

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: SB 1996
 SPONSOR: Senator Sebesta
 SUBJECT: Offenses by Public Servants
 DATE: February 15, 2002 REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------|----------------|-----------|-----------|
| 1. | Cellon | Cannon | CJ | Favorable |
| 2. | _____ | _____ | EE | _____ |
| 3. | _____ | _____ | APJ | _____ |
| 4. | _____ | _____ | AP | _____ |
| 5. | _____ | _____ | _____ | _____ |
| 6. | _____ | _____ | _____ | _____ |

I. Summary:

The bill modifies a number of existing criminal offenses and definitions, and creates several new criminal offenses as second and third degree felonies for: official misconduct; criminal misuse of official position; disclosure or use of confidential criminal justice information; bid tampering, in connection with public contracts; and perjury in official proceedings. The bill also conveys confidential informant status to individuals who provide information regarding suspected criminal conduct committed by public servants, and provides for the recovery of attorney’s fees, under certain circumstances, when an accused public servant is acquitted or charges are dismissed. The bill extends the jurisdiction of the Office of Statewide Prosecution to provide for prosecution of the offenses in ch. 838, F.S.

This bill substantially amends ss. 16.56, 112.3173, 121.091, 837.02, 838.014, 838.015, 838.016, 905.34 and 921.0022, F.S., creates ss. 838.022, 838.20, 838.21, 838.22, 838.23, 838.24, F.S., and repeals ss. 838.15 and 838.16, F.S.

II. Present Situation:

The bill incorporates a number of recommendations contained in the Public Corruption Study Commission’s Report to the Governor (December 15, 1999) [hereinafter, commission, report]. The Governor established the commission to “assure that the State’s elected and appointed officials and those employed by the state abide by the highest standards of behavior and avoid any type of official misconduct.” Executive Order No. 99-237 (September 15, 1999).

The statewide prosecutor has concurrent jurisdiction with the state attorneys to prosecute legislatively specified violations of criminal laws having occurred in or affected two or more

judicial circuits. Art. IV, s. 4(c), Fla. Const. Section 16.56, F.S., details the offenses which the statewide prosecutor may investigate and prosecute.

Section 837.02, F.S., makes it a third degree felony to commit perjury in an official proceeding -- - other than a proceeding relating to the prosecution of a capital felony, which is a second degree felony.

Section 838.014, F.S., defines the terms “benefit,” “corruptly,” “harm,” and “public servant” for the purpose of Florida’s criminal laws prohibiting bribery and misuse of public office. Section 838.015, F.S., provides that actions involving bribery of a public servant are a third degree felony.

Section 838.016, F.S., provides that offenses involving unlawful compensation of a public servant or corruptly rewarding a public servant for official behavior constitutes a third degree felony.

Section 838.15, F.S., criminalizes commercial bribe receiving, defined as soliciting, accepting, or agreeing to accept a benefit with intent to violate a statutory or common law duty to which a person is subject to as: an agent or employee; a fiduciary; a lawyer or other professional advisor; an officer or director of an organization; or an arbitrator. The Florida Supreme Court held the statute unconstitutionally vague and arbitrary, in that it: failed to provide persons of common intelligence sufficient warning of what activities were prohibited; and, applied regardless of whether the proscribed behavior resulted in harm, thereby vesting too much unbridled discretion in the prosecutor’s hands. *Roque v. State*, 664 So.2d 928 (1995). Section 838.16, F.S., makes it a third degree felony to engage in commercial bribery. However, the section’s cross reference to s. 838.15, F.S., renders it unenforceable.

All felony offenders whose offenses were committed on or after October 1, 1998, are subject to the Criminal Punishment Code. The Code allows the trial judge to sentence any felony offender to the statutory maximum for the offense degree, e.g., to five years for a third-degree felony and up to 15 years for a second-degree felony. The Code provides for a mandatory minimum sentence below which the judge may not sentence an offender without providing written reasons. s. 921.00265, F.S. The minimum sentence is calculated by computing various factors like victim injury and prior record. s. 921.0024, F.S. The Offense Severity Ranking Chart ranks most felony offenses from levels 1 to 10, and is the main factor which goes into the minimum sentence calculation. A level 10 offense scores highest; level 1 and level “M” score lowest. s. 921.0022, F.S.

Section 112.3173, F.S., defines specified offenses for which a conviction results in the forfeiture of certain rights under the public retirement system. The statute contains references to ss. 838.15 and 838.16, F.S., which have been found to be unconstitutional.

Section 121.091, F.S., which sets forth retirement benefits within the Florida Retirement System, also contains a reference to ss. 838.15 and 838.16, F.S., which, as noted above, have been found to be unconstitutional.

III. Effect of Proposed Changes:

A section-by section explanation of the bill is provided below:

Section 1. This section of the bill sets forth the title of the act – the “Citizens’ Right to Honest Government Act.”

Section 2. Expands the jurisdiction of the Office of Statewide Prosecution to include any violation of ch. 838, F.S., the Bribery and Misuse of Public Office chapter.

Section 3. This section refines the definitions of the terms “benefit,” “corruptly” or “with corrupt intent,” “harm,” and “public servant,” as used in ch. 838, F.S., while deleting the definitions for “pecuniary benefit,” “harm,” and “government.” The “pecuniary benefit” language is shifted to the new definition of “benefit.” “Corruptly” or “with corrupt intent” means done with knowledge that the act is wrongful.

Section 4. Section 838.015, F.S., is amended by this section of the bill to increase the potential criminal penalty for committing bribery from a felony of the third degree to a felony of the second degree. (It should be noted that Section 8 of the bill removes this crime from the Level 1 rank in the Criminal Punishment Code and places it in Level 7, which would result in mandatory prison time unless the court gives written reasons for mitigating the sentence.)

Section 5. Amends s. 838.016, F.S., to increase the penalty for unlawful compensation for official behavior from a third degree felony to a second degree felony. (Section 8 amends s. 921.0022, F.S., to increase the crime’s ranking from a level 1 offense to a level 7 offense for this crime as well.)

Section 6. Creates a new section of the Florida Statutes, 838.022, entitled Official Misconduct, which provides second degree felony penalties for the acts described therein. These acts are ranked as Level 7 offenses in the Criminal Punishment Code by Section 8 of the bill. (Current s. 839.25, F.S., contains a more narrowly defined “official misconduct” offense which is punished as a third degree felony.) In this section, official misconduct is expanded to include a public servant who acts with corrupt intent to obtain a benefit or to cause harm by:

- Falsifying any official record or document.
- Concealing, covering up, destroying, mutilating, or altering any official record or official document.
- Obstructing, delaying, or preventing the communication of information relating to the commission of a felony that involves the public servant’s agency or entity.

The term “public servant” as used in this newly created section of the statutes does not include a candidate who does not otherwise qualify as a public servant. Official records or documents mean public records within the meaning of this newly created section. The offense includes causing another person to commit one of these violative acts.

A new section 838.20 of the Florida Statutes is created making it a second degree felony for any public servant to corruptly use his or her official position, public property, or public resource to:

- Establish any business relationship between the public servant's agency and any business in which the public servant receives or has an expectation of receiving a benefit.
- Perform his or her official duties to secure a benefit that is not generally available to the public.

The purpose of this provision was to strike a balance between the reality of doing business in government and the need to prohibit the inappropriate use of the public's trust. Commission, Report, at p. 9. This crime is ranked as a Level 7 offense in Section 8 of the bill.

Section 838.21, F.S., is created making it a third degree felony for a public servant to disclose certain types of confidential criminal investigative information or active criminal investigative or intelligence information as defined in ch. 119, F.S., with intent to obstruct, impede, or prevent a criminal prosecution. The Public Corruption Study Commission identified circumstances where public servants wrongfully disclosed such information, negatively compromising investigations and, in some cases, jeopardizing personal safety. Commission, Report, at p. 9. Section 8 of the bill lists this in Level 6 of the Criminal Punishment Code.

Section 838.22, F.S., is created as a bid-tampering statute, making it a second degree felony to engage in certain conduct that currently undermines the competitive bidding process for public contracts but for which no adequate statute currently exists. Commission, Report, at p. 9. Examples of prohibited conduct include: disclosing material information concerning a bid or the bidding process which is not publicly disclosed; establishing a bid specification that provides an unfair competitive advantage to any person; or, altering or amending any submitted bid or bid results to provide an unfair competitive advantage. The prohibited conduct must be committed with corrupt intent to influence or attempt to influence the competitive bidding process undertaken by any state, county, municipal, or special district agency, or any other public entity, for the procurement of commodities or services.

Section 838.23, F.S., is created to give "confidential source" or "confidential informant" status to a person who provides information regarding suspected criminal violations committed by public servants. Section 119.07(3)(c), F.S., exempts any information revealing the identity of a confidential source or confidential informant from Florida's Public Records provisions.

Under this section of the bill, a new section 838.24 of the Florida Statutes is created which provides that if criminal charges against a public servant are dismissed, or the public servant is acquitted, the public servant may seek attorney's fees for the cost incurred in defending against the action under certain circumstances.

Section 7. This section of the bill amends s. 837.02, F.S., to include a second degree felony violation where a public servant makes a false statement, which he or she does not believe to be true, under oath in an official proceeding in regard to any material matter that relates to his or her duties or actions as a public servant. This crime is ranked as a Level 7 offense in the Criminal Punishment Code, in Section 8 of the bill.

Section 8. Amends the Criminal Punishment Code as noted above, deleting references to certain crimes, reassigning other crimes to higher rankings, and assigning rankings to the newly created criminal offenses outlined above.

Section 9. Repeals ss. 838.15 and 838.16, F.S. Section 838.15, F.S., was found “invalid” in *Roque v. State*, 664 So.2d 928 (Fla. 1995). Section 838.16, F.S., provided the penalties for a violation of s. 838.15, F.S.

Sections 10 and 11. Amend ss. 112.3173 and 121.091, F.S., to conform with the repeal of ss. 838.15 and 838.16, F.S.

Section 12. Amends s. 905.34, F.S., to include violations of ch. 838, F.S., within the subject matter jurisdiction of the statewide grand jury.

Section 13. Provides an October 1, 2002, effective date.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The section of the bill relating to “official misconduct” may raise constitutional concerns. In *State v. DeLeo*, 356 So.2d 306 (Fla. 1978), the Florida Supreme Court declared a portion of the official misconduct statute unconstitutional. At that time, the statute prohibited a public servant, acting with corrupt intent to obtain a benefit for himself or another or to cause unlawful harm to another, from knowingly violating, or causing another to violate, any statute or lawfully adopted regulation or rule relating to his or her office. The word “corrupt” was defined as “done with knowledge that the act is wrongful and with improper motive.” The Court found, as follows:

The crime defined by the statute, knowing violations of any statute, rule or regulation for an improper motive, is simply too open-ended to limit prosecutorial discretion in any reasonable way. The statute could be used, at best, to prosecute, as a crime, the most insignificant of transgressions or, at worst, to misuse the judicial process for political purposes. We find it susceptible to arbitrary application because of its ‘catch-all’ nature.

Id. at 308.

The Court also stated that the “corrupt” standard contained in the statute “is too vague to give men of common intelligence sufficient warning of what is corrupt and outlawed. The ‘corruption’ element, as defined, does nothing to cure the statute’s susceptibility to arbitrary application.” Id.; See also *State v. Jenkins*, 469 So.2d 733 (Fla. 1985). (holding that s. 839.25(1)(a), F.S., was unconstitutional because it was vague and subject to arbitrary and capricious application).

Like the official misconduct that was struck down in DeLeo, this bill defines “corrupt” as “done with knowledge that the act is wrongful” but removes the language involving “improper motive.” However, the acts that are prohibited in the bill are defined with greater specificity than in the statute struck down in DeLeo. Given the greater specificity, it may be less likely that a court will find the new language susceptible to arbitrary application.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The potential cost to prosecute, incarcerate and supervise the potential new offenders is indeterminate at this time. The Criminal Justice Estimating Conference has not yet reviewed this bill.

VI. Technical Deficiencies:

On page 7, lines 5, 6 and 10, reference is made to “public officer” and “public employee.” These terms are not defined in the bill, although the term “public servant” is defined, and is utilized in other sections of the bill.

VII. Related Issues:

None.

VIII. Amendments:

None.