

**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.)

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

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BILL: SB 1716

INTRODUCER: Senator Brandes

SUBJECT: Sentencing

DATE: February 3, 2020

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Erickson</u>	<u>Jones</u>	<u>CJ</u>	<u>Pre-meeting</u>
2.	<u>                    </u>	<u>                    </u>	<u>ACJ</u>	<u>                    </u>
3.	<u>                    </u>	<u>                    </u>	<u>AP</u>	<u>                    </u>

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**I. Summary:**

SB 1716 reduces the mandatory minimum penalties imposed upon a prison releasee reoffender (a category of repeat offenders) under s. 775.082(9), F.S. These changes are also applied retroactively. The bill provides a process for resentencing.

Staff estimates that the bill may result in a significant decrease in prison beds because of the reduction in penalties and their retroactive application. See Section V. Fiscal Impact Statement.

The bill takes effect July 1, 2020.

**II. Present Situation:**

**Prison Releasee Reoffender (s. 775.082(9), F.S.)**

Section 775.082(9), F.S., provides that a judge must sentence a person as a “prison releasee reoffender” if the defendant has committed or attempted to commit any of the following enumerated offenses within 3 years after being released from a Florida state or private correctional facility, a county detention facility following incarceration for an offense for which the sentence pronounced was a prison sentence, or a correctional institution of another state, the District of Columbia, the United States, any possession or territory of the United States, or any foreign jurisdiction, following incarceration for an offense for which the sentence is punishable by more than 1 year:

- Treason;
- Murder;
- Manslaughter;
- Sexual battery;
- Carjacking;
- Home-invasion robbery;

- Robbery;
- Arson;
- Kidnapping;
- Aggravated assault with deadly weapon;
- 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 a dwelling or an occupied structure;
- Any violation of s. 790.07, F.S. (felons in possession of firearms);
- Any violation of s. 800.04, F.S. (lewd or lascivious act in the presence of a child);
- Any violation of s. 827.03, F.S. (abuse, aggravated abuse and neglect of a child);
- Any violation of s. 827.071, F.S. (sexual performance by a child); or
- Any violation of s. 847.013(5), F.S. (prohibited computer transmissions constituting lewd exhibition).<sup>1</sup>

A judge must also sentence a defendant as a “prison releasee reoffender” if the defendant committed or attempted to commit any of the previously-described offenses while the defendant was serving a prison sentence or on escape status from a Florida state or private correctional facility or while the defendant was on escape status from a correctional institution of another state, the District of Columbia, the United States, any possession or territory of the United States, or any foreign jurisdiction, following incarceration for an offense for which the sentence is punishable by more than 1 year in this state.<sup>2</sup>

If the state attorney determines that a defendant is a prison releasee reoffender, the state attorney may seek to have the court sentence the defendant as a prison releasee reoffender. Upon proof from the state attorney that establishes by a preponderance of the evidence that a defendant is a prison releasee reoffender, such defendant is not eligible for sentencing under the sentencing guidelines and must be sentenced as follows:

- For a felony punishable by life,<sup>3</sup> by a term of imprisonment for life;
- For a first degree felony,<sup>4</sup> by a term of imprisonment of 30 years;
- For a second degree felony<sup>5</sup>, by a term of imprisonment of 15 years; and
- For a third degree felony,<sup>6</sup> by a term of imprisonment of 5 years.<sup>7</sup>

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<sup>1</sup> Section 775.082(9)(a)1., F.S.

<sup>2</sup> Section 775.082(9)(a)2., F.S.

<sup>3</sup> For example, a capital felony is generally punishable by death or life imprisonment; a life felony is generally punishable by life imprisonment or by a term of imprisonment not exceeding 40 years, and a first degree felony may be punishable by a term of years not exceeding life imprisonment when specifically provided by statute. Section 775.082, F.S.

<sup>4</sup> The maximum term of imprisonment for a first degree felony is generally 30 years imprisonment. Section 775.082, F.S.

<sup>5</sup> The maximum term of imprisonment for a second degree felony is 15 years imprisonment. Section 775.082, F.S.

<sup>6</sup> The maximum term of imprisonment for a third degree felony is 5 years imprisonment. Section 775.082, F.S.

<sup>7</sup> Section 775.082(9)(a)3., F.S.

A person sentenced as a prison releasee reoffender can be released only by expiration of sentence and is not be eligible for parole, control release, or any form of early release. A prison releasee reoffender must also serve 100 percent of the court-imposed sentence.<sup>8</sup>

The prison releasee reoffender provisions provide legislative intent that prison releasee reoffenders “be punished to the fullest extent of the law” unless the prosecuting attorney does not have sufficient evidence to prove the highest charge available, the testimony of material witness cannot be obtained, the victim provides a written statement that he or she does not want the offender to receive a mandatory sentence, or other extenuating circumstances exist which preclude the just prosecution of the offender.<sup>9</sup>

For every case in which the offender meets the prison releasee reoffender criteria and does not receive the mandatory minimum prison sentence, the state attorney must explain the sentencing deviation in writing and place such explanation in the case file maintained by the state attorney.<sup>10</sup>

### **Constitutional and Statutory Savings Clauses**

Until recently, Article X, Section 9 of the State Constitution (Florida’s constitutional savings clause) expressly prohibited any repeal or amendment of a criminal statute that affected prosecution or punishment for any crime previously committed, and therefore, the Florida Legislature was “powerless to lessen penalties for past transgressions; to do so would require constitutional revision.”<sup>11</sup>

In 2018, Florida voters adopted the following amendment to Article X, Section 9 of the State Constitution:

~~Repeal or amendment~~ of a criminal statute shall not affect prosecution ~~or punishment~~ for any crime ~~previously~~ committed before such repeal.

Revised Article X, Section 9 of the State Constitution only prohibits applying the repeal of a criminal statute to any crime committed before such repeal if this retroactive application “affects prosecution.” The revised constitutional savings clause does not expressly prohibit retroactive application of a repeal that does not affect prosecution, a repeal that affects punishment, or an amendment of a criminal statute that affects prosecution or punishment.

The elimination of the expressed prohibition on certain retroactive applications is not a directive to the Legislature to retroactively apply what was formerly prohibited. As the Florida Supreme Court recently stated: “... [T]here will no longer be any provision in the Florida Constitution that would prohibit the Legislature from applying an amended criminal statute retroactively to

<sup>8</sup> Section 775.082(9)(b), F.S. Section 775.082(9), F.S., does not prevent a court from imposing a greater sentence of incarceration as authorized by law, pursuant to s. 775.084, F.S., or any other provision of law. Section 775.082(9)(c), F.S.

<sup>9</sup> Section 775.082(9)(d)1., F.S.

<sup>10</sup> Section 775.082(9)(d)2., F.S.

<sup>11</sup> Comment, *Today’s Law and Yesterday’s Crime: Retroactive Application of Ameliorative Criminal Legislation*, 121 U. Pa. L. Rev. 120, 129 (1972).

pending prosecutions or sentences. However, nothing in our constitution does or will require the Legislature to do so, and the repeal of the prohibition will not require that they do so.”<sup>12</sup>

In 2019, the Legislature created s. 775.022, F.S., a general savings statute for criminal statutes. The statute defines a “criminal statute” as a statute, whether substantive or procedural, dealing in any way with a crime or its punishment, defining a crime or a defense to a crime, or providing for the punishment of a crime.<sup>13</sup>

The statute specifies legislative intent to preclude:

- Application of the common law doctrine of abatement to a reenactment or an amendment of a criminal statute; and
- Construction of a reenactment or amendment as a repeal or an implied repeal<sup>14</sup> of a criminal statute for purposes of Article X, Section 9 of the State Constitution (Florida’s constitutional savings clause).<sup>15</sup>

The statute also states that, except as expressly provided in an act of the Legislature or as provided in two specified exceptions, the reenactment or amendment of a criminal statute operates prospectively and does not affect or abate any of the following:

- The prior operation of the statute or a prosecution or enforcement under the criminal statute;
- A violation of the criminal statute based on any act or omission occurring before the effective date of the act; and
- A prior penalty, prior forfeiture, or prior punishment incurred or imposed under the statute.<sup>16</sup>

The first exception is a retroactive amelioration exception that provides that if a penalty, forfeiture, or punishment for a violation of a criminal statute is reduced by a reenactment or an amendment of a criminal statute, the penalty, forfeiture, or punishment, if not already imposed, must be imposed according to the statute as amended.<sup>17</sup> This means the penalty, forfeiture, or punishment reduction must be imposed retroactively *if the sentence has not been imposed*, including the situation in which the sentence is imposed after the effective date of the amendment. However, nothing in the general savings statute precludes the Legislature from providing for a more extensive retroactive application either to legislation in the future or legislation that was enacted prior to the effective date of the general savings statute. This is because the general savings statute specifically provides for a legislative exception to the default position of prospectivity. The Legislature only has to “expressly provide” for this retroactive application.<sup>18</sup>

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<sup>12</sup> *Jimenez v. Jones*, 261 So.3d 502, 504 (Fla. 2018).

<sup>13</sup> Section 775.022(2), F.S.

<sup>14</sup> The Florida Supreme Court previously indicated that the “standard [is] that implied repeals are disfavored and should only be found in cases where there is a ‘positive repugnancy’ between the two statutes or ‘clear legislative intent’ indicating that the Legislature intended the repeal[.]” *Flo-Sun, Inc. v. Kirk*, 783 So.2d 1029, 1036 (Fla. 2001).

<sup>15</sup> Section 775.022(1), F.S.

<sup>16</sup> Section 775.022(3), F.S.

<sup>17</sup> Section 775.022(4), F.S.

<sup>18</sup> Section 775.022(3), F.S.

The second exception relates to defenses and provides that the general savings statute does not limit the retroactive effect of any defense to a criminal statute enacted or amended by the Legislature to any criminal case that has not yet reached final judgment.<sup>19</sup>

### III. Effect of Proposed Changes:

The bill amends s. 775.082(9), F.S., to reduce mandatory penalties applicable to a prison releasee reoffender. A prison releasee reoffender must be sentenced as follows:

- For a felony punishable by life, to a term of 25 years (current law requires life imprisonment);
- For first degree felony, to a term of imprisonment of 20 years (current law requires 30 years);
- For a second degree felony, to a term of imprisonment of 10 years (current law requires 15 years); and
- For a third degree felony, to a term of imprisonment of 3 years (current law requires 5 years).

The bill provides for retroactive application of the previously-described penalty changes. There are currently technical deficiencies in the bill involving incorrect and conflicting date references (see “Technical Deficiencies” section of this analysis). This analysis represents what appears to be the actual intent of the bill regarding retroactive application.<sup>20</sup> It appears that the intent is to retroactively apply the changes in the bill to:

- A person who qualified as a prison releasee reoffender before July 1, 2020 (referred to in the bill as “former 775.082(9)”), and who was not sentenced as a prison releasee reoffender before July 1, 2020; and
- A person who qualified as a prison releasee reoffender before July 1, 2020, who was sentenced as such before July 1, 2020, to a mandatory minimum term of imprisonment pursuant to former s. 775.082(9), F.S., and who is serving such mandatory minimum term of imprisonment on or after July 1, 2020.

A person who qualified as a prison releasee reoffender before July 1, 2020, and who was not sentenced as a prison releasee reoffender before July 1, 2020, must be sentenced as provided in the bill (see previous description of changes to penalties).

A person who qualified as a prison releasee reoffender before July 1, 2020, who was sentenced as such before July 1, 2020, to a mandatory minimum term of imprisonment pursuant to former s. 775.082(9), F.S., and who is serving such mandatory minimum term of imprisonment on or after July 1, 2020, must be resentenced in the following manner:

- The Department of Corrections must notify this person of his or her eligibility to request a sentence review hearing.
- The person seeking sentence review may submit an application to the court of original jurisdiction requesting that a sentence review hearing be held. The sentencing court retains original jurisdiction for the duration of the sentence for this purpose.
- A person who is eligible for this sentence review hearing is entitled to representation by legal counsel. If the person is indigent and unable to employ counsel, the court must appoint

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<sup>19</sup> Section 775.022(5), F.S.

<sup>20</sup> The bill states: “It is the intent of the Legislature to retroactively apply the amendments to this subsection [s. 775.082(9), F.S.] which are effective on July 1, 2020.” The effective date of the bill is July 1, 2020.

counsel under s. 27.52, F.S. Determination of indigence and costs of representation is as provided in ss. 27.52 and 938.29, F.S.

- Upon receiving an application from an eligible person, the court of original jurisdiction must hold a sentence review hearing to determine if the eligible person meets the criteria for resentencing. If the court determines at the sentence review hearing that the eligible person meets such criteria, the court must resentence the person as provided in the bill (see previous description of changes to penalties); however, the new sentence may not exceed the person's original sentence with credit for time served. If the court determines that such person does not meet the criteria for resentencing, the court must provide written reasons why such person does not meet such criteria.
- A person resented as previously described is eligible to receive any gain-time pursuant to s. 944.275, F.S., he or she was previously ineligible to receive under former s. 775.082(9), F.S.<sup>21</sup>

Because the bill expressly provides for retroactive application of the changes the bill makes, the bill has provided a legislative exception to the default position of prospectivity.

The bill modifies s. 775.082(9)(a)3., F.S., which currently provides that “upon proof from the state attorney that establishes by a preponderance of the evidence that a defendant is a prison releasee reoffender as defined in this section, such defendant is not eligible for sentencing under the sentencing guidelines and must be sentenced” under the penalties specified in s. 775.082(9), F.S. The bill removes reference to the “preponderance of evidence” standard of proof and ineligibility for sentencing under the sentencing guidelines. Neither of these changes appear to be substantive. Whether stated in the statute or not “preponderance of the evidence” would likely be the standard of proof because s. 775.082(9), F.S., does not increase the penalty beyond the statutory maximum.<sup>22</sup> Further, it does not need to be in the statute that a prison releasee reoffender is ineligible to be sentenced under the sentencing guidelines because s. 775.082(9), F.S., specifies that a prison releasee reoffender must be sentenced under that subsection.

The bill also removes language from s. 775.082(9), F.S., that:

- Indicates legislative intent that offenders previously released from prison or a county detention facility following incarceration for an offense for which the sentence pronounced was a prison sentence who meet the prison releasee reoffender criteria be punished to the fullest extent of the law. Requires a state attorney to explain in writing why he or she seeks prison releasee reoffender sanctions for an offender who meets prison releasee reoffender criteria.

The bill takes effect July 1, 2020.

<sup>21</sup> See “Technical Deficiencies” section of this analysis.

<sup>22</sup> “In [*Apprendi v. New Jersey*, 530 U.S. 466 (2000)], the United States Supreme Court held that other than the fact of a prior conviction, any fact that increases the punishment for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *Apprendi* is inapplicable to the Prison Releasee Reoffender Act, because the Act merely limits the court’s discretion in sentencing. It does not increase the penalty beyond the statutory maximum.” *Stabile v. State*, 790 So.2d 1235, 238 (Fla. 5th DCA 2001) (citations omitted), approved, 8383 So.2d 557 (Fla. 2003).

**IV. Constitutional Issues:****A. Municipality/County Mandates Restrictions:**

The bill does not appear to require cities and counties to expend funds or limit their authority to raise revenue or receive state-shared revenues as specified by Article VII, s. 18, of the State Constitution.

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

None.

**C. Trust Funds Restrictions:**

None.

**D. State Tax or Fee Increases:**

None.

**E. Other Constitutional Issues:**

None identified.

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

The Criminal Justice Impact Conference, which provides the final, official estimate of the prison bed impact, if any, of legislation, has not yet reviewed the bill. A preliminary estimate by the Legislature's Office of Economic and Demographic Research (EDR) is not currently available but staff estimates that the bill may result in a significant decrease in prison beds because of the reduction in penalties and their retroactive application.

**VI. Technical Deficiencies:**

The retroactivity provisions of the bill reference "July 1, 2010" on lines 102, 108, and 111. This date is incorrect. The correct date is July 1, 2020, the effective date of the bill. Staff recommends correcting incorrect date references.

The bill provides that a prison releasee reoffender resentenced as provided in the bill is eligible to receive any gain-time pursuant to s. 944.275, F.S., he or she was previously ineligible to receive under former s. 775.082(9), F.S. However, the bill does not remove the current provision which makes prison releasee reoffenders ineligible for any form of early release and requires them to serve 100 percent of their sentence. Only resentenced offenders would receive this benefit. Therefore, staff recommends removal of the current provision which makes prison releasee reoffenders ineligible for any form of early release and requires them to serve 100 percent of their sentence.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends section 775.082 of the Florida Statutes.

**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.