

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.)

Prepared By: The Professional Staff of the Committee on Criminal Justice

BILL: SB 290

INTRODUCER: Senator Rouson

SUBJECT: Criminal Justice

DATE: February 20, 2017

REVISED: _____

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

I. Summary:

SB 290 makes significant changes to Florida’s sentencing laws. Several of these changes involve prison diversion for certain nonviolent felony offenders. Specifically, the bill:

- Requires that certain offenders convicted of simple possession of a controlled substance receive a nonstate prison sanction unless such sentence could present a danger to the public;
- Authorizes a court to depart from a mandatory minimum term of imprisonment for a nonviolent felony or misdemeanor if the court finds that specified criteria are met;
- Reestablishes a sentencing commission to provide recommendations regarding offense severity level rankings of noncapital felonies;
- Authorizes a court to sentence a defendant to a nonstate prison sanction within a prison diversion program if the defendant is convicted of a nonviolent second degree felony and meets other criteria;
- Restores a circumstance for mitigating (reducing) a sentence based on substance abuse or addiction and amenability to treatment and creates a new mitigating circumstance for certain nonviolent felony offenders; and
- Requires diversion through drug court, residential drug treatment, or drug offender probation for certain nonviolent felony offenders who are amenable to substance abuse treatment.

According to the Legislature’s Office of Economic and Demographic Research’s (EDR’s) preliminary estimate, provisions of the bill relating to prison diversion and departure from mandatory minimum terms will result in a decrease in prison beds. However, the Office of State Courts Administrator (OSCA) estimates an indeterminate fiscal impact due to an anticipated increase in judicial time and workload as a result of increased sentencing hearing time. See Section V. Fiscal Impact Statement.

The EDR's preliminary estimate is that prison diversion for certain drug possession offenders will result in a cumulative decrease of 1,001 prison beds over 5 years (FY 2017-18 to FY 2021-22) with a cumulative cost avoidance of \$131,965,742. Prison diversion for certain nonviolent second degree felony offenders will result in a cumulative decrease of 2,027 prison beds over 5 years (FY 2017-18 to FY 2021-22) with a cumulative cost avoidance of \$263,156,174. Other provisions of the bill will result in a decrease in prison beds but that decrease cannot be quantified. The actual appropriation associated with passage of the bill will differ depending on a number of factors including the existing inventory of prison beds.

The OSCA's preliminary estimate is that operating costs of the commission will be \$46,588 per year. Costs may be subject to change based upon changes to underlying factors and actual costs.

The Department of Corrections has also provided preliminary impact estimates for the various sections of the bill. See Section V. Fiscal Impact Statement.

II. Present Situation:

Criminal Punishment Code

In 1997, the Legislature enacted the Criminal Punishment Code¹ (Code) as Florida's "primary sentencing policy."² Noncapital felonies sentenced under the Code receive an offense severity level ranking (Levels 1-10).³ Points are assigned and accrue based upon the level ranking assigned to the primary offense, additional offenses, and prior offenses.⁴ 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,⁵ the permissible sentencing range under the Code is generally the lowest permissible sentence scored up to and including the maximum penalty provided under s. 775.082, F.S.⁶

¹ 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.

² *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 (last visited on January 24, 2017).

³ 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.

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

⁵ 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.

⁶ 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.

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.”⁷ 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.”⁸

Departure from a Code Sentence

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,⁹ 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.

Mandatory Minimum Terms of Imprisonment

Mandatory minimum terms of imprisonment limit judicial discretion in Code sentencing: “If the lowest permissible sentence is less than the mandatory minimum sentence, the mandatory minimum sentence takes precedence.”¹⁰ Generally, the sentencing range under the Code is the scored lowest permissible sentence up to and including the statutory maximum penalty. However, if there is a mandatory minimum sentence that is longer than the scored lowest permissible sentence, the sentencing range is narrowed: the mandatory minimum sentence up to and including the statutory maximum penalty.

Staff identified 118 mandatory minimum terms in Florida law. This inventory excludes repeat offender sanctions. Mandatory minimum terms for felony offenses range from 18 months in prison to life imprisonment. Mandatory minimum terms for misdemeanors range from 5 days to one year. Section 893.135, F.S., which punishes drug trafficking, contains the most mandatory

⁷ *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 January 24, 2017).

⁸ *Id.*

⁹ 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.

¹⁰ Fla. R. Crim. P. 3.704(d)(26). There are limited circumstances in which departure from a mandatory minimum term is authorized. *See e.g.*, the defendant is a youthful offender (s. 958.04, F.S.); state attorney waiver of “10/20/Life” mandatory minimum term (s. 27.366, F.S.); state attorney waiver based on substantial assistance rendered (ss. 790.163(2), 790.164(2), and 893.135(4), F.S.); departure from mandatory minimum term for a violation s. 316.027(2)(c), F.S. (driver involved in a fatal crash fails to stop and remain at the scene of a crash as required by s. 316.027(2)(g), F.S.). *But see State v. Vanderhoff*, 14 So.3d 1185, 1189 (Fla. 5th DCA 2009) (“the parties incorrectly assumed that a mitigating factor that would justify a downward departure under the Criminal Punishment Code, could also allow the trial court to waive a mandatory sentence”).

minimum terms (47) for felonies. Section 379.407, F.S., which punishes saltwater product violations, contains the most mandatory minimum terms (12) for misdemeanors.

INVENTORY OF FLORIDA’S MANDATORY MINIMUM TERMS	
Offense/Penalty Provision & Number of Mandatory Minimum Terms	Description of Mandatory Minimum Term(s)
Driving under the influence; various offenses (ss. 316.027 and 316.193, F.S.). Nine mandatory minimum terms.	4 years, imprisonment: 12 months maximum; 9 months maximum, 6 months maximum, at least 30 days, at least 10 days
Fleeing or eluding; various offenses (s. 316.1935, F.S.). Two mandatory minimum terms.	3 years
Boating under the influence; various offenses (s. 327.35, F.S.). Seven mandatory minimum terms.	Imprisonment: 12 months maximum, 9 months maximum, 6 months maximum, at least 30 days, at least 10 days
Saltwater product violations; various offenses (s. 379.407, F.S.). Twelve mandatory minimum terms.	1 year, 6 months
Phosphogypsum management violation (s. 403.4154, F.S.). One mandatory minimum term.	5 years
Unlawfully practicing health care profession; various offenses (s. 456.065, F.S.). Three mandatory minimum terms.	1 year, 30 days
Unlawfully selling, etc., horse meat (s. 500.451, F.S.). One mandatory minimum term.	1 year
Unlawfully acting as insurer; various offenses (s. 624.401, F.S.). Three mandatory minimum terms.	2 years, 18 months, 1 year
Domestic violence offender intentionally causes bodily harm (s. 741.283, F.S.). One mandatory minimum term.	5 days (does not apply if court imposes a prison sentence)
“10-20-Life” (s. 775.087, F.S.). Eight mandatory minimum terms.	Not less than 25 years and not more than life, 20 years, 15 years, 10 years, 3 years
Murder or attempted murder of law enforcement officer (s. 782.065, F.S.). One mandatory minimum term.	Life
Assault or battery on law enforcement officer or other specified persons (s. 784.07, F.S.). Four mandatory minimum terms.	8 years, 5 years, 3 years
Aggravated assault or aggravated battery upon person 65 years of age or older (s. 784.08, F.S.). One mandatory minimum term.	3 years

INVENTORY OF FLORIDA’S MANDATORY MINIMUM TERMS	
Offense/Penalty Provision & Number of Mandatory Minimum Terms	Description of Mandatory Minimum Term(s)
Possession of a firearm, etc., by a violent career criminal (s. 790.235, F.S.). One mandatory minimum term.	15 years
Deriving support from proceeds of prostitution; third or subsequent violation (s. 796.05, F.S.). One mandatory minimum term.	10 years
Prostitution-related offenses; second or subsequent violation (s. 796.07, F.S.). One mandatory minimum term.	10 days
Fraud; motor vehicle crash offenses (s. 817.234, F.S.). Two mandatory minimum terms.	2 years
Criminal use of personal ID information; various offenses (s. 817.568, F.S.). Six mandatory minimum terms.	10 years, 5 years, 3 years
Animal cruelty (death, etc.); second or subsequent violation (s. 828.12, F.S.). One mandatory minimum term.	6 months
Unlawful killing, etc., of horse or cattle (s. 828.125, F.S.). Two mandatory minimum terms.	1 year
Intentionally defective workmanship; defense or war materials (s. 876.39, F.S.). One mandatory minimum term.	Not less than 1 year in state prison (effectively more than 1 year because a state prison sentence requires more than a 12 month sentence)
Sale, etc., of specified controlled substances within 1,000 feet of real property of K-12 school and other places (s. 893.13, F.S.). One mandatory minimum term.	3 years
Manufacturing methamphetamine/phencyclidine; various offenses (child present) (s. 893.13, F.S.). Two mandatory minimum terms.	10 years, 5 years
Drug trafficking; various offenses (s. 893.135, F.S.). Forty-seven mandatory minimum terms.	Life, 25 years, 15 years, 7 years, 3 years
TOTAL MANDATORY MINIMUM TERMS: 118	

Former Sentencing Commission

A 17-member sentencing commission operated in Florida from 1982 until 1997.¹¹ The former sentencing commission was charged with the following duties:

- Reviewing sentencing practices and recommending modifications to the sentencing guidelines;
- Estimating how sentencing score thresholds and weights assigned to sentencing factors affect rates of incarceration and the levels of the prison population and recommending sentencing score thresholds, weights assigned to sentencing factors, and an appropriation sufficient to fund the estimated prison population;
- Conducting ongoing research on the impact of the sentencing guidelines, the use of imprisonment and alternatives to imprisonment, and plea bargaining; and
- Estimating the impact of any proposed changes to the sentencing guidelines on future rates of incarceration and levels of prison population, reviewing those projections, and making them available to other appropriate agencies of state government and the Legislature.¹²

The commission provided recommendations regarding sentencing guidelines revisions to the Supreme Court, the President of the Senate, the Speaker of the House of Representatives, and the chairs of the relevant substantive committees of both houses. Sentencing guidelines revisions recommended by the commission were effective only upon subsequent adoption by the Legislature of legislation implementing the revisions.

Prison Diversion for Certain Nonviolent Third Degree Felony Offenders

Section 921.00241, F.S., authorizes a court to sentence an offender to a nonstate prison sanction if the offender committed his or her offense on or after July 1, 2009, and absent this diversion, the offender would otherwise be sentenced to state prison. In order to be diverted the offender must meet all of following criteria:

- The offender's primary offense is a third degree felony.
- The offender's total sentence points score, as provided in s. 921.0024, F.S., is not more than 48 points, or the offender's total sentence points score is 54 points and 6 of those points are for a violation of probation, community control, or other community supervision, and do not involve a new violation of law.
- The offender has not been convicted or previously convicted of a forcible felony.
- The offender's primary offense does not require a mandatory minimum sentence.

If the court elects to impose a sentence as provided in this section, then the court must sentence the offender to a term of probation, community control, or community supervision with mandatory participation in a DOC prison diversion program if such program is funded and exists in the judicial circuit in which the offender is sentenced. The prison diversion program must be designed to meet the unique needs of each judicial circuit and of the offender population of that circuit. The program may require residential, nonresidential, or day-reporting requirements;

¹¹ Chapter 82-145, L.O.F., created s. 921.001, F.S., which established the commission. Chapter 97-194, L.O.F., repealed s. 921.001, F.S.

¹² See s. 921.001, F.S. (2008). All further information in this section of the analysis regarding the former sentencing commission is from this source.

substance abuse treatment; employment; restitution; academic or vocational opportunities; or community service work.

A court sentencing an offender pursuant to this section must make written findings that the offender meets the previously-described criteria. The sentencing order must indicate that the offender was sentenced to the prison diversion program. The court may order the offender to pay all or a portion of the costs related to the program if the court determines that the offender has the ability to pay.

Sentence Mitigating Circumstances

As previously noted, the permissible sentencing range under the Code is generally the scored lowest permissible sentence up to and including the maximum penalty provided under s. 775.082, F.S. However, the court may “depart downward” from the scored lowest permissible sentence if the court finds there is a mitigating circumstance. Section 921.0026, F.S., provides a list of mitigating circumstances.¹³

Relevant to the bill, pre-Code sentencing guidelines provided for the following mitigating circumstance: “The defendant requires specialized treatment for addiction, mental disorder, or physical disability, and the defendant is amenable to treatment.”¹⁴

With the enactment of the Code, this mitigating circumstance was modified.¹⁵ As modified, the mitigating circumstance read: “The defendant requires specialized treatment for a mental disorder that is unrelated to substance abuse or addiction or for a physical disability, and the defendant is amenable to treatment.”¹⁶ The Code also specified that the defendant’s “substance abuse or addiction, including intoxication,¹⁷ at the time of the offense” was not a mitigating factor and did “not, under any circumstance, justify a downward departure from the permissible sentencing range.”¹⁸

In 2009, the Legislature created a mitigating circumstance in which substance abuse or addiction could be considered: “The defendant’s offense is a nonviolent felony, the defendant’s Criminal Punishment Code scoresheet total sentence points under s. 921.0024 are 52 points or fewer, and the court determines that the defendant is amenable to the services of a postadjudicatory

¹³ Section 921.0026(4)(d), F.S., specifies that mitigating circumstances include, but are not limited to, the mitigating circumstances specified in that section.

¹⁴ Section 921.0016, F.S. (1996). In 1993, the Legislature codified this mitigating factor which was created by the Florida Supreme Court in 1987. Chapter 93-406, s. 13, L.O.F.; *Barbera v. State*, 505 So.2d 413 (Fla. 1987). In *Barbera*, the court was persuaded that intoxication and drug dependency could mitigate a sentence because the defense of intoxication could be used by a jury to justify convicting a defendant of a lesser offense. In 1999, the Legislature eliminated the voluntary intoxication defense. Chapter 99-174, L.O.F.; s. 775.051, F.S.

¹⁵ Chapter 97-194, s. 8, L.O.F.

¹⁶ Section 921.0026(2)(d), F.S. (1997).

¹⁷ While s. 775.051, F.S., provides that voluntary intoxication resulting from the consumption, injection, or other use of alcohol or other controlled substances (except those legally prescribed) is not a defense to any offense, this does not necessarily preclude the Legislature from addressing substance abuse or addiction, including intoxication, as a mitigating circumstance. For example, while a defendant may not raise as a defense that the victim was a willing participant in the crime, the Legislature has authorized mitigation of a Code sentence based on this circumstance. Section 921.0026(2)(f), F.S.; *State v. Rife*, 789 So.2d 288 (Fla. 2001).

¹⁸ Section 921.0026(3), F.S. (1997).

treatment-based drug court program and is otherwise qualified to participate in the program as part of the sentence.”¹⁹ The only subsequent change to this mitigating circumstance occurred in 2011 when the Legislature increased total sentence points from 52 points to 60 points.²⁰ Further, since the 2009 change, the law specifies that, except for this mitigating circumstance, the defendant’s substance abuse or addiction, including intoxication, is not a mitigating factor.²¹

Drug Court Diversion for Certain Nonviolent Felony Offenders

Section 948.01, F.S., in part, authorizes a court to place a defendant into a postadjudicatory treatment-based drug court program if the defendant’s offense is a nonviolent felony²² committed on or after July 1, 2009, the defendant’s Code scoresheet total sentence points under s. 921.0024, F.S., are 60 points or fewer, the defendant is amenable to substance abuse treatment, and the defendant otherwise qualifies under s. 397.334(3), F.S.²³

The satisfactory completion of the program is a required condition of the defendant’s probation or community control. The defendant must be fully advised of the purpose of the program and must agree to enter the program. The original sentencing court must relinquish jurisdiction of the defendant’s case to the postadjudicatory drug court program until the defendant is no longer active in the program, the case is returned to the sentencing court due to the defendant’s termination from the program for failure to comply with the terms thereof, or the defendant’s sentence is completed.

III. Effect of Proposed Changes:

The bill, which takes effect October 1, 2017, makes significant changes to Florida’s sentencing laws. Several of these changes involve prison diversion for certain nonviolent felony offenders from prison. The changes are described in more detail as follows.

Requiring Prison Diversion for Certain Drug Possession Offenders (Section 1)

Section 1 of the bill requires that certain offenders convicted of simple possession of a controlled substance receive a nonstate prison sanction unless such sentence could present a danger to the public. Section 775.082(10), F.S., currently provides that a court must sentence a defendant to a nonstate prison sanction if the defendant is sentenced for a third degree felony that is not a forcible felony and total sentence points under the Code are 22 points or fewer, unless the court determines such sentence could present a danger to the public.

¹⁹ Section 921.0026(2)(m) and (3), F.S.; ch. 2009-64, s. 2, L.O.F. The term “nonviolent felony” has the same meaning as provided in s. 948.08(6), F.S., which defines “nonviolent felony” as a third degree felony violation of ch. 810, F.S., or any other felony offense that is not a forcible felony as defined in s. 776.08, F.S.

²⁰ Chapter 2011-33, s. 2, L.O.F.

²¹ Section 921.0026(3), F.S. Further, while current law provides for a mitigating circumstance based on the defendant requiring specialized treatment for a mental disorder if the defendant is amenable to treatment, that mental disorder cannot be related to substance abuse or addiction or a for a physical disability. Section 921.0026(2)(d), F.S.

²² “Nonviolent felony” has the same meaning as provided in s. 948.08(6), F.S.

²³ Section 948.01(7), F.S. Section 397.334(3)(a), F.S., provides that entry into any postadjudicatory treatment-based drug court program as a condition of probation or community control pursuant to s. 948.01, F.S., s. 948.06, F.S., or s. 948.20, F.S., must be based upon the sentencing court’s assessment of the defendant’s criminal history, substance abuse screening outcome, amenability to the services of the program, total sentence points, the recommendation of the state attorney and the victim, if any, and the defendant’s agreement to enter the program.

The bill amends s. 775.082, F.S., to provide that if a defendant is sentenced for a primary offense of possession of a controlled substance committed on or after October 1, 2017, and if the total sentence points under the Code are 60 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.

The bill defines “possession of a controlled substance” as possession of a controlled substance in violation of s. 893.13, F.S., but does not include possession with intent to sell, manufacture, or deliver a controlled substance or possession of a controlled substance in violation of s. 893.135, F.S., which punishes drug trafficking.

Staff notes that this diversion provision could apply to a defendant who has a prior record, which might include a prior violent offense. For example, a defendant with a current offense of possession of a controlled substance and a prior offense of aggravated assault would score fewer than 60 total points. However, under the bill, the court could elect not to divert this defendant from prison if it found that the diversion could present a danger to the public.

Authorizing Departure from a Mandatory Minimum Term (Section 1)

Section 1 of the bill also authorizes a court to depart from a mandatory minimum term of imprisonment for a nonviolent felony or misdemeanor if the court finds that specified criteria are met. Currently, such departure may only occur in very limited circumstances, such as when the sentencing court agrees to a state attorney’s request for departure based on substantial assistance rendered by the defendant.

The bill amends s. 775.082, F.S., to provide that a person who is convicted of an offense committed on or after October 1, 2017, which requires that a mandatory minimum term of imprisonment be imposed, may move the sentencing court to depart from the mandatory minimum term and, if applicable, the mandatory fine. The state attorney may file an objection to the motion.

The court may grant the motion if the court finds that the defendant has demonstrated by a preponderance of the evidence that all of the following criteria are met:

- The defendant has not previously received a departure under this section and has not been previously convicted for the same offense for which the defendant requests a departure under this section;
- The offense is not a forcible felony²⁴ or a misdemeanor that involves the use or threat of physical force or violence against another person;
- The offense does not involve physical injury to another person or coercion of another person; and
- The offense does not involve a victim who is a minor or the use of a minor in the commission of the offense.

²⁴ Burglary of an unoccupied structure or conveyance is not a disqualifying offense for departure.

The bill defines “coercion” as:

- Using or threatening to use physical force against another person; or
- Restraining or confining or threatening to restrain or confine another person without lawful authority and against her or his will.

The bill specifies that the departure provision does not apply to repeat offender sentencing pursuant to s. 775.082(9), F.S. (prison release reoffender), s. 775.0837, F.S. (habitual misdemeanor offender), s. 775.084, F.S. (habitual felony offender, habitual violent felony offender, three-time violent felony offender, and violent career criminal), or s. 794.0115, F.S. (dangerous sexual felony offender).

Even if a defendant meets all specified criteria, the court is not required to depart from the mandatory minimum term of imprisonment.

Reestablishing a Sentencing Commission (Section 2)

Section 2 of the bill reestablishes a sentencing commission to provide recommendations regarding offense severity level rankings of noncapital felonies. A 17-member sentencing commission operated in Florida from 1982 until 1997. The reestablished commission mirrors the former sentencing commission in regard to composition and staffing but, unlike the former sentencing commission, the only duty of the reestablished sentencing commission is to provide recommendations regarding offense severity level rankings of noncapital felonies.

The bill creates s. 921.00215, F.S., which establishes a sentencing commission. The commission is composed of the following 17 members:

- Two members of the Senate (one a member of the majority party appointed by the Senate President and the other a member of the minority party appointed by the Senate Minority Leader);
- Two members of the House of Representatives (one a member of the majority party appointed by the Speaker of the House of Representatives and the other a member of the minority party appointed by the House Minority Leader);
- The Chief Justice of the Supreme Court or a member of the Supreme Court designated by the Chief Justice (the Chief Justice or the Chief Justice’s designee is the chair of the commission);
- Three circuit court judges appointed by the Chief Justice;
- One county court judge appointed by the Chief Justice;
- One representative of the victim advocacy profession appointed by the Chief Justice;
- The Attorney General or his or her designee;
- The Secretary of the Department of Corrections or his or her designee;
- One state attorney recommended by the Florida Prosecuting Attorneys Association and appointed by the Governor;
- One public defender recommended by the Public Defenders Association and appointed by the Governor;
- One private attorney recommended by the President of The Florida Bar and appointed by the Governor; and
- Two persons appointed by the Governor to represent the public.

Commission membership must reflect the geographic and ethnic diversity of the state. Membership does not disqualify a member from holding any other public office or from being employed by a public entity. Members serve without compensation but are entitled to be reimbursed for per diem and travel.

Members appointed by the Governor and the members from the Senate and the House of Representatives serve two-year terms. The members appointed by the Chief Justice of the Supreme Court serve at his or her pleasure. The Attorney General and Secretary of the Department of Corrections continue as long as they serve in those positions.

The OSCA acts as staff for the commission and provides necessary data collection, analysis and research, and support services. For the purpose of assisting the commission in its review and in preparing its recommendations, upon request of the commission, the DOC estimates the prison bed impact of any change to offense severity level rankings being considered by the commission and provides technical assistance to the commission.

The commission meets annually or at the call of the chair to:

- Review the offense severity level ranking assigned to noncapital felony offenses under s. 921.0022, F.S. (the offense severity ranking chart), or s. 921.0023, F.S. (designation of ranking if the offense is not ranked in the chart);
- Recommend the inclusion of any noncapital felony offense, including a newly created noncapital felony offense, on the offense severity ranking chart and recommend the appropriate offense severity level ranking to assign to each offense that the commission recommends for inclusion;
- Recommend the removal of any noncapital felony offense ranked on the offense severity ranking chart and rank such noncapital felony offense pursuant to s. 921.0023, F.S.; and
- Recommend a revision to the level of any noncapital felony offense ranked on the offense severity ranking chart and recommend the appropriate offense severity level ranking to assign to each offense that the commission recommends be revised.

The commission, no later than October 1 of each year, makes recommendations to the Governor, members of the Supreme Court, the President of the Senate, the Speaker of the House of Representatives, and the chairs of the relevant substantive committees of both houses on appropriate offense severity level rankings for noncapital felonies. The recommendations must include reasons for each recommendation and an estimate of the prison bed impact of each recommendation.

Authorizing Prison Diversion for Certain Nonviolent Second Degree Felony Offenders (Section 3)

Section 3 of the bill authorizes a court to sentence a defendant to a nonstate prison sanction within a prison diversion program if the defendant is convicted of a nonviolent *second* degree felony and meets other criteria. Section 921.00241, F.S., currently authorizes a court to sentence an offender to a nonstate prison sanction if the offender is convicted of a nonviolent *third* degree felony and meets other criteria specified in the statute.

The bill amends s. 921.00241, F.S., to provide that, notwithstanding s. 921.0024, F.S., and effective for offenses committed on or after October 1, 2017, a court may divert from the state correctional system an offender who would otherwise be sentenced to a state facility by sentencing the offender to a nonstate prison sanction if the offender's primary offense is a nonviolent second degree felony and the offender meets all of the following criteria:

- The offender's total sentence points score is not more than 48 points, or the offender's total sentence points score is 54 points and 6 of those points are for a violation of probation, community control, or other community supervision, and do not involve a new violation of law.
- The offender has not been convicted or previously convicted of a forcible felony, but excluding any third degree felony violation under ch. 810, F.S. (theft and related offenses).
- The offender's primary offense does not require a mandatory minimum sentence.

If the court elects to impose a sentence as provided in this section, the court must sentence the offender to a term of probation, community control, or community supervision with mandatory participation in a DOC prison diversion program if such program is funded and exists in the judicial circuit in which the offender is sentenced. The prison diversion program must be designed to meet the unique needs of each judicial circuit and of the offender population of that circuit. The program may require residential, nonresidential, or day-reporting requirements; substance abuse treatment; employment; restitution; academic or vocational opportunities; or community service work.

A court sentencing an offender pursuant to this section must make written findings that the offender meets the previously-described criteria, and the sentencing order must indicate that the offender was sentenced to a DOC prison diversion program. The court may order the offender to pay all or a portion of the costs related to the program if the court determines that the offender has the ability to pay.

Restoring and Creating Sentence Mitigating Circumstances (Section 4)

Section 4 of the bill restores a circumstance for mitigating (reducing) a Code sentence. This mitigating circumstance, which was authorized under the pre-Code sentencing guidelines until it was removed in 1997, was based on the defendant's substance abuse or addiction and amenability to treatment. Section 4 also creates a mitigating circumstance for certain nonviolent felony offenders.

The bill amends s. 921.0026, F.S., to add the following circumstances for mitigation of a scored lowest permissible sentence under the Code:

- For an offense committed on or after October 1, 2017, the defendant requires specialized treatment for addiction, a mental disorder, or a physical disability, and the defendant is amenable to treatment.
- For an offense committed on or after October 1, 2017, the defendant's offense is a nonviolent felony, and the defendant's Code scoresheet total sentence points are 60 points or fewer.

Requiring Drug Court, Treatment, or Probation for Certain Nonviolent Felony Offenders (Section 5)

Section 5 of the bill *requires* diversion through drug court, residential drug treatment, or drug offender probation for certain nonviolent felony offenders who are amenable to substance abuse treatment. Section 948.01, F.S., in part, currently *authorizes* a court to place a defendant into a postadjudicatory treatment-based drug court program if the defendant's offense is a nonviolent felony committed on or after July 1, 2009, total sentence points under the Code are 60 points or fewer, the defendant is amenable to substance abuse treatment, and the defendant otherwise qualifies under s. 397.334(3), F.S. (criteria for entry into a post adjudicatory treatment-based drug court program).

The bill amends s. 948.01(7), F.S., to *require* a court to place a defendant into a postadjudicatory treatment-based drug court program, residential drug treatment, or drug offender probation if the defendant committed a nonviolent felony offense on or after October 1, 2017, the defendant's Code scoresheet total sentence points are 60 points or fewer, the defendant is amenable to substance abuse treatment, the defendant's criminal behavior is related to substance abuse or addiction, and the defendant otherwise qualifies under s. 397.334(3), F.S. The satisfactory completion of the program is a required condition of the defendant's probation or community control.

Reenacting Statutes Amended by the Bill

The bill also reenacts several statutes to incorporate the amendments made by the bill, as discussed above.

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 (CJIC), which provides the final, official estimate of the prison bed impact, if any, of legislation has not yet reviewed the provisions of the bill. However, the Legislature's Office of Economic and Demographic Research (EDR) has provided a preliminary estimate of the prison bed impact of the provisions of the bill.²⁵ The EDR's preliminary estimate is that the entire bill will have a "negative significant" prison bed impact. "Negative" means a decrease in prison beds. "Negative significant" means a decrease of more than 25 prisons beds.

The EDR notes that its impact statement "is not intended to represent the direct appropriations impact of this bill. Rather, it provides a standalone estimate of the prison bed need of this particular bill. Cost data are included to allow a comparison of the impact of this bill with other proposed legislation. The actual appropriation associated with passage of this bill will differ depending on a number of factors including the existing inventory of prison beds." Stated another way, the two prison bed impacts for which the EDR provides specific prison bed numbers (diversion of certain drug offenders and diversion of certain nonviolent second degree felony offenders) are subsets of the effect, and do not estimate the potential overlap that both policies would create (i.e., drug possession offenders could be in the nonviolent second degree felony pool). Therefore, it cannot be immediately assumed that both policies together are the sum of their parts.

The DOC has also provided preliminary impact estimates of many sections of the bill, which are noted in the discussion of each section.²⁶ The DOC notes that if a significant number of defendants that otherwise would have been sentenced to prison are diverted to supervision under any provision of the bill, there would be a critical need for additional probation staff to manage the additional workload. There would also be a need for additional co-occurring beds and funding for offenders who are in need of outpatient substance abuse treatment services, including assessment, individual counseling, group counseling, treatment plan review, and aftercare services.

The Office of the State Courts Administrator (OSCA) states that the bill "is likely to lead to an increase in judicial workload because there will be much lengthier sentencing hearings as defendants will attempt to prove to the judge that they have a drug problem and that they are amenable to treatment." However, the fiscal impact is indeterminate because the OSCA does not currently have data needed to quantifiably establish the increase in judicial time and workload as a result of increased sentencing hearing time. "Trial court judicial workload is measured using a case weighting system that calculates the amount of time that it takes for a judge to dispose of a case. Passage of this bill may impact the case weighting system. The number of case filings using the case weighting system is used to determine the needs for additional judicial resources each year. Any

²⁵ Prison bed impact information provided by the Office of Economic and Demographic Research, The Florida Legislature (on file with the Senate Committee on Criminal Justice). All information in this section of the analysis regarding EDR estimates is from this source.

²⁶ 2017 Legislative Bill Analysis (SB 290) (February 16, 2017) (on file with the Senate Committee on Criminal Justice). Unless otherwise noted, all information in this section of the analysis regarding DOC estimates is from this source.

judicial workload increases in the future as a result of this bill will be reflected in the Supreme Court’s annual opinion In re: Certification of Need for Additional Judges.”²⁷

Requiring Prison Diversion for Certain Drug Possession Offenders (Section 1)

The EDR’s preliminary estimate is that prison diversion for certain drug possession offenders will result in a cumulative decrease of 1,001 prison beds over 5 years (FY 2017-18 to FY 2021-22) with a cumulative cost avoidance of \$131,965,742 (\$64,993,112 in operating costs²⁸ and \$66,972,630 in fixed capital outlay costs²⁹). The complete breakdown of projected annual prison bed reductions and cost savings is provided in the table below:

Fiscal Year	Projected Cumulative Prison Beds Required	Projected Additional Annual Prison Beds Required	FUNDS REQUIRED			
			Annual Operating Costs	Annual Fixed Capital Outlay Costs	TOTAL Annual Funds	TOTAL Cumulative Funds
2017-2018	-155	-155	(\$1,580,380)	(\$36,210,390)	(\$37,790,770)	(\$37,790,770)
2018-2019	-570	-415	(\$7,569,725)	(\$16,015,650)	(\$23,585,375)	(\$61,376,145)
2019-2020	-815	-245	(\$14,807,728)	(\$8,475,390)	(\$23,283,118)	(\$84,659,263)
2020-2021	-941	-126	(\$19,243,126)	(\$4,144,860)	(\$23,387,986)	(\$108,047,249)
2021-2022	-1,001	-60	(\$21,792,153)	(\$2,126,340)	(\$23,918,493)	(\$131,965,742)
Total	-1,001	-1,001	(\$64,993,112)	(\$66,972,630)	(\$131,965,742)	(\$131,965,742)

Prepared by Florida Legislature, Office of Economic and Demographic Research, January 10, 2017.

The DOC’s preliminary estimate is that this diversion provision will impact the end of year prison population along with a corresponding increase to the supervised population. The chart provided below estimates impact based on certain percentages of the affected population being diverted from prison to supervision and drug treatment pursuant to this diversion provision. For example, for FY 2017-18 to FY 2021-22, the entire population that could be affected (100 percent) is estimated to be 5,287 persons. If five percent of this population (264 persons) were incarcerated, it would cost \$2,610,122. If, instead, these persons were diverted under this provision, the cost of supervision would be \$536,729. The “total cost to implement” (\$2,610,122 minus \$536,729) is a cost savings of \$2,073,383.

²⁷ Information provided by the Office of the State Courts Administrator (January 23, 2017) (on file with the Senate Committee on Criminal Justice). All information in this section of the analysis regarding OSCA estimates is from this source.

²⁸ FY 2015-16 operating costs per inmate were obtained from the DOC. DOC per diem and prison bed costs have not yet been discussed at the CJIC. The EDR states: “The \$53.49 per diem (\$19,524 annual cost) is for all department facilities (excluding private institutions and approximately 150 beds in PRCs) and includes operations, health services, and education services. It does not include debt service costs. It also does not include indirect and administrative costs of \$3.34 per inmate (state facilities). Operating costs in future years were increased by the change in the CPI from the National Economic Estimating Conference.” “PRCs” means probation and restitution centers.

²⁹ The EDR states: “FY 2006-07 capital costs per bed were based on Department of Corrections’ cost to build Suwanee CI (\$94,000,000 for 2,003 lawful capacity beds) as reported at the Criminal Justice Impact Conference held February 23, 2010. Capital costs in later years were increased by the change in the chained price index for state and local construction spending obtained from Global Insight, Inc.”

FY 2017-2018 to FY 2021-2022				
% of Inmates Affected	Affected Population	Inmate Costs	Supervision Costs	Total Cost to Implement
5%	264	(2,610,112)	536,729	(2,073,383)
10%	528	(5,220,223)	1,073,360	(4,146,863)
15%	792	(7,830,335)	1,610,088	(6,220,247)
20%	1,059	(10,469,510)	2,152,872	(8,316,638)
25%	1,321	(13,062,186)	2,685,569	(10,376,617)
50%	2,646	(26,159,244)	5,379,103	(20,780,141)
75%	3,966	(39,209,801)	8,062,551	(31,147,250)
100%	5,287	(52,271,986)	10,748,119	(41,523,867)

Data from the Florida Department of Corrections, February 10, 2017.³⁰

Authorizing Departure from a Mandatory Minimum Term (Section 1)

The EDR’s preliminary estimate is that authorizing courts to depart from a mandatory term of imprisonment will have a “negative indeterminate” prison bed impact (an unquantifiable decrease in prison beds): “Per DOC, in FY 15-16, 1,237 inmates were admitted to prison who received mandatory minimum sentences that could be impacted by this bill language. However, there is no data available to determine what type of sentences offenders with mandatory minimums might receive once they are no longer subject to a required sentencing option.”

The DOC’s preliminary estimate is that this departure provision will have an indeterminate impact.³¹

Reestablishing a Sentencing Commission (Section 2)

Section 2 of the bill reestablishes a sentencing commission and tasks the commission with providing offense-ranking recommendations. Commission members serve without compensation but are entitled to be reimbursed for per diem and travel. The commission is staffed by the OSCA. The OSCA’s preliminary estimate is that total operating costs of the sentencing commission will be \$46,588 per year. Costs may be subject to change based upon changes to underlying factors and actual costs.

³⁰ This data is on file with the Senate Committee on Criminal Justice.

³¹ The DOC notes that “in FY 15/16, of defendants committed to prison or probation, courts did not impose the minimum mandatory requirement in approximately 47% of the cases involving crimes that carry a mandatory minimum. Of roughly 2,100 total admissions for crimes requiring a statutory minimum term of incarceration, approximately 520 were placed on supervision, and about 470 prison sentences were less than the required mandatory term. Given this existing rate of deviation from the minimum, there is no way to project how explicit statutory authority to depart from the mandatory will alter sentencing practices.”

Provided is the OSCA’s breakdown of estimated costs:

- \$2,000 in administrative supplies.
- \$120 for six conference calls.
- \$33,468 in travel costs for four in-person meetings (\$8,367 per meeting).³²
- \$11,000 for maintenance of an information-sharing site about the commission, which would include schedules, agendas, meeting materials, historical information, etc.³³

Authorizing Prison Diversion for Certain Nonviolent Second Degree Felony Offenders (Section 3)

The EDR’s preliminary estimate is that prison diversion for certain nonviolent second degree felony offenders will result in a cumulative decrease of 2,027 prison beds over 5 years (FY 2017-18 to FY 2021-22) with a cumulative cost avoidance of \$263,156,174 (\$120,826,265 in operating costs and \$142,329,909 in fixed capital outlay costs).³⁴ The complete breakdown of projected annual prison bed reductions and cost savings is provided in the table below:

Fiscal Year	Projected Cumulative Prison Beds Required	Projected Additional Annual Prison Beds Required	FUNDS REQUIRED			
			Annual Operating Costs	Annual Fixed Capital Outlay Costs	TOTAL Annual Funds	TOTAL Cumulative Funds
2017-2018	-247	-247	(\$2,518,412)	(\$60,604,758)	(\$63,123,170)	(\$63,123,170)
2018-2019	-954	-707	(\$12,539,641)	(\$35,430,540)	(\$47,970,181)	(\$111,093,351)
2019-2020	-1,496	-542	(\$26,194,175)	(\$21,995,655)	(\$48,189,830)	(\$159,283,181)
2020-2021	-1,823	-327	(\$36,371,262)	(\$14,092,524)	(\$50,463,786)	(209,746,967)
2021-2022	-2,027	-204	(\$43,202,775)	(\$10,206,432)	(\$53,409,207)	(\$263,156,174)
Total	-2,027	-2,027	(\$120,826,265)	(\$142,329,909)	(\$263,156,174)	(\$263,156,174)

Prepared by Florida Legislature, Office of Economic and Demographic Research, January 10, 2017.

The DOC’s preliminary estimate is that this diversion provision will have an indeterminate impact.³⁵

³² Costs include \$1,000 for a meeting space per meeting and travel costs for all commission members. Further, this estimate assumes the courts would bear the cost of the travel, because the bill would require the OSCA to process the travel. Travel costs were calculated by assuming the meetings would take place in Tallahassee. Local members of the commission, such as the Attorney General, were not included in the travel estimate.

³³ This estimate includes a preliminary estimate of 0.25 of a \$40,000 FTE position (\$10,000) for staff maintenance of the website and \$1,000 for hosting.

³⁴ See footnotes 28 and 29.

³⁵ “By expanding the eligibility criteria to include second degree felonies, it is reasonable to expect some additional diversions from prison. Because one of the criteria for diversion under s. 921.00241, F.S., is that the primary offense does not require a mandatory, this provision may also intersect with the provision to allow defendants to request waiver of mandatory sentences to allow even defendants facing a minimum mandatory to be diverted from prison. In addition, some defendants will receive non-prison sanctions under the provision in section 5 of this bill. As prison diversion remains a discretionary option for the court, and the manner in which these different sentencing options in combination may influence sentencing practices is unknown, the impact of this section is indeterminate.”

Restoring and Creating Sentence Mitigating Circumstances (Section 4)

Section 4 of the bill restores a previous mitigating circumstance based on the defendant's substance abuse or addiction and amenability to treatment. It also creates a mitigating circumstance for certain nonviolent felony offenders. The EDR's preliminary estimate is that these changes will have a "negative indeterminate" prison bed impact: "The available data does not have the information necessary to determine which offenders entering prison might require specialized treatment for addiction. Per DOC, in FY 15-16, there were 54,444 (adj.)³⁶ offenders sentenced for a nonviolent felony with total sentencing points between 22 and 60 points, and 12,929 (adj.) of these offenders were sentenced to prison (mean sentence length=26.1 m, incarceration rate: 23.8% adj-23.8% unadj). However, it cannot be determined what sentencing patterns judges might adopt with this new factor at their disposal."

The DOC's preliminary estimate is that the amendments of mitigating circumstances will have an indeterminate impact.³⁷

Requiring Drug Court, Treatment, or Probation for Certain Nonviolent Felony Offenders (Section 5)

Section 5 of the bill requires the court to place certain nonviolent felony offenders into a drug court program, residential drug treatment, or drug offender probation if certain criteria are met. The EDR preliminary estimates that this change will have a "negative indeterminate" prison bed impact: "The available data does not have the information necessary to determine which offenders entering prison might be amenable to substance abuse treatment, nor can it be determined if an offender's criminal behavior was related to substance abuse or addiction."

Because the DOC does not have the ability to predict how many defendants are "amenable to treatment" and whose "criminal behavior is related to substance abuse or addiction," the DOC's preliminary estimate is that the diversion provision will have an indeterminate impact.

The chart provided below estimates impact based on certain percentages of the affected population being diverted from prison to supervision and drug treatment pursuant to this diversion provision. For example, for FY 2017-18 to FY 2021-22, the entire population that could be affected (100 percent) is estimated to be 24,607 persons. If five percent of this population (1,230 persons) were incarcerated, it would cost \$24,014,335. If, instead, these persons were diverted under this diversion provision, the total cost of supervision and drug treatment would be \$15,618,678 (\$2,499,538 for supervision plus \$13,119,141 for treatment). The "total cost to implement" (\$24,014,335 minus \$15,618,678) would be a cost savings of \$8,395,656.

³⁶ The abbreviation "adj." means "adjusted." The abbreviation "unadj." means "unadjusted." Sentencing data from the DOC is incomplete, which means that the numbers the EDR receives are potentially lower than what the actual numbers are. The EDR adjusts these numbers by the percentage of scoresheets received for the applicable fiscal year.

³⁷ "Although the bill changes the factors that a court may consider in imposing a downward departure sentence, such sentences remain discretionary. As a result the projected impact of these changes is indeterminate."

FY 2017-2018 to FY 2021-2022					
% of Inmates Affected	Affected Population	Inmate Costs	Supervision Costs	Drug Treatment Costs	Total Cost to Implement
5%	1,230	(24,014,335)	2,499,538	13,119,141	(8,395,656)
10%	2,462	(48,067,719)	5,003,212	26,238,281	(16,826,226)
15%	3,692	(72,082,055)	7,502,751	39,357,422	(25,221,882)
20%	4,921	(96,076,866)	10,000,223	52,476,564	(33,600,079)
25%	6,152	(120,110,725)	12,501,777	65,595,704	(42,013,244)
50%	12,305	(240,240,975)	25,005,817	131,191,408	(84,043,750)
75%	18,456	(360,332,176)	37,505,579	196,787,112	(126,039,485)
100%	24,607	(480,423,376)	50,005,434	262,382,817	(168,035,125)

Data from the Florida Department of Corrections, February 10, 2017.³⁸

VI. Technical Deficiencies:

None.

VII. Related Issues:

DOC Recommendation for Amendment to Section 3 of the Bill

The DOC notes that Section 3 of the bill expands the eligibility criteria for prison diversion under s. 921.00241, F.S., to include second degree felonies but does not increase the offender’s total sentence points score as provided in s. 921.00241, F.S., for Prison Diversion Programs. The DOC recommends that since the eligibility criteria has been expanded to include second degree felonies, that lines 242-246 be revised to amend current law to increase the offender’s Criminal Punishment Code scoresheet total sentence points under s. 921.0024, F.S., to 60 points or fewer and strike through current law text found on lines 244-246 of the bill. By doing so, this section would align the Criminal Punishment Code score for this diversion program with the postadjudicatory treatment-based drug court program under s. 948.01, F.S.

Oklahoma’s “Justice Safety Valve Act” (Departure from Mandatory Minimum Terms)

The mandatory minimum departure provision of the bill bears some similarity to recent legislation passed by the Oklahoma Legislature.³⁹ The Oklahoma legislation allows a court to depart from mandatory minimum terms applicable to many nonviolent offenses if the court finds that certain criteria are met. However, unlike the bill, the Oklahoma legislation does not preclude a departure if the offender previously received a departure.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 775.082, 921.00241, 921.0026, and 948.01.

This bill creates section 921.00215 of the Florida Statutes.

³⁸ This data is on file with the Senate Committee on Criminal Justice.

³⁹ HB 1528 (“Justice Safety Valve Act”), 55th Leg., 1st Reg. Sess., Okla. Stat., tit. 22, ss. 22-985, 22-985.1, and 22-985.2 (effective November 1, 2015), available at http://webserver1.lsb.state.ok.us/cf_pdf/2015-16%20ENR/hB/HB1518%20ENR.PDF (last visited on January 24, 2017).

This bill reenacts provisions of sections 394.47892, 397.344, 775.08435, 910.035, 921.002, 921.00265, 921.187, and 943.04352 of the Florida Statutes. These reenactments are to incorporate amendments made to statutes that are referenced in the reenacted provisions.

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.

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