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 Judiciary

BILL:	SB 866
INTRODUCER:	Senator Bracy
SUBJECT:	Sentencing
DATE:	January 25, 2018
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Jones	CJ	**Favorable**
2.	Tulloch	Cibula	JU	**Favorable**
3.			ACJ	
4.			AP	

I. Summary:

SB 866 amends several sentencing provisions to raise the sentencing point ceiling for determining the lowest permissible sentence a court may impose in a felony case. Specifically, the bill amends s. 775.082(10), F.S., to raise the point ceiling from 22 points to 44 points for certain nonviolent felony offenders. Similarly, the bill amends s. 921.0024(2), F.S., of the Criminal Punishment Code (Code) to raise the point ceiling from 44 points to 52 points for imposing nonstate prison sentences. The bill also makes conforming changes to the calculation for determining the lowest permissible sentence when the points exceed 52 points under the Code. The effect of these changes is that more offenders will score low enough to qualify for a nonstate prison sentence, like probation. And for offenders who score more than 52 total sentence points, the effect of the new calculation equates to a 6-month reduction in the offender's overall sentence.

Additionally, the bill responds to the First District Court of Appeal's en banc, plurality opinion in *Woods v. State* in which part of the court suggests s. 775.082(10), F.S. is unconstitutional. The bill amends the statute to permit the trial court to sentence the defendant to a state prison sentence if *a jury* or a court (if the defendant waives a jury trial) finds that a nonstate prison sanction could present a danger to the public.

II. Present Situation:

Criminal Punishment Code

The Criminal Punishment Code[1] (Code) is Florida's "primary sentencing policy."[2] Under the code, noncapital felonies receive an offense severity level ranking, Levels 1-10.[3] When a defendant is sentenced under the Code, the highest points are assigned and accrue based upon the ranking of the defendant's primary offense, followed by the defendant's additional and prior offenses.[4] For example, if the defendant's primary charge is a level 10 felony, such as human trafficking,[5] the Criminal Punishment Code scoresheet (scoresheet) assigns 116 points for that offense. If the defendant has a second count of human trafficking listed as an additional or prior offense, the scoresheet assigns 58 points.[6]

Sentencing points also escalate as the level escalates. Using the example above, a level 10 felony like human trafficking, is assigned 116 points as the primary offense. But a level 1 felony, like possession of a stolen driver's license,[7] is assigned 4 points.[8] Points may also be added or multiplied for other factors as well, such as victim injury or the commission of certain offenses like a Level 7 or 8 drug trafficking offense.[9]

The purpose of the scoresheet is to develop the sentencing range for the defendant and determine the lowest permissible sentence. Absent mitigation,[10] 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., for the offenses committed.[11]

Thus, under current law, if the defendant's total sentence points are equal to or less than 44 points, the defendant's lowest permissible sentence may be any nonstate prison sanction, such as probation. However, the highest permissible sentence is still the statutory maximum for the felony offense committed. On the other hand, if the defendant's total sentence points exceed 44 points, the lowest permissible sentence is a state prison sanction. To determine the number of months the defendant will be sentenced to serve in prison, 28 points are subtracted from the total

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[1] Sections 921.002-921.0027, F.S. See chs. 97-194 and 98-204, Laws of Fla. The Code is effective for offenses committed on or after October 1, 1998.
[2] Florida Department of Corrections, *Florida's Criminal Punishment Code: A Comparative Assessment (FY 2012-2013)* Executive Summary (Offenses Committed On or After October 1, 1998), , http://www.dc.state.fl.us/pub/sg_annual/1213/executives.html (last visited on Dec. 12, 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(1)(a), F.S.
[5] Section 921.0022(3)(j), F.S.
[6] *See* n. 4, *supra*.
[7] Section 921.0022(3)(a), F.S.
[8] *See* n. 4, *supra*.
[9] *Id.*
[10] 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.
[11] 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. Section 921.0024(2), F.S.

sentence points, and the remaining total is decreased by 25 percent.[12] For example, if the defendant scored 116 points for the primary count and 58 points for the additional count on the scoresheet, the total would be 174 points. Subtracting 28 points from 174 points, yields 146 points. Decreasing those 146 points by 25 percent equals 36.5. This number, 36.5, is the lowest number of months the defendant must be sentenced to prison on the scoresheet.

Length of Stay

According to a 2015 study of the operations of the Department of Corrections (DOC), length of stay in Florida correctional facilities exceeds the national length of stay average of 30 months. Length of Stay has consistently increased in Florida "from just under 30 months on average in 2008 to almost 40 months by 2015,"[13] according to a recent study. The study's authors further found that the longer average length of stay 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."[14]

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,[15] and if the defendant's total sentence points pursuant to s. 921.0024, F.S., are 22 points or fewer, the court must sentence the defendant 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 defendant to a state correctional facility.[16]

Woods v. State

In *Woods v. State*, the First District Court of Appeal issued an en banc,[17] plurality opinion[18] by which part of the court suggested that s. 775.082(10), F.S., was unconstitutional under *Apprendi v. New Jersey*. In *Apprendi*, the U.S. Supreme Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be

[12] Section 921.0024, F.S. Unless otherwise noted, information on the Code is from this source.
[13] *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/MonitorDocs/Reports/pdf/15-FDC.pdf.
[14] *Id.*
[15] 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.
[16] Section 775.082(10), F.S.
[17] En banc means "with all of the judges present and participating; in full court." BLACK'S LAW DICTIONARY (10th ed. 2014). Florida's district courts of appeal generally sit in panels of three. In going en banc, 14 of the 15 judges at the First District considered the *Woods* case together. The decision reflects Judge Jay was recused.
[18] *Woods v. State*, 214 So. 3d 803 (Fla. 1st DCA 2017).

submitted to a jury, and proved beyond a reasonable doubt."[19] "[T]he Sixth Amendment provides defendants with the right to have a jury find those facts beyond a reasonable doubt."[20]

In *Woods*, the First District Court of Appeal, which is made up of 15 judges, went en banc to reconsider a decision made by a three-judge panel.[21] Because one judge was recused, the remaining 14 judges deliberated. Of those 14 judges, 10 agreed that the sentence imposed by the trial court should be affirmed, while four dissented.[22] However, of the 10 that voted to affirm, five would have held that s. 775.082(10), F.S. was unconstitutional;[23] whereas, five others would *not* have found it unconstitutional.[24] Of the dissenters, none would have reached the question of s. 775.082(10)'s constitutionality at all.[25]

Generally, when there is a plurality opinion, courts look to the narrowest possible holding with which the majority of judges agree.[26] The narrowest possible holding in *Woods* by a majority of the judges is that the sentence was affirmable and not reversible. Thus, the case was affirmed per curiam with multiple concurrences (which is an unusual disposition for a case). However, there is no narrow rationale that these multiple concurring opinions agree upon in the *Woods* case.

Additionally, the Florida Supreme Court has denied review of the *Woods* decision,[27] and no other Florida appellate court appears to have addressed the same constitutional question addressed in *Woods*.[28] As a general rule, a legal issue decided by one Florida district court of appeal that has not been overruled by the Florida Supreme Court is the controlling law that must be followed by all Florida trial courts.[29] However, because there is no majority holding in *Woods* on the issue of whether s. 775.082(10), F.S. is constitutional, it appears *Woods* might not be not binding precedent at this time.

Nonetheless, the concurring opinion in the *Woods* case that would have held s. 775.082(10), F.S. unconstitutional under *Apprendi* has, at the very least, strong persuasive value. This concurring opinion reasoned as follows: "The statutory authority in the last sentence of subsection (10), allowing a trial judge to make factual findings to increase an offender's sentence to a state correctional facility, is unconstitutional because only a jury may make findings that increase a

[19] *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).
[20] *Alleyne v. United States*, 570 U.S. 99, 111-12 (2013), citing *Apprendi v. New Jersey*, 530 U.S. at 484.
[21] *See* n. 17, *supra*.
[22] *Woods*, 214 So. 3d at 804.
[23] *Id.* at 804-12 (Makar, J. concurring).
[24] *Id.* at 812-19 (Osterhaus, J., concurring); *id.* at 819-22 (Winokur, J., concurring).
[25] *Id.* at 822-25 (Wolf, J., dissenting); *id.* at 825-26 (Windsor, J., dissenting).
[26] *Heynard v. State*, 992 So. 2d 120, 129-30, n. 7 (Fla. 2008) ("*See Marks v. United States*, 430 U.S. 188, (1977) (stating that when the Court issues a decision where no rationale receives the vote of five justices, the holding of the Court is the "position taken by those members who concurred in the judgments on the narrowest of grounds.") (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976)).
[27] *Woods v. State*, 2017 WL 2264740 (Fla. May 27, 2017).
[28] In a 2016 case, the Second District Court of Appeal did not reach a constitutional argument raised by the appellant that was similar to the argument raised in *Woods*, but the court noted that "no court in Florida has yet reached the issue." *Reed v. State*, 192 So. 3d 641, 644, n. 2 (Fla. 2d DCA 2016) (citations omitted). Senate Criminal Justice Committee staff reviewed cases subsequent to *Reed* but did not find any Florida Supreme Court case overruling *Woods* or any Florida appellate case addressing a constitutional argument similar to that raised in *Woods.*
[29] *Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992).

penalty beyond a statutory maximum (which is up to twelve months of incarceration as a nonstate sanction)."[30]

III. Effect of Proposed Changes:

Section 1: The bill amends s. 775.082(10), F.S., to require a nonstate prison sanction for certain nonviolent offenders who commit an offense on or after October 1, 2018, and whose total sentence points are 44 points or fewer, unless a jury or a court (if the defendant waives a jury trial) finds that a nonstate prison sanction could present a danger to the public. Under current s. 775.082(10), F.S., this provision is triggered when the offender's total sentence points are 22 points or fewer. Current law also requires a court to make the "danger to the public" findings. The change to require jury findings (unless there is a jury waiver) is intended to address *Woods v. State* (discussed, supra), in which a concurring opinion suggests that s. 775.082(10), F.S., is unconstitutional because a court, rather than a jury, makes the "danger to the public" findings.

Section 2: The bill also amends s. 921.0024(2), F.S., of the Criminal Punishment Code (Code), to provide that, for offenses committed on or after October 1, 2018, the lowest permissible sentence under the Code is a nonstate prison sanction if total sentence points equal or are less than 52 points. Current s. 921.0024(2), F.S., specifies the lowest permissible sentence under the Code is a nonstate prison sanction if total sentence points equal or are less than 44 points.

Under current s. 921.0024(2), F.S., an offender can only score a state prison sentence as the lowest permissible sentence if total sentence points exceed 44 points. The lowest permissible sentence in state prison months is calculated by subtracting 28 points from the total sentence points (exceeding 44 points) and decreasing the remaining total by 25 percent. A prison sentence must exceeds 12 months.[31] This calculation will always result in a state prison sentence that exceeds 12 months.

The bill also amends s. 921.0024(2), F.S., to make conforming changes to the calculation for determining the lowest permissible sentence in state prison months when total sentence points exceed 52 points. Under the bill, for offenses committed on or after October 1, 2018, the lowest permissible sentence in state prison months is calculated by subtracting 36 points from the total sentence points (exceeding 52 points) and decreasing the remaining total by 25 percent. This calculation will always result in a state prison sentence that exceeds 12 months.

The effect of these changes is:

- There will be more offenders who score a nonstate prison sanction as the lowest permissible sentence.
- Those offenders having total sentence points exceeding 52 points, will score a lowest permissible sentence in state prison months that is 6 months less than they would score under current s. 921.0024(2), F.S. For example, a Level 7 primary offense (one count) scores 56 sentence points. Under s. 921.0024(2), F.S., as amended by the bill, a first-time offender with

[30] *Woods*, 214 So. 3d at 805-806 (Makar, J., concurring) (also citing *Blakely v. Washington*, 542 U.S. 296, 310 (2004) (applying *Apprendi* to plea deals); *Plott v. State*, 148 So. 3d 90, 95 (Fla. 2014) ("[W]e hold that upward departure sentences that are unconstitutionally enhanced in violation of *Apprendi* and *Blakely* patently fail to comport with constitutional limitations, and consequently, the sentences are illegal under rule 3.800(a).").

[31] Section 921.0024(2), F.S.

only a Level 7 primary offense (one count)[32] would score a state prison sentence of 15 months as the lowest permissible sentence in state prison months. In contrast, under current s. 921.0024(2), F.S., the same offender would score a state prison sentence of 21 months as the lowest permissible sentence in state prison months.

Sections 3-9: This bill reenacts the following sections of the Florida Statutes for the purpose of incorporating the amendments made to section 921.0024 of the Florida Statutes: 921.00241, 921.0026, 921.00265, 924.06, 948.01, 948.06, and 948.20.

Section 4: The effective date of the bill is October 1, 2018.

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, estimates that the bill will have a "negative significant" prison bed impact (a decrease of more than 25 prison beds).[33]

[32] In this example, the offender does not score points for any factor other than one count of the primary offense.
[33] Telephonic communication on Jan. 9, 2018, between staff of the Senate Committee on Criminal Justice and staff of the Office of Economic and Demographic Research.

The Legislature's Office of Economic and Demographic Research (EDR) provided information relevant to the CJIC impact estimate.[34] Regarding Section 1 of the bill, which amends s. 775.02(10), F.S., the EDR comments:

> Per DOC, in FY 16-17, 4.1% of those sentenced for offenses prior to the creation of s. 775.082(10), F.S. (July 1st, 2009) were sentenced to prison, and 1.5% of those sentenced for offenses committed after this law was created received a prison sentence. For those with sentencing points between 23 and 44 whose criteria matches s. 775.082(10), F.S., 10.7% received a prison sentence in FY 16-17 (3,163 adj.)….[35]
>
> It is not known how the inclusion of the jury will impact sentencing decisions for those with 44 points or less, nor is it known how judges will respond in the other 96.2% of cases, given that they tended to incarcerate at a higher rate than those under 22 points before the initial statute passed (10.7% compared to 4.1%). However, it is likely that judicial activity will change in some form with the implementation of this new scoring structure, and though the magnitude of the reduction cannot be quantified, with 3,163 (adj.) offenders receiving prison sentences, even a small shift in judicial and jury activity in response to this change could produce a significant effect.

Regarding Section 2 of the bill, which amends s. 921.0024(2), F.S., the EDR comments:

> Under this bill, 52 points or less would be the new range where the lowest permissible sentence is a nonstate prison sanction, "unless the court determines within its discretion that a prison sentence, which may be up to the statutory maximums for the offenses committed, is appropriate," and prison sentence length above 52 points would be calculated by subtracting 36 points from the total sentence points and decreasing the remaining total by 25%. *This would reduce future prison sentences by 6 months for point calculations.*[36]
>
> Per DOC, in FY 16-17, about 14.2% of sentences up to 44 points were state prison sanctions, excluding those fitting the criteria in amended s. 775.082(10), F.S. Between 44 and 52 points, prison sentences jumped to 47.9% of all sentences, and above 52 points they reached 62.6%. This shows that judges already give nonstate prison sanctions to offenders between 44 and 52 points in over half of the sentences. Furthermore, such discretion also applies for prison sentence length. Currently, a person with 53 points should receive a prison sentence of 18.75 months, with the new bill dropping that to 12.75 months. However, a close examination of the 53 point category shows that 34% of

[34] Information provided by EDR staff (on file with the Senate Committee on Criminal Justice). All EDR impact analysis information is from this source.
[35] The abbreviation "adj." means "adjusted." 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.
[36] Emphasis provided by Senate Criminal Justice Committee staff.

offenders sentenced under this point total received a prison sentence that was 18 months or less.

It is not known how this section of the bill will impact current judicial discretion. However, it is likely that judicial activity will change in some form with the implementation of this new scoring structure, with a reduction in prison sentencing between 45 and 52 points. Although the magnitude of that reduction cannot be quantified, there are 4,419 (adj.) offenders who received prison sentences across these points, so even a small shift among judges toward nonstate sanctions could significantly impact prison sentences, as well as with the additional shift downwards in prison sentence length for those with 53 points or more.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 775.082 and 921.0024.

This bill also reenacts the following sections of the Florida Statutes for the purpose of the amendments made to section 921.0024 of the Florida Statutes: 921.00241, 921.0026, 921.00265, 924.06, 948.01, 948.06, and 948.20.

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.