

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.)

Prepared By: The Professional Staff of the Committee on Criminal Justice

BILL: SB 866

INTRODUCER: Senator Bracy

SUBJECT: Sentencing

DATE: January 8, 2018

REVISED: 01/10/18

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Jones	CJ	Favorable
2.			JU	
3.			ACJ	
4.			AP	

I. Summary:

SB 866 amends s. 775.082(10), F.S., to require a nonstate prison sanction for certain nonviolent offenders who commit an offense on or after October 1, 2018, and whose total sentence points are 44 points or fewer, unless a jury or a court (if the defendant waives a jury trial) finds that a nonstate prison sanction could present a danger to the public. Under current s. 775.082(10), F.S., this provision is triggered when the offender’s total sentence points are 22 points or fewer. Current law also requires a court to make the “danger to the public” findings. The change to require jury findings (unless there is a jury waiver) is intended to address a recent Florida case holding that s. 782.082(10), F.S., is unconstitutional because a court, rather than a jury, makes the “danger to the public” findings.

The bill also amends s. 921.0024(2), F.S., of the Criminal Punishment Code (Code), to provide that, for offenses committed on or after October 1, 2018, the lowest permissible sentence under the Code is a nonstate prison sanction if total sentence points equal or are less than 52 points. Current s. 921.0024(2), F.S., specifies the lowest permissible sentence under the Code is a nonstate prison sanction if total sentence points equal or are less than 44 points. The bill also makes conforming changes to the calculation for determining the lowest permissible sentence in state prison months when total sentence points exceed 52 points.

The effect of these changes is that there will be more offenders who score a nonstate prison sanction as the lowest permissible sentence, and the scored lowest permissible sentence in state prison months for offenders who score more than 52 total sentence points will be six months less than under current law.

The Criminal Justice Impact Conference estimates that the bill will have a “negative significant” prison bed impact (a decrease of more than 25 prison beds). See Section V. Fiscal Impact Statement.

II. Present Situation:

Criminal Punishment Code

The Criminal Punishment Code¹ (Code) is Florida's "primary sentencing policy."² Noncapital felonies sentenced under the Code receive an offense severity level ranking (Levels 1-10).³ Points are assigned and accrue based upon the level ranking assigned to the primary offense, additional offenses, and prior offenses. Sentence points escalate as the level escalates. Points may also be added or multiplied for other factors such as victim injury or the commission of certain offenses like a Level 7 or 8 drug trafficking offense. The lowest permissible sentence is any nonstate prison sanction in which total sentence points equal or are less than 44 points, though the court may impose a prison sentence up to the statutory maximum for any felony offense committed. 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.⁴ Absent mitigation,⁵ 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., for the offenses committed.⁶

Length of Stay

According to a 2015 study of the operations of the Department of Corrections (DOC), length of stay (LOS) in Florida correctional facilities exceeds the national LOS average (30 months). LOS has consistently increased in Florida "from just under 30 months on average in 2008 to almost 40 months by 2015."⁷ According to the study's authors, the longer average LOS in Florida "explains to a large degree Florida's significantly higher incarceration rate of 522 per 100,000 population versus the U.S. state incarceration rate of 416 per 100,000."⁸

Departure from a Code Sentence

An exception to typical Code sentencing is found in s. 775.082(10), F.S. Under this subsection, if a defendant is sentenced for an offense committed on or after July 1, 2009, which is a third

¹ 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.

² *Florida's Criminal Punishment Code: A Comparative Assessment (FY 2012-2013) Executive Summary (Offenses Committed On or After October 1, 1998)*, Florida Department of Corrections, available at http://www.dc.state.fl.us/pub/sg_annual/1213/executives.html (last visited on Dec. 12, 2017).

³ 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.

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

⁵ The court may "mitigate" or "depart downward" from the scored lowest permissible sentence if the court finds a mitigating circumstance. Section 921.0026, F.S., provides a list of mitigating circumstances.

⁶ 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. Section 921.0024(2), F.S.

⁷ *Study of Operations of the Florida Department of Corrections* (prepared by Carter Goble Associates, LLC), Report No. 15-FDC (November 2015), Office of Program Policy Analysis and Government Accountability, Florida Legislature, p. 80 (footnote omitted). This study is available at <http://www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/15-FDC.pdf> (last visited on Dec. 12, 2017).

⁸ *Id.*

degree felony but not a forcible felony,⁹ and if the defendant's total sentence points pursuant to s. 921.0024, F.S., are 22 points or fewer, the court must sentence the defendant to a nonstate prison sanction. However, if the court makes written findings that a nonstate prison sanction could present a danger to the public, the court may sentence the defendant to a state correctional facility.¹⁰

Woods v. State

In *Apprendi v. New Jersey*, the U.S. Supreme Court held: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."¹¹ "[T]he Sixth Amendment provides defendants with the right to have a jury find those facts beyond a reasonable doubt."¹²

In a subsequent case, *Blakely v. Washington*, the U.S. Supreme Court opined that a defendant may waive his or her rights under *Apprendi*.¹³ "In the context of plea deals, 'the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding.... If appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty.'"¹⁴

In *Woods v. State*, the First District Court of Appeal held that s. 775.082(10), F.S., was unconstitutional: "The statutory authority in the last sentence of subsection (10), allowing a trial judge to make factual findings to increase an offender's sentence to a state correctional facility, is unconstitutional because only a jury may make findings that increase a penalty beyond a statutory maximum (which is up to twelve months of incarceration as a nonstate sanction)."¹⁵ The court cited as authority *Apprendi*, *Blakely*, and *Plott v. State*,¹⁶ a Florida Supreme Court case.

To date, the *Woods* decision has not been overruled by the Florida Supreme Court and no other Florida appellate court appears to have addressed the same constitutional question addressed in

⁹ Section 776.08, F.S., defines a "forcible felony" as treason; murder; manslaughter; sexual battery; carjacking; home-invasion robbery; robbery; burglary; arson; kidnapping; aggravated assault; aggravated battery; aggravated stalking; aircraft piracy; unlawful throwing, placing, or discharging of a destructive device or bomb; and any other felony which involves the use or threat of physical force or violence against any individual.

¹⁰ Section 775.082(10), F.S.

¹¹ *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

¹² *Alleyne v. United States*, 133 S.Ct. 2151, 2160 (2013), citing *Apprendi v. New Jersey*, 530 U.S. at 484.

¹³ *Blakely v. Washington*, 542 U.S. 296, 310 (2004).

¹⁴ *Murray v. State*, 133 So.3d. 557, 558 (Fla.1st DCA 2014), quoting *Blakely*, 542 U.S. at 310. See also *Smith v. State*, 174 So.3d 1025 (Fla. 2d DCA 2015) (departure sentence based on judicial findings did not violate *Apprendi/Blakely* jury requirement because the defendant entered a plea to offenses upon which his departure was based and did not object to factual bases for the departure). In *Murray*, the court rejected a claim that a sentence under s. 775.082(10), F.S., violated *Apprendi* because the defendant "knowingly accepted the judge as factfinder after discussion with the judge and counsel," and therefore "validly waived any *Apprendi/Blakely* concern." *Murray*, 133 So.3d at 559.

¹⁵ *Woods v. State*, 214 So.3d 803, 805-806 (Fla. 1st DCA 2017).

¹⁶ 148 So.3d 90, 95 (Fla. 2014) ("[W]e hold that upward departure sentences that are unconstitutionally enhanced in violation of *Apprendi* and *Blakely* patently fail to comport with constitutional limitations, and consequently, the sentences are illegal under rule 3.800(a).").

Woods v. State.¹⁷ If a legal issue has only been addressed by one Florida district court of appeal and the decision has not been overruled by the Florida Supreme Court, the decision is controlling law on that legal issue and must be followed by all Florida trial courts.¹⁸

III. Effect of Proposed Changes:

The bill amends s. 775.082(10), F.S., to require a nonstate prison sanction for certain nonviolent offenders who commit an offense on or after October 1, 2018, and whose total sentence points are 44 points or fewer, unless a jury or a court (if the defendant waives a jury trial) finds that a nonstate prison sanction could present a danger to the public. Under current s. 775.082(10), F.S., this provision is triggered when the offender's total sentence points are 22 points or fewer. Current law also requires a court to make the "danger to the public" findings. The change to require jury findings (unless there is a jury waiver) is intended to address *Woods v. State* (discussed, supra), which held that s. 775.082(10), F.S., is unconstitutional because a court, rather than a jury, makes the "danger to the public" findings.

The bill also amends s. 921.0024(2), F.S., of the Criminal Punishment Code (Code), to provide that, for offenses committed on or after October 1, 2018, the lowest permissible sentence under the Code is a nonstate prison sanction if total sentence points equal or are less than 52 points. Current s. 921.0024(2), F.S., specifies the lowest permissible sentence under the Code is a nonstate prison sanction if total sentence points equal or are less than 44 points.

Under current s. 921.0024(2), F.S., an offender can only score a state prison sentence as the lowest permissible sentence if total sentence points exceed 44 points. The lowest permissible sentence in state prison months is calculated by subtracting 28 points from the total sentence points (exceeding 44 points) and decreasing the remaining total by 25 percent. A prison sentence must exceed 12 months.¹⁹ This calculation will always result in a state prison sentence that exceeds 12 months.

The bill also amends s. 921.0024(2), F.S., to make conforming changes to the calculation for determining the lowest permissible sentence in state prison months when total sentence points exceed 52 points. Under the bill, for offenses committed on or after October 1, 2018, the lowest permissible sentence in state prison months is calculated by subtracting 36 points from the total sentence points (exceeding 52 points) and decreasing the remaining total by 25 percent. This calculation will always result in a state prison sentence that exceeds 12 months.

The effect of these changes is:

- There will be more offenders who score a nonstate prison sanction as the lowest permissible sentence.

¹⁷ In a 2016 case, the Second District Court of Appeal did not reach a constitutional argument raised by the appellant that was similar to the argument raised in *Woods*, but the court noted that "no court in Florida has yet reached the issue." *Reed v. State*, 192 So.3d 641, 644, n. 2 (Fla. 2d DCA 2016) (citations omitted). Senate Criminal Justice Committee staff reviewed cases subsequent to *Reed* but did not find any Florida Supreme Court case overruling *Woods* or any Florida appellate case addressing a constitutional argument similar to that raised in *Woods*.

¹⁸ *Pardo v. State*, 596 So.2d 665, 666 (Fla. 1992).

¹⁹ Section 921.0024(2), F.S.

- Those offenders with total sentence points exceeding 52 points, will score a lowest permissible sentence in state prison months that is six months less than they would score under current s. 921.0024(2), F.S. For example, a Level 7 primary offense (one count) scores 56 sentence points. Under s. 921.0024(2), F.S., as amended by the bill, a first-time offender with only a Level 7 primary offense (one count)²⁰ would score a state prison sentence of 15 months as the lowest permissible sentence in state prison months. In contrast, under current s. 921.0024(2), F.S., the same offender would score a state prison sentence of 21 months as the lowest permissible sentence in state prison months.

The effective date of the bill is October 1, 2018.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Criminal Justice Impact Conference (CJIC), which provides the final, official estimate of the prison bed impact, if any, of legislation, estimates that the bill will have a “negative significant” prison bed impact (a decrease of more than 25 prison beds).²¹

²⁰ In this example, the offender does not score points for any factor other than one count of the primary offense.

²¹ Telephonic communication on Jan. 9, 2018, between staff of the Senate Committee on Criminal Justice and staff of the Office of Economic and Demographic Research.

The Legislature's Office of Economic and Demographic Research (EDR) provided information relevant to the CJIC impact estimate.²² Regarding Section 1 of the bill, which amends s. 775.02(10), F.S., the EDR comments:

Per DOC, in FY 16-17, 4.1% of those sentenced for offenses prior to the creation of s. 775.082(10), F.S. (July 1st, 2009) were sentenced to prison, and 1.5% of those sentenced for offenses committed after this law was created received a prison sentence. For those with sentencing points between 23 and 44 whose criteria matches s. 775.082(10), F.S., 10.7% received a prison sentence in FY 16-17 (3,163 adj.)....²³

It is not known how the inclusion of the jury will impact sentencing decisions for those with 44 points or less, nor is it known how judges will respond in the other 96.2% of cases, given that they tended to incarcerate at a higher rate than those under 22 points before the initial statute passed (10.7% compared to 4.1%). However, it is likely that judicial activity will change in some form with the implementation of this new scoring structure, and though the magnitude of the reduction cannot be quantified, with 3,163 (adj.) offenders receiving prison sentences, even a small shift in judicial and jury activity in response to this change could produce a significant effect.

Regarding Section 2 of the bill, which amends s. 921.0024(2), F.S., the EDR comments:

... Under this bill, 52 points or less would be the new range where the lowest permissible sentence is a nonstate prison sanction, "unless the court determines within its discretion that a prison sentence, which may be up to the statutory maximums for the offenses committed, is appropriate," and prison sentence length above 52 points would be calculated by subtracting 36 points from the total sentence points and decreasing the remaining total by 25%. *This would reduce future prison sentences by 6 months for point calculations.*²⁴

Per DOC, in FY 16-17, about 14.2% of sentences up to 44 points were state prison sanctions, excluding those fitting the criteria in amended s. 775.082(10), F.S. Between 44 and 52 points, prison sentences jumped to 47.9% of all sentences, and above 52 points they reached 62.6%. This shows that judges already give nonstate prison sanctions to offenders between 44 and 52 points in over half of the sentences. Furthermore, such discretion also applies for prison sentence length. Currently, a person with 53 points should receive a prison sentence of 18.75 months, with the new bill dropping that to 12.75 months. However, a close examination of the 53 point category shows that 34% of

²² Information provided by EDR staff (on file with the Senate Committee on Criminal Justice). All EDR impact analysis information is from this source.

²³ The abbreviation "adj." means "adjusted." Sentencing data from the DOC is incomplete, which means that the numbers the EDR receives are potentially lower than what the actual numbers are. The EDR adjusts these numbers by the percentage of scoresheets received for the applicable fiscal year.

²⁴ Emphasis provided by Senate Criminal Justice Committee staff.

offenders sentenced under this point total received a prison sentence that was 18 months or less.

It is not known how this section of the bill will impact current judicial discretion. However, it is likely that judicial activity will change in some form with the implementation of this new scoring structure, with a reduction in prison sentencing between 45 and 52 points. Although the magnitude of that reduction cannot be quantified, there are 4,419 (adj.) offenders who received prison sentences across these points, so even a small shift among judges toward nonstate sanctions could significantly impact prison sentences, as well as with the additional shift downwards in prison sentence length for those with 53 points or more.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 775.082 and 921.0024.

This bill also reenacts the following sections of the Florida Statutes for the purpose of the amendments made to section 921.0024 of the Florida Statutes: 921.00241, 921.0026, 921.00265, 924.06, 948.01, 948.06, and 948.20.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

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

None.

B. Amendments:

None.