

**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 382

INTRODUCER: Senator Gibson

SUBJECT: Judicial Accountability

DATE: March 3, 2017

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

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

**I. Summary:**

SB 382 requires the Office of Program Policy Analysis and Government Accountability (OPPAGA) to collect data and prepare a report detailing the sentence imposed by each circuit court and county judge in criminal and juvenile cases. Collected data must identify specified case information and demographic information about defendants. The OPPAGA must post this report on its website by March 1 annually.

Evidence of disparity in sentencing by a judge with regard to a demographic group is grounds for disqualification of that judge from any case involving a member of that group.

Beginning February 1, 2018, and each February 1 thereafter, the OPPAGA must provide the report to the Chief Justice of the Florida Supreme Court, the President of the Senate, the Speaker of the House of Representatives, and the majority and minority leaders of each chamber. The OPPAGA must also provide each circuit and county judge an individual annual report of his or her data.

The OPPAGA states that it can implement the bill within budgeted resources. Further, posting a report on the OPPAGA's website and creating and sending reports to individual judges could be completed with current technology resources.

## II. Present Situation:

### The Office of Program Policy Analysis and Government Accountability (OPPAGA)

The Office of Program Policy Analysis and Government Accountability (OPPAGA) was created by the Legislature in 1994.<sup>1</sup> The OPPAGA, which describes itself as the “research arm of the Florida Legislature,”<sup>2</sup> “is an office of the Legislature. OPPAGA provides data, evaluative research, and objective analyses to assist legislative budget and policy deliberations. OPPAGA conducts research as directed by state law, the presiding officers, or the Joint Legislative Auditing Committee.”<sup>3</sup> The OPPAGA’s research services include:

- Performance evaluations and policy reviews of government programs and follow-up reviews that assess whether agencies have resolved problems identified in earlier studies;
- Research and technical assistance to legislators and legislative committees;
- Government Program Summaries (GPS), an electronic encyclopedia containing descriptive and evaluative information on all major state programs; and
- Policy Notes, a weekly electronic newsletter of policy research of interest to Florida policymakers.<sup>4</sup>

The OPPAGA is authorized to examine all entities and numerous records listed in s. 11.45(3), F.S., which includes accounts and records of any governmental entity created or established by law and the information technology programs, activities, functions, or systems of any governmental entity created or established by law.<sup>5</sup>

### Disqualification of a Judge (s. 38.10, F.S.)

Section 38.10, F.S., provides, in part, that whenever a party to any action or proceeding makes and files an affidavit stating fear that he or she will not receive a fair trial<sup>6</sup> in the court where the suit is pending on account of the prejudice<sup>7</sup> of the judge of that court against the applicant or in favor of the adverse party, the judge shall proceed no further. Another judge shall be designated in the manner prescribed by Florida law for the substitution of judges for the trial of causes in which the presiding judge is disqualified.<sup>8</sup> The affidavit must state the facts and the reasons for the belief that any such bias or prejudice exists and be accompanied by a certificate of counsel of record that the affidavit and application are made in good faith.

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<sup>1</sup> Chapter 94-249, L.O.F.

<sup>2</sup> “What We Do,” Office of Program Policy Analysis and Government Accountability, The Florida Legislature, available at <http://www.oppaga.state.fl.us/shell.aspx?pagepath=about/whatwedo.htm> (last viewed on February 28, 2017).

<sup>3</sup> “About OPPAGA,” Office of Program Policy Analysis and Government Accountability, The Florida Legislature, available at <http://www.oppaga.state.fl.us/shell.aspx?pagepath=about/about.htm> (last viewed on February 28, 2017).

<sup>4</sup> See footnote 2.

<sup>5</sup> Section 11.51(1), F.S.

<sup>6</sup> “... [T]he protections of section 38.10 are not confined to fair treatment in the context of a trial.” *Rucks v. State*, 692 So.2d 976, 977 (Fla. 2d DCA 1997) (citation omitted).

<sup>7</sup> “To achieve a judge’s disqualification, the movant need not prove the judge is actually prejudiced.” *Rucks v. State*, 692 So.2d at 977.

<sup>8</sup> “Florida Rule of Judicial Administration 2.160 prescribes the attendant procedure.” *Rucks v. State*, 692 So.2d at 977 (citation omitted).

## The Criminal Punishment Code

In 1997, the Legislature enacted the Criminal Punishment Code<sup>9</sup> (Code) as Florida’s “primary sentencing policy.”<sup>10</sup> Noncapital felonies sentenced under the Code receive an offense severity level ranking (Levels 1-10).<sup>11</sup> Points are assigned and accrue based upon the level ranking assigned to the primary offense, additional offenses, and prior offenses.<sup>12</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>13</sup> 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.<sup>14</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>15</sup> Further, some offenders may qualify for prison diversion under various sections of the Florida Statutes.<sup>16</sup>

One of the stated principles of the Code is that “[s]entencing is neutral with respect to race, gender, and social and economic status.”<sup>17</sup> However, the Code does not include intent language that previously appeared in the law relating to the pre-Code sentencing guidelines regarding “unwarranted variation in sentencing”: “The sentencing guidelines are intended to eliminate unwarranted variation in the sentencing process by reducing the subjectivity in interpreting specific offense-related and offender-related criteria and in defining the relative importance of those criteria in the sentencing decision.”<sup>18</sup>

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<sup>9</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>10</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 February 27, 2017).

<sup>11</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>12</sup> Section 921.0024, F.S. Unless otherwise noted, information on the Code is from this source.

<sup>13</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.

<sup>14</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>15</sup> Fla. R. Crim. P. 3.704(d)(26).

<sup>16</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>17</sup> Section 921.002(1)(a), F.S.

<sup>18</sup> Section 921.001(4), F.S. (1997).

Under the former sentencing guidelines, a recommended sentence was scored and the court was authorized to sentence within a range.<sup>19</sup> If the court wished to impose a prison sentence that exceeded the permissible range (an “upward departure” sentence), the sentence had to be accompanied by a written statement delineating the reasons for the departure.<sup>20</sup> 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>21</sup>

### III. Effect of Proposed Changes:

The bill, which takes effect on July 1, 2017, creates s. 38.24, F.S. Section 38.24, F.S., provides that, pursuant to s. 11.51, F.S.,<sup>22</sup> the OPPAGA shall collect data and prepare a report detailing the sentence<sup>23</sup> imposed by each circuit court and county judge in criminal and juvenile cases. Collected data must identify case information and demographic information about defendants.<sup>24</sup> The initial report must reflect data collected for the previous 5 calendar years, and subsequent reports must include data collected for the previous calendar year.

Collected case information includes:

- The judge who presided over each trial;
- The judge who presided over the sentencing phase;
- The circuit and specific location of the court where each case was heard;
- Each offense for which the defendant was convicted or pled nolo contendere to;
- The range of possible sentences for each offense; and
- The sentence imposed for each offense, including, but not limited to, jail time, prison time, and probation, a fine, or any other imposed terms.

Collected demographic information on defendants includes:

- Age;
- Sex;
- Race;
- Income; and
- Prior criminal history.

The OPPAGA must post this report on its website by March 1 annually.

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<sup>19</sup> Sections 921.0014(1)(b) and 921.0016(1)(b), F.S. (1997).

<sup>20</sup> Section 921.0016(1)(c), F.S. (1997).

<sup>21</sup> Section 921.0016(3), F.S. (1997).

<sup>22</sup> As previously noted, s. 11.51(1), F.S., authorizes the OPPAGA to examine all entities and records listed in s. 11.45(3), F.S., including accounts and records of any governmental entity created or established by law and the information technology programs, activities, functions, or systems of any governmental entity created or established by law.

<sup>23</sup> The term “sentence” is typically used in the adult court system. In the juvenile court system, the final decision as to how a juvenile’s case is to be handled after an adjudication is called a “disposition.” However, because the OPPAGA is required to report information about “juvenile cases,” “sentence” would probably be construed by the OPPAGA to include “disposition.”

<sup>24</sup> The term “defendants” is typically used to describe persons charged with crimes in the adult system. However, because the OPPAGA is required to report information about “juvenile cases,” “defendants” would probably be construed by the OPPAGA to include children charged with delinquent acts.

The bill further provides that evidence of disparity<sup>25</sup> in sentencing by a judge with regard to a demographic group is grounds for disqualification of that judge from any case involving a member of that group.

Finally, the bill provides that, beginning February 1, 2018, and each February 1 thereafter, the OPPAGA shall provide the report to the Chief Justice of the Florida Supreme Court, the President of the Senate, the Speaker of the House of Representatives, and the majority and minority leaders of each chamber. The OPPAGA shall also provide each circuit and county judge an individual annual report of his or her data.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

None.

##### **B. Public Records/Open Meetings Issues:**

It is possible that some of the information collected by the OPPAGA may be from agencies or offices like the Florida Department of Law Enforcement, the Department of Corrections, the Department of Juvenile Justice, the Office of the State Courts Administrator, and the Florida clerks of court. To the extent that records information received is exempt from public disclosure or confidential and exempt, the OPPAGA is required to maintain that status.<sup>26</sup> However, criminal justice statistical information is aggregated information that typically identifies characteristics of an offender group (e.g., the percentage of offenders convicted of a specific offense), not information specific to an individual offender.

##### **C. Trust Funds Restrictions:**

None.

#### **V. Fiscal Impact Statement:**

##### **A. Tax/Fee Issues:**

None.

##### **B. Private Sector Impact:**

None.

##### **C. Government Sector Impact:**

The OPPAGA states that it can implement the bill within budgeted resources. Further, posting a report on the OPPAGA's website and creating and sending reports to individual

<sup>25</sup> The bill does not define the term "disparity," so it is unclear what constitutes disparity in sentencing.

<sup>26</sup> Section 11.0431(2)(a), F.S.

judges could be completed with current technology resources. However, the OPPAGA notes that workload associated with completing tasks described in the bill would greatly increase if the bill requires data collection and reporting on misdemeanor cases and if OPPAGA is required in its initial report to include data for the previous 5 calendar years.<sup>27</sup>

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

The OPPAGA determined that the requirement for data on specific location of the court and individual defendant's income would not be available to include in the report. The bill also requires the inclusion of "juvenile cases." The OPPAGA anticipates that reporting much of the required information on juveniles would be complicated by the confidentiality of juvenile case information. Additionally, there may be difficulties in identifying the range of possible sentences for each offense. Except when mandatory minimum sentences apply, felony cases involving multiple counts or offenses are typically given one sentence aggregating all counts, with the minimum sentence range determined by sentencing scoresheet calculation and the maximum determined by the statutory maximum. Also, judges presiding over juvenile cases have greater discretion in sanctioning delinquent youth, which makes it difficult to compare the given juvenile disposition to possible dispositions.

**VIII. Statutes Affected:**

This bill creates section 38.24 of the Florida Statutes.

**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>27</sup> Telephonic and e-mail communications between staff of the Senate Criminal Committee and OPPAGA staff. E-mail communications are on file with the Senate Committee on Criminal Justice.