

**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 Committee on Criminal Justice

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BILL: SB 1194

INTRODUCER: Senator Bracy

SUBJECT: Sentencing

DATE: March 24, 2017

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Hrdlicka	CJ	<b>Pre-meeting</b>
2.			JU	
3.			AP	

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**I. Summary:**

SB 1194 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.

The Criminal Justice Impact Conference, which provides the final, official prison bed impact, if any, of legislation has not yet reviewed the bill. A preliminary estimate by the Legislature’s Office of Economic and Demographic Research is that the bill will have a “negative indeterminate impact” (an unquantifiable decrease in prison beds). See Section V. Fiscal Impact.

**II. Present Situation:**

**Criminal Punishment Code**

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

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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 9, 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.

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 generally the scored lowest permissible sentence up to, and including, the maximum sentence provided in s. 775.082, F.S.<sup>6</sup> However, if the offender's offense has a mandatory minimum term that is greater than the scored lowest permissible sentence, the mandatory minimum term supersedes the lowest permissible sentence scored.<sup>7</sup> Further, some offenders may qualify for prison diversion under various sections of the Florida Statutes.<sup>8</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>9</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>10</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

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<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" (reduce) the scored lowest permissible sentence if the court finds a mitigating circumstance. Sections 921.002(1)(g) and (3), 921.0026(1), and 921.00265(1) and (2), F.S. Section 921.0026(2), F.S., provides a list of mitigating circumstances. This type of sentence is often referred to as a "downward departure" sentence.

<sup>6</sup> Sections 921.002(1)(g) and 921.0024(2), F.S. The sentencing court may impose sentences concurrently or consecutively. Section 921.0024(2), F.S. A prison sentence must exceed one year. *Id.* 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. *Id.* If total sentence points are greater than or equal to 363 points, the court may sentence the offender to life imprisonment. *Id.*

<sup>7</sup> Fla. R. Crim. P. 3.704(d)(26).

<sup>8</sup> *See e.g.*, s. 775.082(10), F.S. (diversion for an offender whose offense is a nonviolent third degree felony and whose total sentence points are 22 points or fewer); s. 921.00241, F.S. (diversion into a Department of Corrections' prison diversion program for certain nonviolent third degree felony offenders); and s. 948.01, F.S. (diversion into a postadjudicatory treatment-based drug court program for certain nonviolent felony offenders).

<sup>9</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>10</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.*

“aggravating circumstances.”<sup>11</sup> An upward departure sentence had to be within any relevant maximum sentence provided by s. 775.082, F.S.<sup>12</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>13</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>14</sup> In contrast, currently under the Code, only a downward departure sentence may be appealed and only the state may appeal this departure.<sup>15</sup> With few exceptions,<sup>16</sup> a Code sentence within the range of the lowest permissible sentence up to 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>17</sup>

### III. Effect of Proposed Changes:

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. Provided below is a section-by-section analysis of the bill:

**Section 1** of the bill amends s. 921.002, F.S., 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;

<sup>11</sup> Section 921.0016(3), F.S. (1997).

<sup>12</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>13</sup> Section 921.0016(2), F.S. (1997).

<sup>14</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>15</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>16</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 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>17</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.

- 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.

**Section 2** of the bill amends s. 921.0024, F.S., 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>18</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)).

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<sup>18</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.

- 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.

**Section 3** of the bill creates s. 921.00261, F.S., 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 one more 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>19</sup>

**Section 4** amends s. 924.06, F.S., to authorize a defendant to appeal a sentence imposed outside the range authorized by s. 921.0024(3), F.S.

**Section 5** amends s. 924.07, F.S. to authorize the state to appeal a sentence imposed outside the range authorized by s. 921.0024(3), F.S.

**Section 6** reenacts s. 958.04, F.S. This reenactment is to incorporate amendments made by the bill to ss. 924.06 and 924.07, F.S.

**Section 7** provides that the bill takes effect October 1, 2017.

#### **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:

None.

C. Government Sector Impact:

The Criminal Justice Impact Conference, which provides the final, official prison bed impact, if any, of legislation has not yet reviewed the bill. A preliminary estimate by the Legislature's Office of Economic and Demographic Research (EDR) is that the bill 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

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<sup>19</sup> See s. 921.0016, F.S. (1997).

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>20</sup>

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**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 section 921.00261 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.)

None.

**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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<sup>20</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).