

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 194

SPONSOR: Criminal Justice Committee and Senators Webster and Brown-Waite

SUBJECT: Felons/Increased Prison Terms

DATE: February 15, 1999                      REVISED: 2/19/99                      \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Barrow</u>	<u>Cannon</u>	<u>CJ</u>	<u>Favorable/CS</u>
2.	<u>Mannelli</u>	<u>Hadi</u>	<u>FP</u>	<u>Favorable</u>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

## I. Summary:

The Committee Substitute for Senate Bill 194 modifies Florida's minimum mandatory law for a person who commits or attempts to commit one of the statutorily listed felonies and during the commission of such crimes, possessed, discharged, or seriously harmed or killed a person. The CS establishes three separate categories of a minimum-mandatory sentence depending on what the offender did with the firearm. Further, the CS creates a three-year minimum-mandatory for a person guilty of possession of a firearm by a convicted felon.

A person would receive a minimum prison sentence of 10 years if he or she committed or attempted to commit one of the listed felonies and possessed a firearm or destructive device. A person would receive a minimum prison sentence of 20 years if he or she committed or attempted to commit one of the listed felonies and discharged any type of firearm or a destructive device. A person would receive a minimum prison sentence of at least 25 years up to life imprisonment if he or she committed one of the listed felonies and discharged any type of firearm or destructive device resulting in the death or great bodily harm of any person. The CS also increases the minimum term of imprisonment from 8 years to 15 years for a person who commits or attempts to commit one of the statutorily listed, serious felonies and during the commission of such crimes, possessed a semiautomatic firearm and its high-capacity detachable box magazine or a machine gun.

The CS adds the offense of drug trafficking as one of the listed felonies that would result in a minimum term of imprisonment if the offender possessed, discharged, or seriously harmed or killed a person under subsections (2) or (3) of s. 775.087, F.S. The offense of possession of a firearm by a convicted felon is also added to the list of felonies where the firearm minimum mandatory sentences would apply under subsections (2) and (3). An exception is created for possession of a firearm by a convicted felon, however, in that simple possession of a firearm by a convicted felon would carry a 3-year minimum mandatory sentence for a regular firearm. Possession of a machine gun or semiautomatic with a high-capacity detachable box magazine by a convicted felon would carry an 8-year minimum mandatory sentence.

The CS requires a court to impose a firearm minimum mandatory sentence consecutively to any other sentence being imposed by the court. A judge would be allowed to impose a sentence greater than the minimum mandatory sentence if authorized by law. State attorneys would be required to explain sentencing deviations in writing for offenders who do not receive the mandatory minimum sentence, but meet the criteria of s. 775.087, F.S.

The Executive Office of the Governor would be required to conduct public service announcements that would explain the penalties provided in this CS to the public.

The CS takes effect upon becoming law.

This CS substantially amends s. 775.087 of the F.S.

## **II. Present Situation:**

### **A. The Criminal Punishment Code**

The Criminal Punishment Code (Code) is a new sentencing structure in Florida and applies to all non-capital felonies that are committed on or after October 1, 1998. The Code establishes a minimum threshold sentence for offenses in a manner that is similar to the way in which a lowest permissible sentence was established under the sentencing guidelines. The Code utilizes a scoresheet to compute the minimum threshold sentence to establish the lowest sentence a court is authorized to impose upon an offender. The maximum sentence an offender can receive under the Code is the statutory maximum for each offense committed by the offender. The statutory maximum periods of incarceration established in s. 775.082, F.S., are: third degree felony, 5 years in prison; second degree felony, 15 years in prison; first degree felony, 30 years in prison; life felony or first degree felony punishable by life, life in prison. The statutory maximum sentence(s) can be imposed under the Code even for a first-time offender. Sentences may be imposed concurrently or consecutively.

Most criminal offenses are “ranked” in the Code’s offense severity ranking chart, according to the seriousness of the offense as determined by the Legislature, which then determines the points assessed for the crime or crimes committed by an offender. Points are also assessed for an offender’s criminal history, the severity of injuries or death inflicted upon a victim, and the extent of a sexual battery, if any.

A judge may not sentence a person below the lowest permissible sentence without a mitigating reason which is authorized by statute or case law. An example of a mitigating reason to impose a sentence below the lowest permissible sentence is the young age of the offender.

The Criminal Punishment Code contains additional point assessments and “multipliers” which result in an offender’s sentence points being increased or multiplied, and thus, increasing in length. Additional sentence points are also assessed for such things as prior serious felonies and the possession of a firearm. If an offender commits or attempts to commit any felony while having a firearm, regardless of use, 18 additional points are assessed. If an offender commits or attempts to commit any felony while having a semiautomatic or machine gun,

regardless of use, 25 additional points are assessed. Sentence multipliers can multiply an offenders subtotal sentence points. An offender's subtotal sentence points can be multiplied by 1.5 for drug trafficking, violating the Law Enforcement Protection Act, grand theft auto, or being a gang member.

## **B. Minimum Mandatory Sentences for Crimes with Firearms**

S. 775.087(2), F.S., requires a judge to impose a minimum term of imprisonment of **3** years for any person who possess a firearm at any time during the course of one of the following offenses or during an attempt to commit any of the following offenses:

- (a) Murder;
- (b) Sexual battery;
- (c) Robbery;
- (d) Burglary;
- (e) Arson;
- (f) Aggravated assault;
- (g) Aggravated battery;
- (h) Kidnaping;
- (i) Escape;
- (j) Aircraft piracy;
- (k) Aggravated child abuse;
- (l) Aggravated abuse of an elderly person or disabled adult;
- (m) Unlawful throwing, placing, or discharging of a destructive device or bomb;
- (n) Carjacking;
- (o) Home-invasion robbery; or
- (p) Aggravated stalking.

S. 775.087(3)(a), F.S., requires a court to impose an **8**-year minimum mandatory sentence if a person commits any of the above enumerated offenses and during the course of the offense the person possessed a semiautomatic firearm and its high-capacity magazine or a machine gun.

Minimum mandatory sentences are not reduced by gain time and the offender must spend the entire mandatory term in prison.

## **C. Other Sentencing Enhancement Mechanisms**

### **1. Habitual Felony Offender**

A judge has the complete discretion under s. 775.084, F.S., to sentence a person as a habitual felony offender if the following criteria are met:

- a. The offender has been convicted of two prior felonies. A withhold of adjudication counts as a conviction for the purposes of enhanced penalties.
- b. The prior convictions were sentenced on separate occasions.

- c. The charge for which the offender is being sentenced is a felony.
- d. The crime for which the offender is being sentenced was committed within 5 years of the date of the conviction for the offender's last prior felony, or within 5 years of the defendant's release from prison whichever was later.
- e. The pending offense and one of the priors were not third degree felonies for possession of controlled substances, such as cocaine. (Possession with intent to sell or trafficking are qualifying offenses.)

If a judge designates a qualifying person as a habitual felony offender, the judge may impose a sentence which is double the statutory maximum. For example, a habitual offender being sentenced for a third degree felony such as auto theft may be sentenced to ten years in prison. A habitual offender may be sentenced for a maximum of thirty years in prison for a second degree felony such as burglary of a dwelling or possession of cocaine with intent to sell. A habitual offender may receive a life sentence for committing a first degree felony.

## 2. Habitual Violent Felony Offender

A judge has the complete discretion under s. 775.084, F.S., to sentence a person as a habitual violent felony offender if the following criteria are met:

- a. A person has previously been convicted for one of the following crimes or for an attempt to commit one of the following crimes:
  - Arson; sexual battery; robbery; kidnaping; aggravated child abuse; aggravated abuse of an elderly person or disabled adult; aggravated assault; murder; manslaughter; unlawful throwing, placing, or discharging of a destructive device or bomb; armed burglary; aggravated battery; or aggravated stalking.
- b. The crime for which the offender is being sentenced is any felony that was committed within 5 years of the date of the conviction for the offender's last prior felony, or within 5 years of the defendant's release from prison whichever was later.

If a judge designates a qualifying person as a habitual violent felony offender, the judge may impose a sentence that is double the statutory maximum; thus, the enhanced penalty authorized by the habitual violent felony offender statute is the same as the enhanced penalty authorized by the habitual felony offender law. *See, State v. Hudson*, 698 So.2d 831 (Fla.1997).

S. 775.084(3)(a)6., F.S., provides that a judge must sentence a qualifying person as a habitual felony offender or habitual violent felony offender unless the judge finds that such a sentence is not necessary for the protection of the public. The statute further requires a judge to file a report every time a qualifying offender is not sentenced as a habitual felony offender or a habitual violent felony offender. The State Court Administrator's Office has indicated that these reporting requirements are rarely

complied with. Furthermore, it is lawful for a judge to designate a person as a habitual felony offender or as a habitual violent felony offender and sentence the person to probation with no term of incarceration.

### 3. Violent Career Criminal

The Evelyn Gort Violent Career Criminal Act requires a judge to sentence a person as a violent career criminal if the offender meets the following criteria:

- a. The offender has previously been convicted three or more times of any of the following offenses:

Burglary; aggravated assault; aggravated battery; aggravated stalking; aggravated child abuse; aggravated abuse of an elderly person or disabled adult; lewd lascivious or indecent conduct; escape; possession of a concealed firearm; possession of a firearm by a convicted felon; possession of a short-barrel shotgun; robbery; carjacking; sexual battery; manslaughter; murder; treason; home invasion robbery; and any other felony which involves the use or threat of physical force or violence against any individual;

- b. The offense for which the offender is to be sentenced is for one of the crimes enumerated above;
- c. The prior convictions were sentenced on separate occasions;
- d. The crime for which the offender is being sentenced was committed within 5 years of the date of the conviction for the offender's last prior felony, or within 5 years of the defendant's release from prison whichever was later; and
- e. The offender has previously been incarcerated in state or federal prison.

If a judge elects to designate an offender as a violent career criminal, then the court must sentence the violent career criminal as follows:

- a. In the case of a life felony or a felony of the first degree, for life;
- b. In the case of a felony of the second degree, for a term of years not exceeding 40, with a mandatory minimum term of 30 years' imprisonment; and
- c. In the case of a felony of the third degree, for a term of years not exceeding 15, with a mandatory minimum term of 10 years' imprisonment.

S. 775.084(4)(d) F.S., gives judges discretion to decide whether a person should be designated and sentenced as a habitual offender, habitual violent offender, or violent career criminal. It states that if the court finds that it is not necessary for the protection of the public to sentence a defendant who meets the criteria for sentencing as a habitual felony offender, a habitual violent felony offender, or a violent career criminal, with

respect to an offense committed on or after October 1, 1995, sentencing can be imposed without regard to s. 775.084, F.S.

#### 4. Prison Releasee Reoffender

Created in 1997, the Prison Releasee Reoffender (PRR) Act targets offenders who commit crimes within a short period of time from being released from prison. The PRR Act requires qualifying offenders to be sentenced to the statutory maximum for the offense committed. It also prohibits such offenders from earning incentive gain-time while serving his or her resulting prison sentence.

If a qualifying offender does not get the maximum sentence, a state attorney must explain the sentencing deviation in writing and place it in the file maintained by the state attorney. State attorneys are required to quarterly report to the president of the Florida Prosecuting Attorneys Association providing the deviation memoranda.

An offender must be sentenced as a PRR if:

a. A state attorney decides to seek to have a person sentenced as a prison releasee reoffender;

b. The offender has committed or attempted to commit one of the following crimes:

Treason; murder; manslaughter; sexual battery; carjacking; home-invasion robbery; robbery arson; kidnaping; aggravated assault; aggravated battery; aggravated stalking; aircraft piracy; unlawful throwing; placing; or discharging of a destructive device or bomb; any felony that involves the use or threat of physical force or violence against an individual; armed burglary; burglary of an occupied structure or dwelling; any felony violation of ss. 790. 07 (relating to felonies committed with firearms), s. 800.04 (lewd, lascivious, or indecent assault), s. 827.03 (aggravated abuse of a child or the disabled), or s. 827.071 (sexual performance by a child), F.S.; and

c. The offender committed one of the enumerated offenses within 3 years of being released from prison.

S. 775.082(8)(d), F.S. requires that a state attorney file a report explaining the sentence for every case in which a qualifying offender does not receive the statutory maximum sentence.

### III. Effect of Proposed Changes:

The CS modifies Florida's minimum mandatory law for offenders who commit certain criminal offenses with a firearm from 3 years to 10 years, 20 years, or 25 years to life, or 8 years to 15 years, 20 years, or 25 years to life, depending on whether the offender possessed, discharged, or seriously harmed or killed a person. The CS establishes three separate categories of a minimum-

mandatory sentence depending on what the offender did with the firearm or destructive device as well as what type of firearm was involved.

Criminal offenders who would be subject to the minimum mandatory terms created in this CS under subsection (2) of s. 775.087, F.S., are persons who possess, discharge, or actually seriously hurt or kill someone with a firearm or a destructive device while committing or attempting to commit one of the following felonies:

1. Murder;
2. Sexual battery;
3. Robbery;
4. Burglary;
5. Arson;
6. Aggravated assault;
7. Aggravated battery;
8. Kidnapping;
9. Escape;
10. Aircraft piracy;
11. Aggravated child abuse;
12. Aggravated abuse of an elderly person or disabled adult;
13. Unlawful throwing, placing, or discharging of a destructive device or bomb;
14. Carjacking;
15. Home-invasion robbery;
16. Aggravated stalking;
17. Possession of a firearm by a convicted felon; or
18. Trafficking in cannabis, trafficking in cocaine, capital importation of cocaine, trafficking in illegal drugs, capital importation of illegal drugs, trafficking in phencyclidine, capital importation of phencyclidine, trafficking in methaqualone, capital importation of methaqualone, trafficking in amphetamine, capital importation of amphetamine, trafficking in flunitrazepam, or other violation of s. 893.135 (1), F.S.

If a person possessed a machine gun or a semiautomatic firearm with a high-capacity detachable box magazine and commits or attempts to commit one of the above-listed felonies *or* committing or attempting to commit the offense of sale, manufacture, delivery, or intent to sell, manufacture, or deliver any controlled substance, minimum mandatory prison terms will also apply under subsection (3) of s. 775.087, F.S.

The CS adds the offense of drug trafficking to the list of felonies that, if committed, would result in a minimum term of imprisonment if the offender possessed, discharged, or seriously harmed or killed a person under subsections (2) or (3) of s. 775.087, F.S.

This CS also adds the offense of possession of a firearm by a convicted felon to the list of felonies that, if committed, would result in a minimum term of imprisonment if the offender possessed, discharged, or seriously harmed or killed a person under subsections (2) or (3) of s. 775.087, F.S. This offense only applies to felons who have not had his or her civil rights restored. Rather than having the 10-year and 15-year minimum mandatory sentences apply to mere “possession” of a firearm by a convicted felon, exceptions are created to apply a 3-year minimum mandatory

sentence for a firearm and an 8-year minimum mandatory sentence for a machine gun or semiautomatic firearm with a high-capacity detachable box magazine.

For all other above-delineated felonies where an offender possessed a firearm or destructive device, during the commission of the offense, the person would receive a minimum prison sentence of 10 years. The CS also increases the minimum term of imprisonment from 8 years to 15 years for a person who commits or attempts to commit one of the statutorily listed felonies and during the commission of such crimes, possessed a semiautomatic firearm and its high-capacity detachable box magazine or a machine gun.

A person would receive a minimum prison sentence of 20 years if he or she committed or attempted to commit one of the above-listed felonies and discharged any type of firearm, or a destructive device during the course of the commission of the felony, attempted felony, or the flight from the crime scene while he or she was carrying, displaying, using, threatening to use, or attempting to use the firearm or destructive device. The offense of sale, manufacture, delivery, or intent to sell, manufacture, or deliver any controlled substance is also included in the list for subsection 775.087(3), F.S., to apply the minimum mandatory sentence when the firearm was a machine gun or semiautomatic with a high-capacity magazine. The minimum mandatory sentence would apply regardless of whether the use of a weapon is an element of the felony committed.

A person would receive a minimum prison sentence of at least 25 years up to life imprisonment if he or she committed one of the listed felonies and discharged any type of firearm, or a destructive device, during the course of the commission of the felony or the flight from the crime scene that resulted in the death or great bodily harm of any person. The offense of sale, manufacture, delivery, or intent to sell, manufacture, or deliver any controlled substance is also included in the list for subsection 775.087(3), F.S., which involves using a machine gun or semiautomatic with a high-capacity magazine, to apply the minimum mandatory sentence.

Express authoritative language is provided to judges to sentence an offender to a longer sentence of incarceration or death if it is otherwise provided by law. This authority is given in all instances where an offender is subject to a minimum mandatory term of imprisonment pursuant to s. 775.087, F.S. Therefore, if because of another sentencing enhancement statute or because of the Criminal Punishment Code, and offender could be sentenced to an incarcerative period that is longer than the minimum mandatory sentence required under s. 775.087, F.S., the court can sentence the offender to the longer incarcerative period. An offender, however, will have to serve his or her minimum mandatory sentence as part of that longer sentence. Therefore, an offender will not be able to earn any gain-time for the minimum mandatory portion of his or her sentence; thus, the offender serves day-for-day on the minimum mandatory portion of the sentence.

The CS provides that it is the intent of the Legislature that the minimum terms of imprisonment for offenses involving the possession, carrying, use, threat of use, or attempted use be imposed for each qualifying felony count for which the person is convicted. The CS requires a court to impose any firearm minimum mandatory sentence authorized by this CS to be consecutive to any other sentence being imposed by the court. A judge would be authorized to impose a sentence greater than the minimum mandatory sentence if authorized by law.

For all cases in which an offender would meet the criteria for the imposition of a minimum mandatory sentence under s. 775.087, F.S., the state attorney would be required to explain any sentencing deviations if an otherwise qualifying offender does not receive the mandatory minimum sentence. The written explanation for the sentencing deviation must be placed in the case file that is maintained by the state attorney. The CS also requires that copies of deviation memoranda to be submitted quarterly to be maintained by the Florida Prosecuting Attorneys Association for at least 10 years. The Florida Prosecuting Attorneys Association would be required to make the information available to the public upon request.

The Executive Office of the Governor would be required to conduct public service announcements in “visible” local media throughout the state that would explain the penalties provided in CS/SB 194 to the public. Visible local media is anticipated to mean television, flyers and pamphlets, newspapers, and the Internet.

The CS would take effect upon becoming law.

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

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

None.

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

None.

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

None.

#### **V. Economic Impact and Fiscal Note:**

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

None.

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

There would be an indeterminate positive fiscal impact upon persons or businesses associated with the requirement that the Executive Office of the Governor place public service announcements in “visible” local media throughout the state that explains the penalties created in CS/SB 194. Therefore, persons or businesses that would provide the “visible” media means to comply with this mandate in the CS would receive a financial benefit from these information announcements. It is anticipated that “visible” media would include newspapers, flyers and pamphlets, television, and the Internet.

C. Government Sector Impact:

**Potential Prison Bed Impact**

The Criminal Justice Impact Conference has formed a consensus as to the prison bed impact for the next five years if CS/SB 194 passes in its present form. The estimated number of beds and costs associated with those prison beds are as follows:

<b>Fiscal Year</b>	<b>Projected Add'l Cumulative Prison Beds Required Under SB 194</b>	<b>Projected Add'l Annual Prison Beds Required</b>	<b>Annual Operating Costs</b>	<b>Annual Fixed Capital Outlay Costs</b>	<b>TOTAL Annual Funds</b>	<b>TOTAL Cumulative Funds</b>
<b>1999-00</b>	3	3	\$28,887	\$2,326,737	\$2,355,623	\$2,355,623
<b>2000-01</b>	96	93	\$978,157	\$7,113,545	\$8,091,702	\$10,447,326
<b>2001-02</b>	373	277	\$4,756,509	\$8,021,379	\$12,777,888	\$23,225,214
<b>2002-03</b>	677	304	\$10,941,425	\$9,358,191	\$20,299,616	\$43,524,830
<b>2003-04</b>	1,022	345	\$18,200,164	\$9,907,926	\$28,108,091	\$71,632,921
<b>TOTAL</b>	1,022	1,022	\$34,905,142	\$36,727,779	\$71,632,921	\$71,632,921

This impact is based on the assumption that the offenders affected by this bill who would receive a non-prison sanction under current law will continue to receive a non-prison sanction under the new law. Although this may seem counter-intuitive, it is based on empirical data (both nation-wide and in Florida) which indicates that whenever sentencing structures are radically changed, the participants will attempt to maintain their prior sentencing practices. The extent to which this initial resistance is mitigated over time is unknown.

The bulk of the anticipated impact of CS/SB 194 in the first three years is due to the provision in the bill that would send offenders guilty of possession of a firearm by a convicted felon to prison for a minimum-mandatory term of three years. Currently, approximately 56 percent of those coming to prison for this offense serve less than 42 months and this population would now serve a minimum of three years. In subsequent years, the impact of this provision levels off as new admissions are offset by releases.

The impact of the “10-20-Life” provision is not felt until after three years when those who would have been approaching their release date under current law would remain in prison longer. According to the Criminal Justice Impact Conference, the prison bed impact of CS/SB 194 would accelerate after five years because: (1) there is a “lag-time” between the offense date and the sentence date and (2) violators of the firearm minimum-mandatory law will be serving a much longer sentence than what is currently being served by violators of the current firearm minimum-mandatory law.

The Criminal Justice Impact Conference does not attempt to project any general or specific deterrent effect which might result from CS/SB 194. To the extent that offenders are incarcerated for greater periods of time, specific deterrence (or, incapacitation) will occur. Although the impact of general deterrence is indeterminate, if any does occur, it will assist in alleviating the fiscal impact of CS/SB 194 upon the criminal justice prison system.

The currently authorized prison capacity is approximately 84,000 beds. Projections of the September 28, 1998 Criminal Justice Estimating Conference and the Department of Corrections phase-in schedule indicate that this capacity should be sufficient under current law and current administration until FY 2002-2003. Construction of new beds would have to commence 18- 24 months prior to this time. Based on funding in the Department of Corrections' "start-up" budget, there should be a cushion of approximately 1,800 beds at the end of FY 1999-2000, and the construction costs for the FY 1999-2000 projected impact could be absorbed.

### **Potential Impact on the Court System**

A survey of the chief judges of each judicial circuit by the Office of the State Courts Administrator indicates that there will almost certainly be an increase in the number of jury trials because: (a) there will be little incentive to plead to a charge which carries a minimum-mandatory sentence, and (b) under the CS, trial judges lack the ability to exercise discretion. The Public Defenders' Association concurs with the chief judges' projection. The Florida Prosecuting Attorneys' Association stated that the impact was indeterminate.

Although it is logical to assume that there may be an increase in trials, the actual impact is impossible to determine with great precision. Currently, approximately 56 percent of those coming to prison for possession of a firearm (493 in FY 1997-98) serve between 12 and 42 months and approximately 65 percent of those coming to prison with a firearm minimum-mandatory (611 in FY 1997-98) serve less than 10 years. These 1,104 offenders comprise the pool of potential trials. In Calendar Year 1997, there were 145 criminal court judges who presided over approximately 5,400 trials. If 10 percent of the pool of potential trials actually went to trial (110), that would equate to a 2 percent increase in the number of jury trials, which would generate a need for 3 additional judges and associated staff; this would also generate 4.5 FTE for prosecutors and public defenders. The fiscal impact would approximate \$952,000 annually.

The provision in the bill pertaining to public notification of the increased penalties is not specific concerning the type of media campaign and its duration, and consequently the fiscal impact is indeterminate at this time. However, according to the Florida Broadcasters' Association, the cost of producing and exhibiting four different non-commercial sustaining announcements (NCSA) on television, radio, and cable for six months would approximate \$400,000. NCSAs can be used to generate air time on a 3:1 basis (for each minute purchased, another three are provided by the broadcaster). NCSAs were used to publicize the constitutional amendments on the November 1998 ballot and to publicize hurricane preparedness procedures.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.

---

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

---