

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

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

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

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BILL: CS/SB 554

INTRODUCER: Criminal Justice Committee; and Senators Brandes and Perry

SUBJECT: Sentencing

DATE: January 27, 2020

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Erickson</u>	<u>Jones</u>	<u>CJ</u>	<u>Fav/CS</u>
2.	<u>Jameson</u>	<u>Jameson</u>	<u>ACJ</u>	<u>Pre-meeting</u>
3.	_____	_____	<u>AP</u>	_____

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

COMMITTEE SUBSTITUTE - Technical Changes

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**I. Summary:**

CS/SB 554 creates two new circumstances for mitigating (reducing) a sentence under the Criminal Punishment Code:

- For defendants sentenced on or after October 1, 2020, the defendant requires specialized treatment for substance abuse or addiction, a mental disorder, or a physical disability.
- The defendant's offense is a nonviolent felony, total sentence points are 60 points or fewer, and the defendant is sentenced for the offense on or after October 1, 2020.

The new mitigating circumstance relating to specialized treatment for substance abuse or addiction, a mental disorder, or a physical disability is substituted for two current mitigating circumstances:

- The defendant's offense is a nonviolent felony, the defendant's total sentence points are 60 points or fewer, and the defendant is amenable to and qualified to participate in a post-adjudicatory treatment-based drug court program.
- The defendant requires specialized treatment for a mental disorder unrelated to substance abuse or addiction or for a physical disability.

The bill also removes language that restricts mitigation based upon substance abuse or addiction, including intoxication at the time of the offense.

The Legislature's Office of Economic and Demographic Research preliminarily estimates that the bill will have a "negative significant" prison bed impact (a decrease of more than 25 prison beds). See Section V.

The effective date of the bill is October 1, 2020.

## II. Present Situation:

### Criminal Punishment Code

In 1997, the Legislature enacted the Criminal Punishment Code<sup>1</sup> (Code) as "Florida's primary sentencing policy."<sup>2</sup> Noncapital felonies sentenced under the Code receive an offense severity level ranking (Levels 1-10).<sup>3</sup> Points are assigned and accrue based upon the level ranking assigned to the primary offense, additional offenses, and prior offenses.<sup>4</sup> Sentence points escalate as the level escalates. Points may also be added or multiplied for other factors such as victim injury. The lowest permissible sentence is any nonstate prison sanction in which total sentence points equal or are less than 44 points, unless the court determines that a prison sentence is appropriate. If total sentence points exceed 44 points, the lowest permissible sentence in prison months is calculated by subtracting 28 points from the total sentence points and decreasing the remaining total by 25 percent.

Absent mitigation (see discussion, *supra*), 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.<sup>5</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>6</sup> Further, some offenders may qualify for prison diversion under various sections of the Florida Statutes.<sup>7</sup>

### 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

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

<sup>2</sup> *Florida's Criminal Punishment Code: A Comparative Assessment* (September 2018), Florida Department of Corrections, available at [http://www.dc.state.fl.us/pub/scoresheet/cpc\\_code.pdf](http://www.dc.state.fl.us/pub/scoresheet/cpc_code.pdf) (last visited on Nov. 6, 2019).

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

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

<sup>5</sup> 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>6</sup> Fla. R. Crim. P. 3.704(d)(26).

<sup>7</sup> See e.g., s. 775.082(10), F.S. (prison 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).

sentence if the court finds there is a mitigating circumstance. Section 921.0026, F.S., provides a list of mitigating circumstances.<sup>8</sup>

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.”<sup>9</sup>

With the enactment of the Code, this mitigating circumstance was modified.<sup>10</sup> 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.”<sup>11</sup> The Code also specified that the defendant’s “substance abuse or addiction, including intoxication,<sup>12</sup> 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.”<sup>13</sup>

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 treatment-based drug court program and is otherwise qualified to participate in the program as part of the sentence.”<sup>14</sup> The only subsequent change to this mitigating circumstance occurred in 2011 when the Legislature increased total sentence points from 52 points to 60 points.<sup>15</sup> 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.<sup>16</sup>

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<sup>8</sup> Section 921.0026(4)(d), F.S., specifies that mitigating circumstances include, but are not limited to, the mitigating circumstances specified in that section.

<sup>9</sup> 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.

<sup>10</sup> Chapter 97-194, s. 8, L.O.F.

<sup>11</sup> Section 921.0026(2)(d), F.S. (1997).

<sup>12</sup> 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).

<sup>13</sup> Section 921.0026(3), F.S. (1997).

<sup>14</sup> 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.

<sup>15</sup> Chapter 2011-33, s. 2, L.O.F.

<sup>16</sup> 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 for a physical disability. Section 921.0026(2)(d), F.S.

### III. Effect of Proposed Changes:

The bill amends s. 921.0026, F.S., relating to circumstances for mitigating (reducing) a Code sentence, to create two new circumstances for mitigating (reducing) a sentence under the Criminal Punishment Code:

- For defendants sentenced on or after October 1, 2020, the defendant requires specialized treatment for substance abuse or addiction, a mental disorder, or a physical disability.
- The defendant's offense is a nonviolent felony, total sentence points are 60 points or fewer, and the defendant is sentenced for the offense on or after October 1, 2020.

The new mitigating circumstance relating to specialized treatment for substance abuse or addiction, a mental disorder, or a physical disability is substituted for two current mitigating circumstances:

- The defendant's offense is a nonviolent felony, the defendant's total sentence points are 60 points or fewer, and the defendant is amenable to and qualified to participate in a post-adjudicatory treatment-based drug court program.
- The defendant requires specialized treatment for a mental disorder unrelated to substance abuse or addiction or for a physical disability.

The bill also removes language that restricts mitigation based upon substance abuse or addiction, including intoxication at the time of the offense.

The bill also reenacts ss. 775.08435, 921.002, and 921.00265, F.S., all relating to mitigating circumstances, to incorporate amendments made to s. 921.0026, F.S.

The effective date of the bill is October 1, 2020.

### IV. Constitutional Issues:

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

None.

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

None.

#### C. Trust Funds Restrictions:

None.

#### D. State Tax or Fee Increases:

None.

#### E. Other Constitutional Issues:

None identified.

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

The Criminal Justice Impact Conference, which provides the final, official estimate of the prison bed impact, if any, of legislation has not yet reviewed the bill. The Legislature's Office of Economic and Demographic Research (EDR) preliminarily estimates that the bill will have a "negative significant" prison bed impact (a decrease of more than 25 prison beds). The EDR provided the following information regarding its estimate:

... [S]pecialized treatment for substance abuse and addiction as a mitigating factor can apply to an expanded pool of offenders while having committed a nonviolent felony with total sentence points that are 60 or fewer can be used as a mitigating circumstance as well. These changes would permit a larger number of downward departures for inmates eligible under these criteria.

Per the DOC, on June 30th, 2019, roughly 60% of the inmate population had a substance abuse problem. It is not known how many of these people fit the criteria for mitigating circumstances. With FY 18-19 data unavailable, FY 17-18 data show that there were 92,033 (adj.) offenders sentenced for nonviolent offenses with 60 or fewer sentence points, and 12,163 (adj.) were sentenced to prison (mean sentence length=25.1 m, incarceration rate: 13.2% adj.-13.2% unadj.). While it is not known how many of these also had drug abuse problems, the inclusion of drug offenses in the nonviolent category likely creates significant overlap, and perhaps a higher percentage [for] those with substance abuse problems than the general population. Furthermore, although it is not known how often judges will use these new opportunities for mitigating circumstances, nor is it known who is eligible within the population receiving prison that had not received a downward departure for other mitigating circumstances, this pool is very large, so this bill would be expected to have a significant impact on both prison sentences and the length of prison sentences.<sup>17</sup>

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<sup>17</sup> The preliminary EDR estimate is on file with the Senate Committee on Criminal Justice.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends section 921.0026 of the Florida Statutes.

This bill reenacts the following sections of the Florida Statutes: 775.08435, 921.002, and 921.00265.

**IX. Additional Information:****A. Committee Substitute – Statement of Changes:**

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

**CS by Criminal Justice on December 10, 2019:**

The committee substitute substitutes the word “defendants” for the word “offenders.”

**B. Amendments:**

None.