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 912

SPONSOR: Criminal Justice Committee and Senator Latvala

SUBJECT: Sentencing

DATE: March 10, 1999 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Cannon	CJ	Favorable/CS
2.			FP	
3.				
4.				
5.				

I. Summary:

Committee Substitute for Senate Bill 912 amends s. 775.085, F.S. (1998 Supp.), Florida's hate crimes statute, and s. 794.023, F.S., the statute relating to sexual battery by multiple perpetrators, to make changes to those statutes identical to the changes made to the masked felon law in 1997. The effect of these changes is to indicate that both statutes reclassify the degree of an offense rather than enhance the penalty.

This CS substantially amends the following sections of the Florida Statutes: 775.085; 794.023.

II. Present Situation:

A. Section 775.085 and Section 794.023, F.S.

Section 775.085, F.S. (1998 Supp.), Florida's hate crimes law, provides that the penalty for any felony or misdemeanor shall be "reclassified" if the commission of such felony or misdemeanor evidences prejudice based on the race, color, ancestry, ethnicity, religion, sexual orientation, national origin, mental or physical disability, or advanced age of the victim.

If the commission of such felony or misdemeanor evidences such prejudice, the penalty for:

- a second degree misdemeanor shall be punishable as if it were a first degree misdemeanor;
- a first degree misdemeanor shall be punishable as if it were a third degree felony;
- a third degree felony shall be punishable as if it were a second degree felony;
- a second degree felony shall be punishable as if it were a first degree felony; and
- a first degree felony shall be punishable as if it were a life felony.

Section 794.023, F.S., provides for enhanced penalties for acts of sexual battery committed by more than one person. If it is charged and proven by the prosecution that, during the same criminal transaction or episode, more than one person committed a sexual battery, the penalty for:

- a sexual battery offense that is a second degree felony shall be punishable as if it were a first degree felony; and

- a sexual battery offense that is a first degree felony shall be punishable as if it were a life felony.

Section 794.023, F.S., specifies that it does not apply to life felonies or capital felonies. It further specifies that, for purposes of sentencing under chapter 921 and determining incentive gain-time eligibility under chapter 944, a felony offense which is "reclassified" under the penalty subsection is ranked one level above the ranking under s. 921.0012 or s. 921.0013, F.S, of the offense committed.

B. Relevant Case Law On the Distinction Between Penalty Enhancements and Offense Reclassifications

In *Cabal v. State*, 678 So. 2d 315 (Fla. 1996), the Florida Supreme Court reviewed s. 775.0845, F.S. (1993), the masked felon law. The Third District Court of Appeals had previously held that this statute, which the Court said imposed an enhanced penalty for wearing a mask while committing a felony, *acted to reclassify* the underlying felony to a distinct separate crime of the next higher degree. The Florida Supreme Court disagreed. The Court noted that the masked felon law did not reference reclassifying the prohibited conduct as a distinct, substantive offense, but only spoke to increasing the penalty.

In dicta, the Florida Supreme Court noted that the masked felon law was amended in 1995, with the addition of the following language to the statute: "For purposes of sentencing under chapter 921. . . a felony offense which is reclassified under this subsection is ranked one level above the ranking under s. 921.0012 or s. 921.0013 of the offense committed." The court stated that the amended statute was not at issue in the case, and therefore, did not address whether this language acted to require reclassification of an offense to the next higher degree for offenses committed after 1993.

Other cases have discussed erroneous constructions of the old masked felon law and other enhanced penalty statutes. In *Spicer v. State*, 615 So.2d 725 (Fla. 2d DCA 1993), the Court determined that the 1989 version of the masked felon law (identical to the 1993 version), was a penalty enhancement statute. The Court reversed the circuit court which had imposed a sentence of life imprisonment on the defendant. The defendant was convicted of robbery with a mask. Robbery is a second degree felony. The Court used the masked felon law to reclassify the second degree felony to a first degree felony, and then sentenced the defendant to life imprisonment under the habitual offender statute, which authorizes life imprisonment for a first degree felony.

The Court in *Spicer* stated that the masked felon law was like the habitual offender statute in that both statutes enhanced a penalty rather than reclassified the degree of the offense. The Court determined that a correct construction of the law would place the circuit court in an "either-or"

situation in which it could have imposed a sentence under the sentencing guidelines not exceeding 30 years (the maximum statutory penalty for a first degree felony), or it could have used the second-degree felony conviction to sentence the defendant as a habitual offender to 30 years imprisonment (since the habitual offender statute authorizes a sentence of 30-years imprisonment for a second degree felony).

Two decisions subsequent to the *Cabal* decision that have shed light on sentencing under enhanced penalty statutes are *Wray v. State*, 639 So.2d 621 (Fla. 4th DCA 1994) and *Finch v. State*, 693 So.2d 1067 (Fla. 1997). In *Wray*, the Court affirmed the circuit court's imposition of a departure sentence based on a finding that the crime was racially motivated. The defendant was convicted of second degree murder with a deadly weapon. At sentencing, the circuit court stated that it found reason to aggravate the sentence and go outside of the recommended sentence under the sentencing guidelines because it found that the offense was racially motivated.

The Court found case law authority for allowing a departure sentence for a racially motivated crime. The Court noted that, since the defendant was convicted of a second degree murder, a life felony, the hate crime statute was not applicable (the statute contained no provision for enhancement of first degree felonies or life felonies); however, the case law in this area supported its decision that a racially motivated sentence was a proper basis for a departure sentence.

In *Finch*, the Court reviewed the sentence of a defendant convicted of strong arm robbery with a mask. The Court found that the defendant's second degree robbery had been erroneously scored as a first degree felony, rather than as a second degree felony. The appellant's sentence, as erroneously calculated, amounted to an upward departure, without written reasons, from his guidelines sentence as correctly calculated.

C. Recent Legislative Changes

In 1997, the Legislature revisited the masked felon law and amended it. The Legislature deleted reference to "enhanced penalties" in the title description of the statute, and substituted reference to "reclassification." The Legislature also deleted the phrase "shall be punishable as if it were," which appeared repeatedly in the sentencing provision of the law, and substituted the phrase "shall be reclassified to." These changes were in response to the *Cabal* decision and were intended to clarify that the legislative intent is to provide for reclassification of the degree of the offense under the masked felon law and not an enhanced penalty. *See McDonald v. State*, 714 So.2d 643, 644 (Fla. 3rd DCA 1998) (Section 775.0845, F.S., "acted to reclassify McDonald's robbery conviction from a second degree felony to a first degree felony. . . .").

Unlike the current masked felon law, the hate crimes statute and the statute relating to sexual battery by multiple perpetrators, both contain the term "enhanced penalties" in the title description of those statutes and both retain the phrase "shall be punishable as" in the sentencing provisions of those statutes. The statute relating to sexual battery by multiple perpetrators does have the language that was added to the masked felon law in 1995 which specifies that the ranking of reclassified felony offenses in the offense severity ranking chart; the hate crimes statute does not have this language.

D. Felony Reclassification and Its Effect on Sentencing Under the Criminal Punishment Code and Habitual Offender Statute

Under the sentencing guidelines, a recommended guidelines sentence was calculated. This was the sentence that was to be imposed (with minor variations to account for small discretionary increases or decreases in this sentence), unless there was a mitigation based upon certain mitigating factors that were mainly, though not exclusively, specified in statute, or there was an "upward departure" sentence. "Upward departure" sentences were not often imposed. There had to be a statutorily-specified aggravating factor present, and an "upward departure" sentence was appealable by the defendant.

The Criminal Punishment Code, Florida's new sentencing scheme which applies to felony offenses committed on or after October 1, 1998, eliminated the "upward departure" sentence. Under the Code, a lowest permissible sentence is scored. This lowest permissible sentence is not analogous to a recommended guidelines sentence under the sentencing guidelines. The lowest permissible sentence is a baseline sentence which the court may not go below absent a mitigating factor being present. It is not intended to necessarily serve as a recommendation that the lowest permissible sentence should be the sentence that the court imposes. The Code provides for a sentencing range from the lowest permissible sentence up to, and including, the maximum penalty for the felony degree of the offense being sentenced. The sentencing court is free to impose any sentence within this sentencing range, and a sentence within this range is not subject to appeal.

Some of the cases which have found that enhanced penalty statutes have been erroneously construed as offense-degree reclassification statutes discuss how this erroneous construction effects guidelines sentencing. Since sentencing now is pursuant to the Code, rather than the sentencing guidelines, the relevancy of these cases to Code sentencing is only in pointing out the distinction between enhanced penalties and offense-degree reclassifications. More relevant to current sentencing practices are the cases in which the courts have discussed the different effects of enhanced penalties and offense-degree reclassifications on habitual offender sentencing.

Today, offense-degree reclassification would having a bearing on the scoring of the lowest permissible sentence under the Criminal Punishment Code, and would expand the range of sentencing between the lowest permissible sentence and the maximum penalty for the felony degree of the offense being sentenced. This could be important not only in those cases in which the court determines that the facts of the case warrant a sentence closer to the maximum penalty than to the lowest permissible sentence, but also in those cases in which the court wants to establishes a sentence in the middle range. The effect of such reclassification on habitual offender sentencing is the same as it has always been. By reclassifying the felony degree to the next, higher felony degree, the sentence under the habitual offender statute may be significantly greater than if the felony had not been reclassified.

III. Effect of Proposed Changes:

Committee Substitute for Senate Bill 912 amends s. 775.085, F.S. (1998 Supp.), Florida's hate crimes statute, and s. 794.023, F.S., the statute relating to sexual battery by multiple perpetrators, to make changes to those statutes identical to the changes made to the masked felon law in 1997.

The effect of these changes is to indicate that both statutes reclassify the degree of an offense rather than enhance the penalty.

Like the changes to the masked felon law in 1997, the changes proposed in CS/SB 912 appear to be in reaction to the dicta in *Cabal* discussing the 1995 changes to the masked felon law. From this dicta it cannot be discerned with certainty if the Court was intimating that the 1995 changes (the ranking of reclassified offenses) might not be sufficient to indicate legislative intent that the masked felon law is an offense-degree reclassification statute. Much of the language that the Court found to indicate that the 1993 version of the masked felon law was a penalty enhancement statute was retained in the masked felon law after the 1995 changes and was not deleted until 1997, the year after the *Cabal* decision. Whether or not such a reading of *Cabal* was how the Court would have actually ruled in a future case regarding the 1995 version of the masked felon law, the *Cabal* decision was the reason for the 1997 legislation which further clarified that the masked felon law reclassifies the offense degree.

The changes proposed in CS/SB 912 to the hate crimes statute and the statute relating to sexual battery are identical to those made in 1997 to the masked felon law: the deletion of the term "enhanced penalties" from the title description of those statutes; the substitution in the title description of the term "reclassification"; the deletion of the phrase "shall be punishable as if it were" where it appears in the sentencing provisions of those statutes; and the substitution of the phrase "is reclassified to" in those sentencing provisions. Accordingly, a felony of the third degree is not "punishable as if it were" a second degree felony, but rather "is reclassified to" a second degree felony under the hate crimes statute and the statute relating to sexual battery by multiple perpetrators.

In terms of habitual offender sentencing, the proposed changes to these two statutes might result in significantly longer sentences for a small number of offenders. For example, regarding a third degree felony, the difference between "punishing" a third degree felony as a second degree felony and "reclassifying" the third degree felony to a second degree felony is, potentially, the difference between a maximum sentence of 10 years (for a third degree felony) under the habitual offender sentencing provision and a maximum sentence of 30 years (for a second degree felony) under that sentencing provision.

In terms of sentencing under the Criminal Punishment Code, reclassification of an offense pursuant to those two statutes would increase the lowest permissible sentence for an offense if the ranking of the reclassified offense were specified in the law (as is the case with the statute relating to sexual battery by multiple perpetrators but not with the hate crimes statute). Reclassification would also expand the sentencing range for both statutes since the offenses, as reclassified by those statutes, would be subject to a greater maximum penalty than if not reclassified.

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:

None.

C. Government Sector Impact:

Committee Substitute for Senate Bill 912 has not yet been reviewed by the Criminal Justice Estimating Conference (CJEC), and therefore no official CJEC estimate of the CS's fiscal impact is available. However, CS/HB 183, which is identical to CS/SB 912, was reviewed by the CJEC which determined that CS/HB 183 had no fiscal impact. While reclassification of offense degrees under the hate crimes statute and the statute relating to sexual battery by multiple perpetrators could, potentially, result in longer sentences, the fact that there is a range of sentencing under the Criminal Punishment Code means significant discretion in sentencing, and therefore, actual sentencing practices cannot be inferred until such time as sentencing patterns under the Code can be discerned. Further, the number of offenders who would fall under those two statutes is very small.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.