircraft piracy; unlawful throwing; placing; or discharging of a destructive device or bomb; any felony that involves the use or threat of physical force or violence against an individual; armed burglary; burglary of an occupied structure or dwelling; any felony violation of ss. 790.07(relating to felonies committed with firearms), s. 800.04(Lewd, lascivious, or indecent assault) s. 827.03 (aggravated abuse of a child or the disabled) or s. 827.071 (sexual performance by a child), F.S.; and

3. The offender committed one of the enumerated offenses within 3 years of being released from prison.

Section 775.082(8)(d), F.S. requires that a state attorney file a report explaining the sentence for every case in which a qualifying offender does not receive the statutory maximum sentence.

B. EFFECT OF PROPOSED CHANGES:

Mandatory Sentencing

HB 113 amends section 775.087(2), F.S. to require a judge to impose a minimum term of imprisonment of **10** years instead of the current 3 years, for any person who possess a firearm at any time during the course of one of the enumerated offenses or during an attempt to commit one of the enumerated offenses. Except the minimum mandatory sentence for possession of a firearm during an aggravated assault or during a burglary of a conveyance will remain 3 years. The enumerated offenses are as follows:

- (a) Murder;
- (b) Sexual battery;
- (c) Robbery;
- (d) Burglary;
- (e) Arson;
- (f) Aggravated assault;
- (g) Aggravated battery;
- (h) Kidnaping;
- (l) Escape;
- (j) Aircraft piracy;
- (k) Aggravated child abuse;

- (l) Aggravated abuse of an elderly person or disabled adult;
- (m) Unlawful throwing, placing, or discharging of a destructive device or bomb;
- (n) Carjacking;
- (o) Home-invasion robbery; or
- (p) Aggravated stalking.

The bill adds trafficking in illegal drugs and capital importation of illegal drugs to the enumerated crimes that can qualify an offender for the new 10 year minimum mandatory.

The bill provides that a minimum sentence of **20** years must be imposed if the firearm that an offender possesses discharged during the course of one of the enumerated felonies.

The bill further provides that a minimum sentence of **25** years, and up to a life sentence, must be imposed if the firearm that an offender possesses during the course of an enumerated felony is discharged causing death or great bodily harm. These minimum mandatory sentences do not prohibit a judge from imposing a greater sentence as authorized by law (such as the death penalty).

While the 10 year minimum mandatory sentence does not apply if the offense is Burglary of a Conveyance or Aggravated Assault, the 20 and 25 year minimum mandatories do apply Burglary of a Conveyance and Aggravated Assault.

Semiautomatic Firearms and Machine Guns

The bill amends section 775.087(2), F.S. to require a judge to impose a minimum term of imprisonment of **15** years, instead of the current 8 years, for any person who possess a semiautomatic firearm and its high-capacity detachable box magazine or a machine gun at any time during the course of one of the enumerated offenses or during an attempt to commit one of the offenses. Similarly, the penalty for the discharge of the machine gun or semiautomatic firearm becomes a minimum of 20 years under the bill and if a person is injured with such a weapon the penalty is a minimum mandatory of 25 years to life.

Legislative Intent and Other Provisions

The bill provides that the legislature intends for the new minimum mandatory sentences to be imposed for each qualifying count, and the court is required to impose the minimum mandatory sentences consecutive to any other term of imprisonment imposed for any other felony offense.

The bill requires the Governor to place public service announcements throughout the state explaining the penalties provided by the bill.

The bill takes effect upon becoming law.

Reporting Requirements

Qualifying offenders must receive the new minimum mandatory sentences unless the state attorney's office submits a written memorandum to the court requesting that the minimum mandatory term not be imposed and stating the reasons why the mandatory term should not be imposed. The memorandum must be entered in the court file in any case where a law enforcement agency based a criminal charge on facts demonstrating that the defendant met the criteria for the new minimum mandatory sentences provided for by the bill.

A report relating to the sentencing of offenders to the minimum mandatory terms provided for by the bill must be sent annually by the state attorneys to the Speaker of the House, The President of the Senate, and the Executive Office of the Governor. The report shall include the number of charges made by law enforcement that were received in each circuit during the previous year alleging facts that qualify an offender for a minimum mandatory sentence as provided for by the bill. The report must also include the case number for these qualifying offenses, the final disposition, and whether the minimum mandatory sentences were imposed. These reports must also be made available to the public on the Internet by July 1, 2001.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

No.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

No.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

No.

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

No.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

- (1) Who evaluates the family's needs?

N/A

- (2) Who makes the decisions?

N/A

- (3) Are private alternatives permitted?

N/A

- (4) Are families required to participate in a program?

N/A

- (5) Are families penalized for not participating in a program?

N/A

- b. Does the bill directly affect the legal rights and obligations between family members?

No.

- c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

775.087, F.S.; 921.0022, F.S.; 947.146, F.S.

E. SECTION-BY-SECTION ANALYSIS:

Section 1: Increases current 3 year minimum mandatory for possession of a firearm during the course of an enumerated felony to 10 years; includes drug trafficking and capital importation of illegal drugs in the list of enumerated felonies subject to the minimum mandatory penalty; provides that the minimum mandatory sentences must be imposed consecutively to the sentence for any other felony offenses; requires a judge to impose a minimum term of imprisonment of **15** years, instead of the current 8 years, for any person who possess a semiautomatic firearm and its high-capacity detachable box magazine or a machine gun at any time during the course of one of the enumerated offenses or during an attempt to commit one of the offenses; provides that the penalty for the discharge of the machine gun or semiautomatic firearm becomes a minimum of 20 years under the bill and if a person is injured with such a weapon the penalty is a minimum mandatory of 25 years to life.

Section 2: Establishes the reporting requirements necessary for the failure to impose the minimum mandatory sentences; requires the State Attorney's to file annual reports and to make the information available on the Internet.

Section 3. Reenacts sections 921.0022, and 947.146, F.S.

Section 4. Requires the Governor to place public service announcements throughout the state explaining the penalties provided by the bill.

Section 5. Makes the bill effective upon becoming law.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

See Fiscal Comments.

2. Recurring Effects:

See Fiscal Comments.

3. Long Run Effects Other Than Normal Growth:

See Fiscal Comments.

4. Total Revenues and Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

See Fiscal Comments.

2. Recurring Effects:

See Fiscal Comments.

3. Long Run Effects Other Than Normal Growth:

See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

See Fiscal Comments.

2. Direct Private Sector Benefits:

See Fiscal Comments.

3. Effects on Competition, Private Enterprise and Employment Markets:

See Fiscal Comments.

D. FISCAL COMMENTS:

The Criminal Justice Estimating Conference met and based projections for additional prison beds and funds necessary on the assumption that all offenders would be sentenced to prison with a 3 or 8 year firearm mandatory. The fiscal year projections are as follows:

- FY 1999-2000: No prison beds with no funds necessary.
- FY 2000-2001: No prison beds with \$ 904,547 necessary.
- FY 2001-2002: 37 prison beds with \$ 3,347,425 necessary.
- FY 2002-2003; 156 prison beds with \$ 7,575,343 necessary.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill is exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

Reports and Memorandums

If the reporting requirements are complied with, the reporting requirements should make the state attorneys more accountable for carrying out the minimum mandatory penalties required by the bill. Since the state attorneys are elected officials, the reports could be used by political opponents to show a lack of willingness to impose the minimum mandatory sentences.

The bill requires a memorandum to be filed in every case where a law enforcement officer charges an offender with a qualifying offense, however, the purpose of the memorandum is to explain why a state attorney did not seek the minimum mandatory. When the minimum mandatory is imposed, the bill would still require a memorandum to be filed even though there would be no reason to prepare a memorandum.

Consecutive Sentences

The bill provides that the legislature intends for the new minimum mandatory sentences to be imposed for each qualifying count, and the court is required to impose the minimum mandatory sentences required by the bill consecutive to any other term of imprisonment imposed for *any other* felony offense. This provision does not explicitly prohibit a judge from imposing the minimum mandatory sentences concurrent to each other. For instance, a person sentenced for 2 qualifying counts, such as armed burglary and aggravated assault, could receive a ten year minimum mandatory sentence for each count, but the judge could order that the sentences run at the same time so that the offender is incarcerated for a total of 10 years.

Accomplices

Section 777.011, F.S., provides that any person who aids or abets any criminal offense may be charged, convicted, and punished as a principle in the first degree. This statute allows the person who helps plan a murder to receive the same sentence as the person who actually kills the victim. However, the courts have held that an accomplice who does not possess a firearm is not subject to the minimum mandatory penalties. The Florida Supreme Court in Earnest v. State, 351 So. 2d 957 (Fla. 1977), interpreted section 777.011, F.S. as not applying to the minimum mandatory for firearms:

We agree that the term "possession" does not clearly encompass vicarious possession, and we agree that petitioner is entitled to the benefit of the doubt. The Legislature has not unequivocally expressed an intention to require three year minimum sentences for all persons who participate in one of the enumerated criminal adventures.

Thus an accomplice who drives an offender to and from the scene of an armed robbery may be charged with armed burglary, however, if the driver never possessed a firearm during the commission of the crime, then the driver can not receive the minimum mandatory for the firearm possessed by the co-defendant. Kenny v. State 693 So.2d 1136 (1st DCA 1997).

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The committee substitute changed the original bill by removing Burglary of a Conveyance and Aggravated Assault from the qualifying offenses that subject a person to the new 10 year minimum mandatory for possession of a firearm during the commission of a crime.

VII. SIGNATURES:

COMMITTEE ON CRIME AND PUNISHMENT:

Prepared by:

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