

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 Criminal Justice Committee

BILL: CS/SB 2000

INTRODUCER: Criminal Justice Committee and Senator Dockery

SUBJECT: Sentencing Policy Advisory Council

DATE: March 11, 2008 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Cannon	CJ	Fav/CS
2.			JA	
3.				
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

The bill creates a 15-member Sentencing Policy Advisory Council within the Legislature to evaluate sentencing policy, sentencing practices, and laws affecting or applicable to sentencing or punishment. The bill requires the council to report its findings and recommendations, and recommendations must be consistent with specified goals. The bill contains provisions relevant to membership of the council, selection of its chair, staffing, reimbursement for per diem and travel expenses, required meetings, and reports of findings and recommendations to the Governor, the Legislature, and the Florida Supreme Court, which are due on or before January 15 of each year.

The bill also requires the council to report its preliminary findings and recommendations regarding specific questions on or before January 15, 2009.

This bill creates section 921.0019 of the Florida Statutes.

II. Present Situation:

The Former Sentencing Commission

In 1982, the Legislature created s. 921.001, F.S., which created the Sentencing Commission (“commission”) and charged it with the responsibility for the development of a system of sentencing guidelines on a statewide basis.¹ Initial promulgation of the guidelines was made by the Florida Supreme Court in 1983, and the law required subsequent revisions to be approved by the Legislature prior to enactment. Before sentencing guidelines, sentencing of felony offenders was limited only by the maximum penalty provided for the felony offense pursuant to s. 775.082, F.S. (the general penalties section of the Florida Statutes), and most offenders were parole eligible. This was a form of indeterminate sentencing. The guidelines provided for structured sentencing. Parole was abolished prospectively. In subsequent years, s. 921.001, F.S., was revised numerous times to provide for additional duties for the commission. The commission was dissolved with the repeal of this statute, effective October 1, 2008, though the statute remains in the Florida Statutes for 10 years from October 1, 1998.²

Section 921.001, F.S., in the form in which it appeared prior to its repeal, provided for a 17-member Sentencing Commission consisting of:

- Two members of the Senate appointed by the President of the Senate.
- Two members of the House of Representatives appointed by the Speaker of the House of Representatives.
- The Chief Justice of the Florida Supreme Court or a member of the Florida Supreme Court designated by the Chief Justice.
- Three circuit court judges, one county court judge, and one representative of the victim advocacy profession, appointed by the Chief Justice of the Florida Supreme Court.
- The Attorney General or her or his designee.
- The secretary of the Department of Corrections or her or his designee.
- One state attorney recommended by the Florida Prosecuting Attorneys Association and appointed by the Governor.
- One public defender recommended by the Public Defenders Association and appointed by the Governor.
- One private attorney recommended by the President of The Florida Bar and appointed by the Governor.
- Two persons of the Governor’s choice.

The Chief Justice or a member of the Florida Supreme Court designated by the Chief Justice served as chair of the commission. Commission members appointed by the Governor and commission members from the Senate and the House of Representatives served 2-year terms. Commission members appointed by the Chief Justice of the Supreme Court served at her or his

¹ ch. 82-145, L.O.F.

² Section 1, ch. 97-194, L.O.F., provides that “[s]ections 921.0001, 921.001, 921.011, 921.0012, 921.0013, 921.0014, 921.0015, 921.0016, and 921.005, Florida Statutes, as amended by this act are repealed effective October 1, 1998, except that those sections shall remain in effect with respect to any crime committed before October 1, 1998.” Section 43 of this act provides that “[t]he Division of Statutory Revision of the Joint Legislative Management Committee shall leave the repealed statutory provisions referenced herein in the Florida Statutes for 10 years from October 1, 1998.” The referenced statutes all relate to the former sentencing guidelines.

pleasure. Commission members served without compensation but were entitled to be reimbursed for per diem and travel expenses. The Office of the State Courts Administrator acted as staff for the commission and provided all necessary data collection, analysis, and research, and support services.

The commission met annually or at the call of the chair to review sentencing practices and recommend modifications to the guidelines. In recommending modifications to the sentencing guidelines, the commission was required to take into consideration the existing sentencing and release practices and correctional resources, including the capacities of local and state correctional facilities, in addition to other relevant factors. For the purpose of assisting the commission in recommending modifications to the sentencing guidelines, the Department of Corrections was authorized to collect and evaluate data on sentencing practices in the state from each of the judicial circuits and provide technical assistance to the commission upon request.

The commission was required, no later than October 1 of each year, to make a recommendation to the members of the Florida Supreme Court, the President of the Senate, the Speaker of the House of Representatives, and the chairs of the relevant substantive committees of both houses on the need for changes in the guidelines. Upon receipt of such recommendation, the Florida Supreme Court was authorized to revise the statewide sentencing guidelines to conform them with all or part of the commission's recommendation. This revision then had to be submitted by the Florida Supreme Court to the President of the Senate, the Speaker of the House of Representatives, and the chairs of the relevant substantive committees of both houses no later than December 1 of each year following the receipt of the recommendations of the commission. However, this revision was effective only upon the subsequent adoption by the Legislature of legislation implementing the guidelines as then revised. The court was authorized to also revise the statewide sentencing guidelines if it certified that the revisions were necessary to conform the guidelines to previously adopted statutory revisions.

The commission, with the assistance of the Department of Corrections, was also required to estimate how sentencing score thresholds and weights assigned to the sentencing factors would affect the rates of incarceration and the levels of prison population and submit to the Legislature, by October 1 of each year, recommended sentencing score thresholds, recommended weights assigned to the sentencing factors, and a recommended appropriation for state correctional resources that was sufficient to fund the estimated prison population.

The commission and the Office of the State Courts Administrator were required to conduct ongoing research on the impact of the sentencing guidelines, the use of imprisonment and alternatives to imprisonment, and plea bargaining. The commission, with the aid of the Office of the State Courts Administrator, the Department of Corrections, and the Parole Commission, was also required to estimate the impact of any proposed changes to the sentencing guidelines on future rates of incarceration and levels of prison population, based in part on historical data of sentencing practices which had been accumulated by the Office of the State Courts Administrator and on Department of Corrections records reflecting average time served for offenses covered by the proposed changes to the guidelines. The commission also was required to review the projections of impact and make them available to other appropriate agencies of state government, including the Legislature, by October 1 of each year.

The Former Sentencing Guidelines and the Criminal Punishment Code

As previously indicated, sentencing guidelines were created for felony offenses, excluding capital felonies. These sentencing guidelines underwent significant transformations during the time the guidelines were Florida's sentencing system. The guidelines were repealed in 1997 and replaced by a new sentencing system, the Criminal Punishment Code ("Code"), applicable to felony offenses, excluding capital felonies, committed on or after October 1, 1998.³ Some features of the former sentencing guidelines were retained in the Code: the offense severity ranking chart; sentencing points that are statutorily designated for primary, additional, and prior offenses based on an assigned offense severity level (there are 10 levels with level 10 being the most severe and accruing the most sentencing points);⁴ statutorily designated points or point multipliers for victim injury and other factors; and "mitigating" factors (factors that may be found that will allow for a reduction in sentence length or a non-prison sanction rather than a prison sentence).

There are several important differences between the former guidelines and the Code. The Code eliminated "upward departure sentences," a feature of the former guidelines. The sentence imposed under the former guidelines was the recommended guidelines sentence, unless the sentenced was "mitigated" (reduced) based on the finding of a mitigating circumstance (a "downward departure sentence") or an "upward departure sentence" was imposed based on an aggravating circumstance. A downward departure sentence and an upward departure sentence were subject to appeal. Under the Code, absent mitigation, the scored "lowest permissible sentence" is simply the "floor" for sentencing for all felonies scored under the Code. The "ceiling" for sentencing is the maximum penalty for the felony degree of the offense as provided in s. 775.082, F.S. (The one exception is when the scored lowest permissible sentence exceeds the maximum penalty under s. 775.082, F.S., in which case the sentence required by the Code must be imposed.) Although sentencing practices might indicate that the majority of sentences are closer to the lowest permissible sentence than to the maximum penalties in s. 775.082, F.S., no sentencing court is constrained from imposing the maximum penalty allowable by law. Code sentences are not appealable except as illegal sentences or as mitigated sentences, though the latter may only be appealed by the state.

The mechanism for calculating the lowest permissible sentence under Code also differs from the mechanism under the former guidelines. Under the Code, the lowest permissible sentence is the minimum sentence that may be imposed by the trial court, absent a valid reason for mitigation. The lowest permissible sentence is any nonstate prison sanction in which the total sentence points equal or are less than 44 points, 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. When the total sentence points are greater than 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.

For example, if a first-time offender is convicted of a level 7 second degree felony as the defendant's primary offense and accrues no other sentence points but the sentence points for the

³ See chs. 97-194 and 98-204, L.O.F.

⁴ A level may be assigned to a felony offense by specifically ranking the offense in the offense severity ranking chart (s. 921.0022, F.S.) or pursuant to s. 921.0023, F.S., which assigns a specific ranking to any unlisted felony offense based on the felony degree of that offense.

primary offense, the offender scores 56 sentence points for the Level 7 primary offense. Since total sentence points are greater than 44 points, the lowest permissible sentence scored is state prison, and a state prison sentence must be imposed, absent mitigation. The lowest permissible sentence in prison months is 21 months ($56 - 28 = 28 \times .75 = 21$). The permissible sentencing range is 21 months to 180 months (i.e., 15 years, which is the maximum penalty under s. 775.082, F.S., for a second degree felony).

Section 921.002(1), F.S., provides that the Code embodies the principles that:

- Sentencing is neutral with respect to race, gender, and social and economic status.
- The primary purpose of sentencing is to punish the offender. Rehabilitation is a desired goal of the criminal justice system but is subordinate to the goal of punishment.
- The penalty imposed is commensurate with the severity of the primary offense and the circumstances surrounding the primary offense.
- The severity of the sentence increases with the length and nature of the offender's prior record.

III. Effect of Proposed Changes:

The bill creates s. 921.0019, F.S., which creates a 15-member Sentencing Policy Advisory Council (“council”) within the Legislature to evaluate sentencing policy, sentencing practices, and laws affecting or applicable to sentencing or punishment, including, but not limited to, the Criminal Punishment Code (“Code”),⁵ the degree and offense severity level ranking of offenses, mandatory sentences, enhanced penalties, felony and misdemeanor reclassifications, gain-time and early release mechanisms, and for the purpose of making findings and recommendations on a continuing basis regarding changes to such policy, practices, and laws. The council serves in an advisory capacity to the Legislature, the Governor, and the Supreme Court.

Any recommended change to sentencing policy, sentencing practices, or laws affecting or applicable to sentencing or punishment must be consistent with all of the following goals:

- Protecting public safety, including, but not limited to, ensuring the incarceration of violent criminal offenders and nonviolent criminal offenders who commit repeated acts of criminal behavior and who have demonstrated an inability to comply with less restrictive penalties previously imposed for nonviolent criminal acts.
- Supporting the principles embodied in the Code as described in s. 921.002(1), F.S.⁶
- Providing for the most cost-effective and efficient use of correctional resources to the extent that such use is not in conflict with the goals relating to public safety and the principles embodied in the Code.

⁵ See ss. 921.002, 921.0021, 921.0022, 921.0023, 921.0024, 921.0025, 921.0026, 921.00265, and 921.0027, F.S.

⁶ See the “Present Situation” section of this analysis for a discussion of these principles.

The council is composed of the following 15 members:

- Two members of the Senate appointed by the President of the Senate.
- Two members of the House of Representatives appointed by the Speaker of the House of Representatives.
- The Chief Justice of the Florida Supreme Court or a member of the Florida Supreme Court designated by the Chief Justice.
- Three circuit court judges, one county court judge, and one representative of the victim advocacy profession, appointed by the Chief Justice of the Florida Supreme Court.
- The Attorney General or her or his designee.
- The Secretary of the Department of Corrections or her or his designee.
- One state attorney appointed by the Governor from a list of three nominees recommended by the Florida Prosecuting Attorneys Association.
- One public defender appointed by the Governor from a list of three nominees recommended by the Public Defenders Association.
- One private attorney appointed by the Governor from a list of three nominees recommended by the President of The Florida Bar.

Council membership must reflect the geographic and ethnic diversity of the state. The council chair is selected by the members for a 1-year term. Council members are appointed to serve 4-year terms, except that a legislative member's term expires upon leaving office as a Senate or House member.

The council must meet at least quarterly, though other meetings may be called by the chair upon giving 7 days' notice to the public. The council is authorized to take public testimony.

Council members serve without compensation, but are entitled to per diem and travel expenses, which are paid by the appointing entity.

The Office of Legislative Services provides staff support for the council. Council staff members consist of an executive director and any other staff member determined to be necessary to the completion of the council's duties, subject to appropriations. Upon request of the chair of the council or the executive director, the Legislature's Office of Economic and Demographic Research, the Office of Program Policy Analysis and Government Accountability, the Department of Corrections and any other state agency or department, and the Office of the State Courts Administrator must assist the council in providing necessary data collection, analysis, and research.

On or before January 15 of each year, the council must provide a report of its findings and recommendations to the Governor, the President of the Senate, the Speaker of the House of Representatives, and the Chief Justice of the Supreme Court. The council may provide the Legislature, the Governor, and the Florida Supreme Court with additional reports of findings and recommendations at any time it deems appropriate. Additionally, the President of the Senate or the Speaker of the House may also direct the council to report by a certain date the council's findings and recommendations regarding an issue pertinent to sentencing policy, sentencing practice, or laws affecting or applicable to sentencing or punishment.

In addition to the council's yearly reporting requirements, the bill directs the council to provide preliminary findings and recommendations to the Governor, the President of the Senate, the Speaker of the House of Representatives, and the Florida Supreme Court on or before January 15, 2009, regarding the following questions:

- Should the Legislature repeal any laws providing for a mandatory minimum sentence or modify such laws to provide for presumptive mandatory minimum sentences or exceptions to mandatory sentences in some circumstances?⁷
- Do mandatory sentencing laws conflict with or undermine the purpose of the Criminal Punishment Code?⁸
- Are particular criminal acts punished as more than one specific offense and, if so, has this resulted in duplication, confusion, or inconsistent penalties?⁹
- Are the penalties for particular felony or misdemeanor offenses disproportionate to those for other felonies or misdemeanor offenses of a similar nature or severity?¹⁰
- Do current enhanced penalties or felony and misdemeanor reclassifications for repeat offenders result in duplication, confusion, or inconsistent penalties?¹¹
- Should the Legislature preclude the courts from sentencing to prison defendants convicted of third-degree felonies who score under 44 total sentence points?¹²

⁷ Although the Criminal Punishment Code provides for considerable flexibility in sentencing, there are numerous mandatory minimum sentences in the Florida Statutes that limit the sentencing court's ability to apply a Code sentence the court believes is appropriate based on the particular facts of the case and within the limits of the law. A "presumptive mandatory minimum sentence," which Florida law does not currently authorize, may be defined as a mandatory minimum penalty that is presumed to apply unless the sentencing court deviates from this penalty based on "good cause," the "interests of justice," the finding of a specific factor or factors, or whatever ground the Legislature determines is an appropriate ground for such deviation.

⁸ *Id.*

⁹ For example, s. 812.019, F.S., punishes dealing in stolen property. Section 812.0195, F.S., punishes dealing in stolen property by use of the Internet. If s. 812.095, F.S., did not exist, the elements of dealing in stolen property under s. 812.019, F.S., would not appear to preclude charging a person under that statute for dealing in stolen property by use of the Internet. Another example is mutilation of the state flag. There are currently three statutes that punish this criminal act. See ss. 256.051, 256.06, and 876.52, F.S.

¹⁰ Currently, there is no annual or continuing review of penalties by any branch of government or by any body to assess whether the penalty for an offense may be disproportionate in relation to similar offenses.

¹¹ Enhanced penalties may be defined as penalties that a sentencing court may impose or is required to impose that exceed the maximum penalties in s. 775.082, F.S. However, sometimes the term "enhanced penalty" has been used to describe a misdemeanor or felony offense that is greater in felony or misdemeanor degree than a similar, but not identical, offense. For example, identity theft or identity fraud is generally a third degree felony under s. 817.568(2)(a), F.S. However, under s. 817.568(2)(b), F.S., if the amount of the injury or fraud perpetrated is \$5,000 or more, the crime is a second degree felony. A reclassification statute generally increases the degree of a crime by one felony or misdemeanor degree if a particular factor is found. Regarding enhanced penalties for repeat offenders, ss. 775.082 and 784.084, F.S., alone provide for five repeat offender classifications with enhanced penalties: prison releasee reoffender; habitual felony offender; habitual violent felony offender; three-time violent felony offender; and violent career criminal. More than one classification may be applicable to a person based upon the person's current offense and criminal history.

¹² Under the Code, the scored lowest permissible sentence is a nonstate prison sanction when total sentence points equal or are less than 44 points. A sentencing court may exceed the lowest permissible sentence, even when total sentence points equal or are less than 44 points. However, a prison sentence must exceed one year. Courts have imposed a sentence of a year-and-a-day, which means the offender will be incarcerated in state prison. While this sentencing lessens the impact on local jails, it increases the impact on the state prison system.

- Should the Legislature change the current “Truth in Sentencing” gain-time restrictions specified in s. 944.275(4)(b)3., F.S., to more closely align with the federal minimum requirements?¹³
- Should the Legislature authorize correctional probation officers to apply a continuum of administrative sanctions for technical probation violations that do not affect public safety?¹⁴

The effective date of the bill is July 1, 2008.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

¹³ This subparagraph provides, in part, that for sentences imposed for offenses committed on or after October 1, 1995, the Department of Corrections may grant up to 10 days per month of incentive gain-time, except that no prisoner is eligible to earn any type of gain-time in an amount that would cause a sentence to expire, end, or terminate, or that would result in a prisoner’s release, prior to serving a minimum of 85 percent of the sentence imposed. The bill’s reference to “federal minimum requirements” is a reference to federal grants provided to states that enact laws to require that certain violent offenders serve at least 85 percent of their sentences. Some states have enacted such a requirement only in regard to violent offenders, while other states, like Florida, have enacted such a requirement in regard to all offenders incarcerated in state prison. “Congress addressed truth in sentencing as part of the Violent Crime Control and Law Enforcement Act of 1994. Funding at \$8 billion through the year 2000 was authorized for the Violent Offender Incarceration and Truth in Sentencing Incentive Grant (VOITIS) program. States receive money for construction or improvement of correctional facilities upon demonstration that truth in sentencing and related incarceration policies exist for violent offenders. Regulations were designed to accommodate various sentencing structures, including guidelines, as well as new laws that specify 85 percent of sentence policy.” Lyons, Donna. *NCSL Legisbrief: Truth in Sentencing*. Vol. 7, No. 21 (April/May 1999). National Conference of State Legislatures.

¹⁴ In 2007, the Office of Program Policy Analysis & Governmental Accountability (OPPAGA) recommended that “[t]he state should consider alternatives to handling technical violations by low-risk offenders in order to better target limited resources at persons who pose the greatest public risk while still holding all offenders responsible for their actions.” Most of these alternatives have been enacted by law [technical violation letters and citations (notice to appear)] or by the courts (violation of probation court). Two alternatives have not been implemented. The first relates to having a designated officer (“determination officer”), using established criteria, determine whether or not to submit violation reports on technical violations forwarded to the designated officer by probation officers. The second is graduated sanctions for minor violations, or more specifically, authorizing probation officers to “apply a continuum of administrative sanctions to technical violations that could include loss of privileges, increased reporting and drug testing, the imposition of curfew, and community service.” OPPAGA states that “[t]he guidelines or formal response structure should take into consideration the determined risk level of the individual, his or her previous violations, the nature of the particular violation, and the full range of potential responses.” *Department of Corrections Zero Tolerance Policy Increases Offender Scrutiny But Is Not Based on Risk to Public Safety*. Report No. 07-13 (February 2007). Office of Program Policy Analysis & Governmental Accountability.

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

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The bill authorizes per diem and travel expenses, which are paid by the appointing entity.

The bill also requires the Office of Legislative Services to provide staff support for the council. Council staff members consist of an executive director and any other staff member determined to be necessary to the completion of the council's duties, subject to appropriations.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

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

CS by Criminal Justice on March 11, 2008:

Eliminates references to rules of criminal procedure so that the Sentencing Policy Advisory Council's review and findings and recommendations are directed at sentencing policy, sentencing practice, and laws affecting or applicable to sentencing or punishment.

B. Amendments:

None.