

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Appropriations Subcommittee on Criminal and Civil Justice

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BILL: CS/SB 1068

INTRODUCER: Criminal Justice Committee and Senator Brandes

SUBJECT: Sentencing

DATE: April 12, 2017

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Sumner/Erickson</u>	<u>Hrdlicka</u>	<u>CJ</u>	<u>Fav/CS</u>
2.	<u>McAuliffe</u>	<u>Sadberry</u>	<u>ACJ</u>	<u>Pre-meeting</u>
3.	_____	_____	<u>AP</u>	_____

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**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/SB 1068 authorizes a court to sentence an offender to a term in the county jail in the county where the offense was committed for up to 24 months if the offender meets the following criteria:

- The offender's total sentence points are more than 44 points, but no more than 60 points;
- The offender's primary offense is not a forcible felony, except that an offender whose primary offense is a third degree felony burglary or trespass offense is eligible to be sentenced to a county jail; or
- The offender's primary offense is not punishable by a minimum mandatory sentence exceeding 24 months.

The court may only sentence an offender to a county jail under the bill if there is a contractual agreement between the chief correctional officer of the county and the Department of Corrections (DOC). The DOC must enter into such contract upon the request of a chief correctional officer. Contracts are to be awarded by the DOC on a first-come, first-served basis. The contract must specifically establish the maximum number of beds and the validated per diem rate. The contract must provide for per diem reimbursement for occupied inmate days based on the contracting county's most recent annual adult male custody or adult female custody per diem rates not to exceed \$60. All contractual per diem rates must be validated by the Auditor General before payments are made.

The bill also amends the Criminal Punishment Code (Code) to create upward departure sentencing for noncapital felony offenses committed on or after October 1, 2017. An upward departure sentence is a sentence that exceeds a specified permissible sentencing range. In order to impose an upward departure sentence, the court must provide a written statement specifying the reasons for the departure. The bill lists a number of “aggravating circumstances” for which an upward departure sentence is reasonably justified. The defendant and the state may appeal a sentence outside the permissible sentencing range.

Regarding the provisions of the bill involving county jail, all contracts are contingent upon a specific appropriation in the General Appropriations Act. The Auditor General and the Department of Corrections may experience significant expenditures to implement the bill.

The Criminal Justice Impact Conference, which provides the final, official prison bed impact, if any, met on March 29, 2017 and determined that the provisions of the bill involving the upward departure sentencing will have a “negative indeterminate impact” (an unquantifiable decrease in prison beds). See Section V. Fiscal Impact Statement.

The bill takes effect July 1, 2017.

## **II. Present Situation:**

### **The Criminal Punishment Code and Sentencing**

In 1997, the Legislature enacted the Criminal Punishment Code<sup>1</sup> (Code) as Florida’s “primary sentencing policy.”<sup>2</sup> Noncapital felonies sentenced under the Code receive an offense severity level ranking (Levels 1-10).<sup>3</sup> Points are assigned and accrue based upon the level ranking assigned to the primary offense, additional offenses, and prior offenses.<sup>4</sup> Sentence points escalate as the level escalates. Points may also be added or multiplied for other factors such as victim injury.

The lowest permissible sentence is any nonstate prison sanction in which total sentence points equal or are less than 44 points, unless the court determines that a prison sentence is appropriate. If total sentence points exceed 44 points, the lowest permissible sentence in prison months is calculated by subtracting 28 points from the total sentence points and decreasing the remaining total by 25 percent. Absent mitigation,<sup>5</sup> the permissible sentencing range under the Code is

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<sup>1</sup> Sections 921.002-921.0027, F.S. See chs. 97-194 and 98-204, L.O.F. The Code is effective for offenses committed on or after October 1, 1998.

<sup>2</sup> Florida’s Criminal Punishment Code: A Comparative Assessment (FY 2012-2013) (Executive Summary), Florida Department of Corrections, available at [http://www.dc.state.fl.us/pub/sg\\_annual/1213/executives.html](http://www.dc.state.fl.us/pub/sg_annual/1213/executives.html) (last visited on March 23, 2017).

<sup>3</sup> Offenses are either ranked in the offense severity level ranking chart in s. 921.0022, F.S., or are ranked by default based on a ranking assigned to the felony degree of the offense as provided in s. 921.0023, F.S.

<sup>4</sup> Section 921.0024, F.S. Unless otherwise noted, information on the Code is from this source.

<sup>5</sup> The court may “mitigate” or “depart downward” from the scored lowest permissible sentence if the court finds a mitigating circumstance. Section 921.0026, F.S., provides a list of mitigating circumstances.

generally the lowest permissible sentence scored up to and including the maximum penalty provided under s. 775.082, F.S.<sup>6</sup>

### **Upward Departure Sentences under the Former Sentencing Guidelines**

Under the former (pre-Code) sentencing guidelines, a recommended sentence was scored and the court was authorized to sentence within permitted sentencing ranges (based upon scored total sentence points).<sup>7</sup> If the court wished to impose a prison sentence that varied upward by more than 25 percent from the recommended guidelines prison sentence, the court had to provide a written statement delineating the reasons for the departure.<sup>8</sup> This type of sentence was often referred to as an “upward departure” sentence. The Legislature provided a list of some reasons for which a departure was reasonably justified. These departure reasons were referred to as “aggravating circumstances.”<sup>9</sup> An upward departure sentence had to be within any relevant maximum sentence provided by s. 775.082, F.S.<sup>10</sup>

Under the former sentencing guidelines, the failure of a trial court to impose a sentence within the sentencing guidelines was subject to appellate review under ch. 924, F.S., but the extent of departure from a guidelines sentence was not subject to appellate review.<sup>11</sup> Under ch. 924, F.S., a defendant and the state were authorized to appeal a sentence imposed outside the range permitted by the guidelines authorized under ch. 921, F.S.<sup>12</sup> In contrast, currently under the Code, only a downward departure sentence may be appealed and only the state may appeal this departure.<sup>13</sup> With few exceptions,<sup>14</sup> a Code sentence within the range of the lowest permissible sentence up to

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<sup>6</sup> If the scored lowest permissible sentence exceeds the maximum penalty in s. 775.082, F.S., the sentence required by the Code must be imposed. If total sentence points are greater than or equal to 363 points, the court may sentence the offender to life imprisonment.

<sup>7</sup> Sections 921.0014(1)(b) and 921.0016(1)(b), F.S. (1997). If total sentence points were less than or equal to 40, the recommended sentence was a nonstate prison sanction, but the court could increase total sentence points by up to, and including, 15 percent. Section 921.0014(2), F.S. (1997). If total sentence points were greater than 40 and less than or equal to 52, the court could impose a state prison sentence. *Id.* If total sentence points were greater than 52, the court was required to impose a prison sentence calculated by total sentence points. *Id.* Recommended sentence length in state prison months could be increased by up to, and including, 25 percent, but could not be increased if total sentence points had been increased by up to, and including, 15 percent. *Id.*

<sup>8</sup> Section 921.0016(1)(c), F.S. (1997). The statement had to be filed within 7 days after the date of sentencing. *Id.* A written transcription of orally stated reasons for departure from the guidelines at sentencing was permissible if it was filed within 7 days after the date of sentencing. *Id.*

<sup>9</sup> Section 921.0016(3), F.S. (1997).

<sup>10</sup> Section 921.0016(1)(e), F.S. (1997). Section 775.082(3), F.S., provides the maximum sentences for felonies. The maximum sentences for noncapital felonies are: 5 years imprisonment for a third degree felony; 15 years imprisonment for a second degree felony; generally 30 years imprisonment for a first degree felony; and generally life imprisonment or imprisonment for a term of years not exceeding life imprisonment for a life felony. *Id.*

<sup>11</sup> Section 921.0016(2), F.S. (1997).

<sup>12</sup> Section 924.06(1)(e), F.S. (1997), authorized this appeal by a defendant. Section 924.07(1)(i), F.S. (1997), authorized this appeal by the state.

<sup>13</sup> Section 924.06, F.S., does not address an appeal by a defendant of a downward departure sentence. Section 924.07(1)(i), F.S., authorizes the state to appeal a downward departure sentence. The extent of downward departure is not subject to appellate review. Section 921.0026(1), F.S.

<sup>14</sup> An exception is fundamental error. A defendant challenging a sentencing error must generally file a motion under Fla. R. Crim. P. 3.800(b) in order to raise fundamental error on appeal. *Nawaz v. State*, 28 So.3d 122, 124 (Fla. 1st DCA 2010). A defendant is not required to file a motion under this rule in order to appeal fundamental error in the sentencing process. *Id.* Fundamental error in the sentencing process is error “basic to the judicial decision under review and equivalent to a denial of due process.” *State v. Johnson*, 616 So.2d 1, 3 (Fla. 1993). A sentence may be within statutory limits but if the trial court

and including the statutory maximum penalty is not appealable: “As to the sentence itself, ‘the general rule in Florida is that when a sentence is *within statutory limits*, it is not subject to *review* by an appellate court.’”<sup>15</sup>

### **Length of Stay**

According to a recent study of the operations of the Department of Corrections (DOC), length of stay (LOS) in Florida correctional facilities exceeds the national LOS average (30 months). LOS has consistently increased in Florida “from just under 30 months on average in 2008 to almost 40 months by 2015.”<sup>16</sup> According to the study’s authors, the longer average LOS in Florida “explains to a large degree Florida’s significantly higher incarceration rate of 522 per 100,000 population versus the U.S. state incarceration rate of 416 per 100,000.”<sup>17</sup>

### **Departure from a Code Sentence When Total Sentencing Points are 22 Points or Fewer**

An exception to typical Code sentencing is found in s. 775.082(10), F.S. Under this subsection, if a defendant is sentenced for an offense committed on or after July 1, 2009, which is a third degree felony but not a forcible felony,<sup>18</sup> and if the total sentence points pursuant to s. 921.0024, F.S., are 22 points or fewer, the court must sentence the offender to a nonstate prison sanction. However, if the court makes written findings that a nonstate prison sanction could present a danger to the public, the court may sentence the offender to a state correctional facility.

### **Alternative Sentencing**

An offender with a sentence in excess of one year typically serves his or her sentence in a state correctional facility operated by the Department of Corrections (DOC);<sup>19</sup> however, other options are statutorily authorized and sometimes available. These include placement in a:

- Prison diversion program for offenders who meet certain criteria, including a requirement to have no more than 54 total sentence points.<sup>20</sup>

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considered “constitutionally impermissible factors” in imposing the sentence, then the court committed fundamental error. *Nawaz*, 28 So.3d at 124. For example, it is fundamental error if a court considered “charges of which an accused has been acquitted in passing sentence.” *Epprecht v. State*, 488 So.2d 129, 131 (Fla. 3d DCA 1986).

<sup>15</sup> *Charles v. State*, 204 So.3d 63, 66 (Fla. 4th DCA 2016), quoting *Howard v. State*, 820 So.2d 337, 339 (Fla. 4th DCA 2002) (emphasis provided by the court). A defendant may appeal a Code sentence that exceeds the statutory maximum penalty under s. 775.082, F.S., unless otherwise provided by law. Section 924.06(1)(e), F.S.

<sup>16</sup> Study of Operations of the Florida Department of Corrections (prepared by Carter Goble Associates, LLC), Report No. 15-FDC (November 2015), Office of Program Policy Analysis and Government Accountability, Florida Legislature, p. 80 (footnote omitted). This study is available at <http://www.oppaga.state.fl.us/Summary.aspx?reportNum=15-FDC> (last visited on March 23, 2017).

<sup>17</sup> *Id.*

<sup>18</sup> Section 776.08, F.S., defines a “forcible felony” as treason; murder; manslaughter; sexual battery; carjacking; home-invasion robbery; robbery; burglary; arson; kidnapping; aggravated assault; aggravated battery; aggravated stalking; aircraft piracy; unlawful throwing, placing, or discharging of a destructive device or bomb; and any other felony which involves the use or threat of physical force or violence against any individual.

<sup>19</sup> Section 921.0024(2), F.S.

<sup>20</sup> Section 921.00241, F.S. The court may sentence the offender to a term of probation, community control, or community supervision with mandatory participation in a prison diversion program of the DOC.

- Local detention facility if the offender’s sentence is between 366 days and 22 months and there is a contract between the DOC and the chief correctional officer for the applicable county.<sup>21</sup>
- Imprisonment in county jail if the total of the prisoner’s cumulative sentences is not more than one year.<sup>22</sup>
- County work camps operated under a county/state contractual arrangement.<sup>23</sup>
- County or municipal facility pursuant to a contract between the DOC and such facility. Section 944.171, F.S., authorizes the DOC to contract with county or municipal facilities for the purpose of housing inmates. The DOC indicates that such contractual arrangements have been used as recently as FY 2011-2012, with Franklin, Washington, and Lafayette Counties.<sup>24</sup>

### III. Effect of Proposed Changes:

#### Sentencing of Offenders to County Jail

Effective July 1, 2017, Section 6 creates s. 950.021, F.S., to authorize a court to sentence an offender to a term in the county jail in the county where the offense was committed for up to 24 months if the offender meets all of the following criteria:

- The offender’s total sentence points on the Code worksheet are more than 44 points, but no more than 60 points.
- The offender’s primary offense is not a forcible felony as defined in s. 776.08, F.S., except that an offender whose primary offense is a third degree felony under ch. 810, F.S., entitled “Burglary and Trespass,” is eligible to be sentenced to a county jail.
- The offender’s primary offense is not punishable by a minimum mandatory sentence in excess of 24 months.

Section 6 provides that the court may only sentence an offender meeting the above-referenced criteria to county jail if there is a contract for the applicable county between the county’s chief correctional officer and the DOC.

The DOC must enter into a contract with a county when requested by the county’s chief correctional officer. The contract must specifically establish the maximum number of beds and the validated per diem rate. The contract must provide for per diem reimbursement for occupied inmate days based on the contracting county’s most recent annual adult male custody or adult female custody per diem rates not to exceed \$60 per inmate. All contractual per diem rates must be validated by the Auditor General before payments are made.

A contract is contingent upon a specific appropriation in the General Appropriations Act. Contracts must be awarded by the DOC on a first-come, first-served basis up to the maximum appropriation. The maximum appropriation allowable consists of funds appropriated in or

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<sup>21</sup> Section 921.188, F.S.

<sup>22</sup> Section 922.051, F.S.

<sup>23</sup> Section 950.002, F.S.

<sup>24</sup> Department of Corrections, *Senate Bill 1068 Analysis* (March 23, 2017) (on file with the Senate Committee on Criminal Justice).

transferred to the specific appropriation category created by the bill entitled “Inmates Sentenced to County Jail” (ISCJ).

In addition to an appropriation, the bill authorizes the DOC to transfer funds into the ISCJ specific appropriation category to fulfill DOC’s contractual per diem obligation that may not exceed the DOC’s average male or female total per diem published for the preceding fiscal year. This allows the DOC flexibility in the amount it must transfer into this specific category because the number of counties that will request contracts to have offenders sentenced to their jails is unknown. The maximum appropriation allowable would be the appropriated funds plus any funds that are transferred from other DOC categories to fulfill DOC’s contractual per diem obligation. All contractual per diem rates as well as per diem rates used by the DOC must be validated by the Auditor General.

### **Criminal Punishment Code Sentencing**

The bill amends the Criminal Punishment Code (Code) to create upward departure sentencing for noncapital felony offenses committed on or after October 1, 2017. An upward departure sentence is a sentence that exceeds a specified permissible sentencing range.

The bill amends s. 921.002, F.S., (Section 1), which provides principles and requirements regarding the Code and appeals of Code sentencing. New provisions are added relating to upward departure sentencing under the Code (see descriptions of sections 2 and 3 of the bill), which are applicable to any noncapital felony offense committed on or after October 1, 2017. These provisions:

- Require that reasons for an upward departure sentence be articulated in writing;
- Specify the level of proof (preponderance of the evidence) necessary to establish facts supporting the departure;
- Provide that an upward departure sentence will be upheld when at least one circumstance supports the departure (even if there is a circumstance found that does not justify the departure); and
- Authorize an appeal by a defendant and the state of a sentence outside the permissible sentencing range.

The bill amends s. 921.0024, F.S., (Section 2), the Code worksheet, to create a new subsection (3), which applies to any noncapital felony offense committed on or after October 1, 2017. New subsection (3) tracks current law relating to Code sentencing as follows:

- Adheres to the current method for calculating total sentence points and the lowest permissible sentence in prison months (when total sentence points exceed 44 points);
- Authorizes concurrent or consecutive sentencing;
- Requires that the lowest permissible sentence in prison months be imposed if this sentence exceeds the statutory maximum sentence provided in s. 775.082, F.S.;
- Authorizes life imprisonment if total sentence points are greater than or equal to 363;
- Prohibits an offender sentenced to life imprisonment from any form of discretionary early release, except executive clemency or conditional medical release; and

- Adheres to any requirement under s. 921.0024(1), F.S., to impose a statutory maximum sentence.<sup>25</sup>

Sentencing under new subsection (3) also differs substantially from sentencing under the current Code.

Sentencing under the current Code:

- If total sentence points equal or are less than 44 points, the lowest permissible sentence is any nonstate prison sanction, unless the court determines that a sentence up to the statutory maximum is appropriate.
- If total sentence points exceed 44 points, the lowest permissible sentence in prison months is calculated. Generally, the permissible sentencing range is the scored lowest permissible sentence in prison months up to and including the statutory maximum under s. 775.082, F.S. However, if the calculated lowest permissible sentence exceeds the statutory maximum under s. 775.082, F.S., the lowest permissible sentence is imposed.

Sentencing under the bill:

- Under new paragraph (3)(c), if total sentence points equal or are less than 44 points, the court may impose a nonstate prison sanction or the court may increase the total sentence points by up to, and including, 25 percent.
- Under new paragraph (3)(c), if total sentence points exceed 44 points as a result of this “up to 25 percent increase,” the court may not impose a state prison sentence that is longer than the scored lowest permissible sentence in prison months (calculated under new paragraph (3)(d)).
- Paragraph (3)(d), specifies how the lowest permissible sentence in prison months is calculated (when total sentence points exceed 44 points). The calculation is identical to the current Code. It also follows the current Code in providing that if the calculated lowest permissible sentence exceeds the statutory maximum under s. 775.082, F.S., the lowest permissible sentence is imposed.
- New paragraph (3)(e) applies to the defendant whose total sentence points exceed 44 points. The defendant’s lowest permissible sentence in prison months is calculated under new paragraph (3)(d). Once calculated, the court is permitted under new paragraph (3)(e) to impose a state prison sentence that does not vary upward by more than 25 percent from the scored lowest permissible sentence in prison months. This sentence may not exceed the statutory maximum sentence provided in s. 775.082, F.S.
- New paragraph (3)(f) specifies that, except as provided in s. 921.00261, F.S. (upward departure sentencing), the trial court may not impose a prison sentence that varies upward by more than 25 percent from the scored lowest permissible sentence in prison months. The permissible range for sentencing for an upward departure sentence imposed by the court pursuant to s. 921.00261, F.S., is the lowest permissible sentence up to and including the statutory maximum sentence provided in s. 775.082, F.S.

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<sup>25</sup> Section 921.0024(1)(b), F.S., provides for sentence point multipliers for an offense related to a criminal gang and for an adult-on-minor sex offense. If application of either multiplier results in the lowest permissible sentence exceeding the statutory maximum sentence for the primary offense under ch. 775, F.S., the court may not apply the multiplier and must sentence the defendant to the statutory maximum sentence.

The bill creates s. 921.00261, F.S., (Section 3), which explains what sentence constitutes an upward departure sentence and what requirements must be met by the trial court to impose this departure sentence:

- A sentence pursuant to s. 921.0024(3)(d) or (e), F.S., is not an upward departure sentence. An upward departure sentence is a state prison sentence that varies upward by *more than 25* percent from the lowest permissible sentence in prison months calculated pursuant to s. 921.0024(3)(d), F.S.
- The trial court may impose an upward departure sentence only if the sentence is accompanied by a written statement from the court specifying the reasons for the departure, filed within 7 days after the date of sentencing. A written transcription of orally stated reasons for this departure is permissible if it is filed by the court within 7 days after the date of sentencing.
- The imposition of a split sentence of incarceration followed by community control or probation does not by itself constitute an upward departure. For the purpose of determining the maximum sentence authorized by law, any community control portion of a split sentence does not constitute a term of imprisonment.
- An upward departure sentence must be within any relevant maximum sentence limitations provided by s. 775.082, F.S.
- An upward departure sentence is discouraged unless there are circumstances or factors that reasonably justify the departure. The failure of the trial court to impose a sentence within the range authorized by s. 921.0024(3), F.S., is subject to appellate review under ch. 924, F.S., but the extent of the departure from such range is not subject to appellate review.

Aggravating circumstances to be considered include, but are not limited to, the following.

- The departure results from a legitimate, uncoerced plea bargain.
- The offense was one of violence and was committed in a manner that was especially heinous, atrocious, or cruel.
- The offenses before the court for sentencing arose out of separate episodes, the primary offense is scored at offense level 4 or higher, and the defendant has committed five or more offenses within a 180-day period which have resulted in convictions.
- The primary offense is scored at offense level 3, and the defendant has committed eight or more offenses within a 180-day period which have resulted in convictions.
- The offense before the court for disposition was committed within 6 months after the defendant was discharged from probation, community control, or pretrial intervention or diversion or released from state prison, whichever is later.
- The defendant occupied a leadership role in a criminal organization.
- The offense was committed by a public official under color of office.
- The defendant knew the victim was a law enforcement officer at the time of the offense, the offense was a violent offense, and that status is not an element of the primary offense.
- The offense created a substantial risk of death or great bodily harm to many persons or to one or more children.
- The victim was especially vulnerable due to age or physical or mental disability.
- The offense was motivated by prejudice based on race, color, ancestry, ethnicity, religion, sexual orientation, or national origin of the victim.
- The victim suffered extraordinary physical or emotional trauma or permanent physical injury or was treated with particular cruelty.



- The victim was physically attacked by the defendant in the presence of one or more members of the victim's family.
- The offense resulted in substantial economic hardship to the victim and consisted of an illegal act or acts committed by means of concealment, guile, or fraud to obtain money or property, to avoid payment or loss of money or property, or to obtain business or professional advantage, when two or more of the following circumstances were present:
  - The offense involved multiple victims or multiple incidents per victim.
  - The offense involved a high degree of sophistication or planning or occurred over a lengthy period of time.
  - The defendant used position or status to facilitate the commission of the offense, including positions of trust, confidence, or fiduciary relationship; or
  - The defendant was in the past involved in other conduct similar to that involved in the current offense.
- The offense was committed in order to prevent or avoid arrest, to impede or prevent prosecution for the conduct underlying the offense, or to effect an escape from custody.
- The defendant is not amenable to rehabilitation or supervision, as evidenced by an escalating pattern of criminal conduct, which is a progression from nonviolent to violent crimes, a progression of increasingly violent crimes, or a pattern of increasingly serious criminal activity.
- The defendant induced a minor to participate in any of the offenses pending before the court for disposition.
- The primary offense is scored at offense level 7 or higher, and the defendant has been convicted of an additional offense that scored, or would have scored, at an offense level 8 or higher.
- The defendant has an extensive unscorable juvenile record.
- The defendant committed an offense involving sexual contact or sexual penetration, and, as a direct result of the offense, the victim contracted a sexually transmissible disease.

Most of the provisions of s. 921.00261, F.S., including the listed aggravating circumstances, mirror provisions of prior law relating to the pre-Code sentencing guidelines.<sup>26</sup>

The bill amends s. 924.06, F.S., (Section 4), to authorize a defendant to appeal a sentence imposed outside the range authorized by s. 921.0024(3), F.S. The bill also amends s. 924.07, F.S., (Section 5), to authorize the state to appeal a sentence imposed outside the range authorized by s. 921.0024(3), F.S.

### **Reenactments**

The bill reenacts s. 958.04, F.S., (Section 7). This reenactment is to incorporate amendments made by the bill to ss. 924.06 and 924.07, F.S.

### **Effective Date**

The bill is effective July 1, 2017, (Section 8).

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<sup>26</sup> See s. 921.0016, F.S. (1997).

**IV. Constitutional Issues:**

## A. Municipality/County Mandates Restrictions:

None.

## B. Public Records/Open Meetings Issues:

None.

## C. Trust Funds Restrictions:

None.

**V. Fiscal Impact Statement:**

## A. Tax/Fee Issues:

None.

## B. Private Sector Impact:

The Department of Corrections (DOC) states that CS/SB 1068 may result in the elimination of privately operated community release center contracts if the DOC is required to contract with the sheriffs for the inmates currently served by these contracts.

## C. Government Sector Impact:

**Sentencing of Offenders to County Jail**

The Auditor General states additional staff would be needed to meet the bill's requirements of validating per diem rates used by the Department of Corrections.<sup>27</sup>

Based on inmate admissions for Fiscal Year 2015-16, the DOC found that there were approximately 4,200 inmates that met criteria in the bill. The loss of this number of inmates could impact bed space usage (custody), inmate work squads, community release programs, institutional inmate work, and program assignments.<sup>28</sup>

For Fiscal Year 2015-2016 the per diem for all DOC facilities excluding private facilities is \$53.49. This is an average of the adult male per diem of \$48.28 and female per diem of \$57.06. The per diem accounts for the operation of a full facility including expenditures for security, and other support staff, utilities, maintenance, insurance, medical, and education. When the inmate population impacted in small increments statewide, the inmate variable per diem of \$15.91 is the most appropriate to use. The variable per diem is used when the change to the inmate population does not require the opening or closure of an additional housing unit and therefore does not include funding for staffing. This per

<sup>27</sup> Auditor General, *HB 157 Analysis* (January 23, 2017) (on file with the Senate Committee on Criminal Justice).

<sup>28</sup> Department of Corrections, *Senate Bill 1068* (March 23, 2017) (on file with the Senate Committee on Criminal Justice).

diem includes costs more directly aligned with individual inmate care such as medical, food, inmate clothing, and personal care items.<sup>29</sup>

The bill provides for per diem reimbursement for occupied inmate days based on the contracting county’s most recent annual adult male custody or adult female custody per diem rates, not to exceed \$60 per inmate. The DOC provided the following fiscal information for potential funding consideration when the population would warrant the various operating per diems.<sup>30</sup>

<b>Fiscal Based on 730 Days (24 months)</b>				
% Inmates	ADP <sup>31</sup>	FDC Cost	Additional Cost Incurred to Implement	Total Cost to Implement
75%	3150	\$123,000,255	\$14,969,745	\$137,970,000
50%	2100	\$82,000,170	\$9,979,830	\$91,980,000
25%	1050	\$24,420,690	\$21,569,310	\$45,990,000
20%	840	\$9,756,012	\$27,035,988	\$36,792,000
15%	630	\$7,317,009	\$20,276,991	\$27,594,000
10%	420	\$4,878,006	\$13,517,994	\$18,396,000
5%	210	\$2,439,003	\$6,758,997	\$9,198,000

<b>Fiscal Based on 547 Days (18 months)</b>				
% Inmates	ADP	FDC Cost	Additional Cost Incurred to Implement	Total Cost to Implement
75%	3150	\$92,165,945	\$11,217,056	\$103,383,000
50%	2100	\$61,443,963	\$7,478,037	\$68,922,000
25%	1050	\$18,298,791	\$16,162,209	\$34,461,000
20%	840	\$7,310,327	\$20,258,473	\$27,568,800
15%	630	\$5,482,745	\$15,193,855	\$20,676,600
10%	420	\$3,655,163	\$10,129,237	\$13,784,400
5%	210	\$1,827,582	\$5,064,618	\$6,892,200

<b>Fiscal Based on 365 Days (12 months)</b>				
% Inmates	ADP	FDC Cost	Additional Cost Incurred to Implement	Total Cost to Implement
75%	3150	\$61,500,128	\$7,484,873	\$68,985,000
50%	2100	\$41,000,085	\$4,989,915	\$45,990,000
25%	1050	\$12,210,345	\$10,784,655	\$22,995,000
20%	840	\$4,878,006	\$13,517,994	\$18,396,000
15%	630	\$3,658,505	\$10,138,496	\$13,797,000

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> ADP is average daily population.

10%	420	\$2,439,003	\$6,758,997	\$9,198,000
5%	210	\$1,219,502	\$3,379,499	\$4,599,000

<b>Fiscal Based on 182 Days (6 months)</b>				
% Inmates	ADP	FDC Cost	Additional Cost Incurred to Implement	Total Cost to Implement
75%	3150	\$30,665,817	\$3,732,183	\$34,398,000
50%	2100	\$20,443,878	\$2,488,122	\$22,932,000
25%	1050	\$6,088,446	\$5,377,554	11,466,000
20%	840	\$2,432,321	\$6,740,479	9,172,800
15%	630	\$1,824,241	\$5,055,359	6,879,600
10%	420	\$1,216,160	\$3,370,240	4,586,400
5%	210	\$608,080	\$1,685,120	2,293,200

**Criminal Punishment Code Sentencing**

The Criminal Justice Impact Conference, which provides the final, official prison bed impact, if any, met on March 29, 2017 and determined that the provisions of the bill involving the upward departure sentencing will have a “negative indeterminate impact” (an unquantifiable decrease in prison beds). The EDR notes: “It is not known how current court discretion will be impacted by these changes to sentencing under the Code, especially the creation of upward departure sentencing. Furthermore, since upward departure sentencing does not currently exist under the Code (generally, the sentencing range is the lowest permissible sentence up to the statutory maximum), the prison bed impact of sentencing as proposed in the bill cannot be ascertained from DOC data on sentencing.”<sup>32</sup>

**VI. Technical Deficiencies:**

The bill does not specify if the inmates sentenced to county jail will be required to serve 85 percent of the sentence. Without this provision, the bill could result in inmates sentenced to county jails serving less than 85 percent of the sentence imposed. Section 951.21, F.S., provides counties the discretion to reduce the time an inmate must serve by the award of gain time.

The DOC states that because of the discretionary authority afforded the county, the actual percentage of a sentence an inmate will serve may vary depending on local policies and interpretations of the statute. The DOC further explains that it is clear that the maximum amount of a sentence that could be satisfied by gain time is 25 percent, meaning the inmate would serve 75 percent of the sentence.<sup>33</sup>

<sup>32</sup> Impact information was provided by staff of the Office of Economic and Demographic Research on March 6, 2017 via e-mail (on file with the Senate Committee on Criminal Justice).

<sup>33</sup> Department of Corrections, *Senate Bill 1068 Analysis* (March 23, 2017) (on file with the Senate Committee on Criminal Justice).

Section 951.21(1), F.S., authorizes the county to grant up to 5 days per month for the first 2 years of a sentence “when no charge of misconduct has been sustained against a county prisoner.” Section 951.21(3), F.S., authorizes “an extra good-time allowance for meritorious conduct or exceptional industry not to exceed 5 days per month.” If an inmate earns the maximum allowable award under these statutes of 10 days per month, the sentence could be reduced by up to 25 percent by virtue of the application of gain time.<sup>34</sup>

## VII. Related Issues:

It appears that any contract between the DOC and a county would be limited to one year; however, inmates under this section could be sentenced to up to 24 months. “The bill does not address what would happen to the inmate’s sentence or confinement if a contract is revised or cancelled and the inmate’s service of sentence is still active after the contract cancellation.”<sup>35</sup>

The DOC also notes that “the bill states that the court will ‘sentence’ the offender to county jail, which means that the court will impose a sentence and also determine where the offender will serve the sentence. The bill language creates confusion as to whether the offender is being committed to the Department and housed in the county jail, or whether the offender is being committed to the county.”<sup>36</sup>

## VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 921.002, 921.0024, 924.06, and 924.07.

This bill creates sections 921.00261 and 950.021 of the Florida Statutes.

This bill reenacts section 958.04 of the Florida Statutes. This reenactment is to incorporate amendments made by the bill to ss. 924.06 and 924.07, F.S.

## IX. Additional Information:

### A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

#### CS by Criminal Justice on March 27, 2017:

The CS:

- Specifies what sentencing under the Code is permitted without a written reason for sentencing.
- Provides that sentencing that exceeds a permitted range is an upward departure sentence and requires a written reason to justify the departure.
- Lists a number of “aggravating circumstances” for which an upward departure sentence is reasonably justified.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

- Authorizes the defendant and the state to appeal a sentence outside the permissible sentencing range.

**B. Amendments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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