

STORAGE NAME: h417.cp

DATE: March 9, 1997

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
CRIME AND PUNISHMENT
BILL ANALYSIS & ECONOMIC IMPACT STATEMENT**

BILL #: HB 417

RELATING TO: sentencing

SPONSOR(S): Representative Argenziano and Representative Burroughs

STATUTE(S) AFFECTED: Section 921.0016 F.S.

COMPANION BILL(S): SB 80 (I), SB 204 (I)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) CRIME AND PUNISHMENT
- (2)
- (3)
- (4)
- (5)

I. SUMMARY:

Section 921.0016, F.S., provides nonexclusive reasons for a judge to impose a sentence below the guideline range as established by Chapter 921. To depart below the guidelines a judge must find by a preponderance of the evidence that one of the circumstances listed in section 921.0016 or in the case law exist. This bill would not allow intoxication at the time of the offense to be a mitigating basis for a downward departure sentence below the guidelines. This bill also places limitations on whether substance abuse and addiction may be used as a basis for downward departure.

It is not clear if the intent of this bill is to completely deny judges the ability to use addiction and drug abuse as mitigating reasons to impose a sentence below the guidelines. This bill could also be interpreted to allow mitigation for the influence of controlled substances (but not alcohol) at the time of the offense. Judges are required to interpret laws in favor of the defendant.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

The Guidelines

The Sentencing Guidelines as enacted on January 1, 1994, and revised on October 1, 1995, divide most felony crimes into 10 levels of rising degrees of severity. The points assigned to an offense within a particular level vary depending on whether the offense is the primary offense charged, an accompanying offense, or is part of a defendant's criminal record. When all the points are added up, the preparer of the score sheet is to subtract the total by 28 to get the number of months which become the middle of the guidelines. Any sentence 25% above or below the middle of the guidelines is still "within the guidelines" and is not considered a departure sentence. If the bottom of the guidelines is less than 12 months, then the court may also give any non-state prison sanction including a term in the county jail or probation. The guidelines also assign additional points for such aggravating factors as victim injury, sexual penetration, violations of probation, and whether a firearm was used in the commission of a felony.

Departure Sentences

Section 921.0016, F.S., allows a court to impose a sentence above or below the guidelines if a court finds by a preponderance of the evidence that a particular aggravating or mitigating circumstance exists. Preponderance of the evidence is the lowest burden of proof and means that it is more likely than not that a certain fact exists. Grounds for departure are listed by section 921.0016, F.S., however, the reasons for departure listed by statute are **not** exclusive. Examples of aggravating circumstances for upward departure listed by statute include: the departure results from a plea bargain; the offense was one of violence and was motivated by prejudice based on race, color, ancestry, ethnicity, religion, sexual orientation, or national origin of the victim; the defendant is not amenable to rehabilitation as evidenced by an escalating pattern of criminal conduct. The nonexclusive mitigating factors listed by Section 921.0016 are as follows:

- (a) The departure results from a legitimate, uncoerced plea bargain.
- (b) The defendant was an accomplice to the offense and was a relatively minor participant in the criminal conduct.
- (c) The capacity of the defendant to appreciate the criminal nature of the conduct or to conform that conduct to the requirements of law was substantially impaired.
- (d) The defendant requires specialized treatment for addiction, mental disorder, or physical disability, and the defendant is amenable to treatment.
- (e) The need for payment of restitution to the victim outweighs the need for a prison sentence.
- (f) The victim was an initiator, willing participant, aggressor, or provoker of the incident.

- (g) The defendant acted under extreme duress or under the domination of another person.
- (h) Before the identity of the defendant was determined, the victim was substantially compensated.
- (l) The defendant cooperated with the state to resolve the current offense or any other offense.
- (j) The offense was committed in an unsophisticated manner and was an isolated incident for which the defendant has shown remorse.
- (k) At the time of the offense the defendant was too young to appreciate the consequences of the offense.
- (l) The defendant is to be sentenced as a youthful offender.

The courts have allowed other reasons for departure besides these reasons listed by statute. Any one of these mitigating factors may be used as a reason for downward departure. Except factor (j), the defendants prior criminal history and the type of offense committed have no bearing on whether a court may use these factors for downward departure.

B. EFFECT OF PROPOSED CHANGES:

This bill adds subsection (5) to limit mitigating factors which may be used for downward departure:

A defendant's substance abuse or addiction, including intoxication *at the time of the offense*, is not a mitigating factor under subsection (4) and does not, under any circumstances, justify a downward departure from the recommended guidelines sentence. (Italics Added).

It is not clear whether the phrase "at the time of the offense" modifies just the word intoxication or whether it modifies substance abuse, addiction and intoxication. If the phrase "at the time of the offense" does modify addiction, then a defendant's addiction at sentencing could still be used as a mitigating factor even though addiction at the time of the offense could not be used as a basis for downward departure.

This bill also removes the word addiction from mitigating factor (d), which states:

The defendant requires specialized treatment for *addiction*, mental disorder, or physical disability and the defendant is amenable to treatment. (Italics added).

Addiction as used in factor (d) is an ongoing condition which could relate to a defendant's ongoing condition at the time of sentencing. If addiction in the new subsection (5) is limited by the phrase "at the time of the offense," then removing the word addiction from the mitigating factors without doing more would have no effect on

the use of factor (d) by the courts because section 921.0016, F.S., specifically allows a judge to consider factors not mentioned in the statute.

Another possible interpretation of this bill is read the words "at the time of the offense" as modifying intoxication and not substance abuse or addiction. If the bill were interpreted in this manner, then intoxication at the time of the offense and the ongoing conditions of addiction or drug abuse would not be allowed as grounds for mitigation. This interpretation would still permit the influence of controlled substances (but not intoxication) to be considered as a reason to depart below the guidelines. Judges are required to interpret criminal laws in a manner most favorable to the defendant.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

Not Applicable.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

Not Applicable.

(3) any entitlement to a government service or benefit?

Not Applicable.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

Not Applicable.

(2) what is the cost of such responsibility at the new level/agency?

Not Applicable.

(3) how is the new agency accountable to the people governed?

Not Applicable.

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

Not Applicable.

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

Not Applicable.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

Not Applicable.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

- (1) Who evaluates the family's needs?

Not Applicable.

- (2) Who makes the decisions?

Not Applicable.

- (3) Are private alternatives permitted?

Not Applicable.

- (4) Are families required to participate in a program?

Not Applicable.

- (5) Are families penalized for not participating in a program?

Not Applicable.

- b. Does the bill directly affect the legal rights and obligations between family members?

Not Applicable.

- c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

Not Applicable.

(2) service providers?

Not Applicable.

(3) government employees/agencies?

Not Applicable

D. SECTION-BY-SECTION ANALYSIS:

This section need be completed only in the discretion of the Committee.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

See Fiscal Comments.

2. Recurring Effects:

See Fiscal Comments.

3. Long Run Effects Other Than Normal Growth:

See Fiscal Comments.

4. Total Revenues and Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

See Fiscal Comments.

2. Recurring Effects:

See Fiscal Comments.

3. Long Run Effects Other Than Normal Growth:

See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

See Fiscal Comments.

2. Direct Private Sector Benefits:

See Fiscal Comments.

3. Effects on Competition, Private Enterprise and Employment Markets:

See Fiscal Comments.

D. FISCAL COMMENTS:

The Criminal Justice Estimating Conference, (CJEC), is required to make an estimate of all bills that can affect the inmate population at the Department of Corrections. The estimate for this bill assumes that departure sentences based on a defendant's need for rehabilitation for addiction would be prohibited. CJEC did not consider the impact of not allowing mitigation for persons under the influence of drugs or alcohol at the time of the offense. Based on those two assumptions the Department's estimate on this bill's impact on prison populations is as follows:

FY 1997-98	402
FY 1998-99	650
FY 1999-00	769
FY 2000-01	830
FY 2001-02	866
FY 2002-03	891

The CJEC has revised its forecast of prison population in the year 2002 from 116,205 to 84,099. The legislature has already agreed to fund 83,414 beds, with the funds to be appropriated in the year that the beds are to be occupied. There are currently almost 5000 empty beds.

Even Assuming that this bill will have the broadest effect that any interpretation allows, there are reasons to believe that the CJEC overestimated the impact that this bill could have. CJEC arrived at this estimate based on the total number of score sheets in the past year that showed downward departure because a defendant requires specialized treatment for addiction, mental disorder or physical disability, and the defendant is amenable to treatment. That category does not break down how many cases were mitigated for addiction and how many cases were mitigated for mental disorder or physical disability. Furthermore, the estimate does not take into account whether judges, who are predisposed to imposing a departure sentence, will be able to find

another reason to for a downward departure sentence. For these reasons CJEC may have overestimated the impact of this bill.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill is exempt from the requirement of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggravate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

One of the difficulties of limiting mitigating and aggravating factors is that it is impossible to predict the circumstances in which they will be applied. These factors are not limited by the type of offense or the criminal history of the offenders. Any attempt to limit one of the mitigating factors would be best understood if changes were incorporated into the mitigating factor that a bill attempts to change.

State of Mind at the Time of the Offense

Mitigating factor (c) is the factor which relates to the defendant's state of mind at the time of the offense. If the intent of the legislation is to disallow mitigation for the influence of drugs or alcohol at the time of the offense, that purpose could be better realized with the following addition to factor (c):

The capacity of the defendant to appreciate the criminal nature of the conduct or to conform that conduct to the requirements of law was substantially impaired.
However, a person's capacity, if diminished by the influence of alcohol or controlled substances at the time of the offense may not in any manner be considered a reason to impose a sentence below the guidelines, or for any other manner of mitigation.

A determined judge has a lot of flexibility and discretion to find a mitigating reason for departure. The suggested language would not prohibit a judge from imposing a downward departure sentence if someone seeks help for an addiction even though that person may have been under the influence of illegal drugs or alcohol at the time of the offense.

Ongoing conditions of addiction and alcoholism

If the intent of the legislation is to disallow mitigation for the ongoing condition of addiction, alcoholism or substance abuse, then the following amendment to factor (d) could better realize that purpose:

The defendant requires specialized treatment for a addiction, mental disorder, or physical disability, and the defendant is amenable to treatment. However, addiction, alcoholism, and substance abuse may not in any manner be considered as a reason to impose a sentence below the guidelines, or for any other manner of mitigation.

The whereas clauses in this bill are not necessary to establish the legislature's right to limit the reasons for downward departure sentences. Some offenses such as aggravated assault with a firearm already require a minimum mandatory sentence that a judge may not depart from. The United States Supreme Court in Lockett v. Ohio, 98 S. Ct. 2954 (1978) has held that, "legislatures remain free to decide how much discretion in sentencing should be reposed in the judge or jury in noncapital cases." (Id. at 2964)

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

VII. SIGNATURES:

COMMITTEE ON CRIME AND PUNISHMENT:

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