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DATE: June 4, 1997

****AS PASSED BY THE LEGISLATURE****
CHAPTER #: 97-194, Laws of Florida

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
CRIME AND PUNISHMENT
FINAL BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL #: CS/HB 241, Second Engrossed
RELATING TO: Sentencing
SPONSOR(S): Crime and Punishment Committee and Representative Valdes
STATUTE(S) AFFECTED: ss. 20.315; 39.0581; 775.0823; 775.084; 775.0845; 775.087; 775.0875;
777.03; 777.04; 782.051; 784.08; 794.023; 874.04; 893.13; 893.135;
893.20; 921.001; 921.0014; 921.0016; 921.0021-24; 921.0026;
921.187-88; 924.06-07; 944.17; 947.141; 947.146; 947.168; 948.015;
948.034; 948.51; 958.04
COMPANION BILL(S): SB 716(s)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) CRIME AND PUNISHMENT YEAS 8 NAYS 1
- (2) CRIMINAL JUSTICE APPROPRIATIONS YEAS 7 NAYS 1
- (3)
- (4)
- (5)

I. SUMMARY:

Effective October 1, 1998, the bill establishes the "Florida Criminal Punishment Code." Currently, the court is required to impose, either a state sentence within 25% of a recommended guideline, or the court may depart to any sentence within the statutory maximum if there are sufficient reasons to depart from the sentencing guidelines. The bill allows a judge to impose any prison sentence up to the statutory maximum. The statutory maximum is 5 years for a third degree felony, 15 years for a second degree felony and 30 years for a first degree felony. However, under the new Punishment Code, a Judge may not impose a sentence below what is the equivalent of the present bottom of the guideline range without written reasons. Therefore, the sentencing "floor" that exists under the current guidelines will remain the same, but the "ceiling" will only be limited by the maximum sentence allowed by statute.

Effective July 1, 1997, the new code allows the court to sentence any **second-time felony offender** up to **22-months** in prison, regardless of whether the guidelines call for a prison sentence.

Effective July 1, 1997, the bill prohibits judges from using the defendant's substance abuse, or addiction, as a reason to sentence a person below the sentencing guidelines.

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II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

The Sentencing Guidelines

The Sentencing Guidelines, as enacted on January 1, 1994, and revised on October 1, 1995, divide most felony crimes into 10 levels of rising degrees of severity. The points assigned to an offense within a particular level vary depending on whether the offense is the primary offense charged, an accompanying offense, or is part of a defendant's criminal record. When all the points are added up, the preparer of the score sheet is to subtract the total by 28 to get the number of months which become the middle of the guidelines. Any sentence 25% above or below the middle of the guidelines is still "within the guidelines" and is not considered a departure sentence. If the bottom of the guidelines totals less than 12 months then the court may also give any nonstate prison sanction including a term in the county jail. The guidelines also assign additional points for such aggravating factors as victim injury, sexual penetration, violations of probation, and whether a firearm was used in the commission of a felony.

Departure Sentences

Section 921.0016, F.S., allows a court to impose a sentence above or below the guidelines if a court finds that a particular aggravating or mitigating circumstance exists. Grounds for departure are listed in section 921.0016, F.S., however, the reasons for departure listed by statute are not exclusive. Examples of aggravating circumstances include: the departure results from a plea bargain; the offense was one of violence and was committed in a manner that was especially heinous, atrocious, or cruel; the offense was motivated by prejudice based on race, color, ancestry, ethnicity, religion, sexual orientation, or national origin of the victim; and the defendant is not amenable to rehabilitation as evidenced by an escalating pattern of criminal conduct. Examples of mitigating circumstances that permit a sentence below the guidelines include: plea bargains; the capacity of the defendant to appreciate the criminal nature of the conduct was substantially impaired; the defendant requires specialized treatment for addiction and is amenable to treatment; the defendant is to be sentenced as a youthful offender; and the need to repay restitution outweighs the need for a prison sentence.

In practice, for all defendants who score prison time, sentences below the guidelines occur more often than sentences within the guideline range. According to the Department of Corrections, 62% of all defendants who score prison time receive sentences below the bottom of the guidelines. These figures vary region to region from 85% downward departure in Miami to 30% in Key West. New information from the Department indicates that the 1995 guidelines appear to be mitigated at a rate of 38% higher than the 1994 guidelines. In contrast, 1.1% of defendants are sentenced to prison when the guidelines score does not call for state prison. However, the 1.1% figure does not take into account habitual offender sentences and mandatory minimum sentences which provide some flexibility for upward departure.

Habitual Offender and Mandatory Minimum Sentences

Over 12% of state prison inmates are sentenced as habitual offenders or receive mandatory minimum sentences that usually exceed the guideline range. An example of

minimum mandatory is section 775.087, F.S., which requires the imposition of a minimum three year sentence if a person carries a firearm during the commission of certain crimes such as robbery, aggravated assault, aggravated battery, and burglary.

A person may be sentenced as an habitual offender if the following criteria are met:

1. The defendant has previously been convicted of any combination of two or more felonies in this state or other qualified offenses.
2. The felony for which the defendant is to be sentenced was committed within 5 years of the defendant's last felony, or within 5 years of the defendant's release from prison or parole.
3. The felony for which the defendant is to be sentenced, and one of the two prior felony convictions is not for possession of a controlled substance.

Reasons for High Frequency of Downward Departure Sentences

There are a number of possible reasons why so many defendants are receiving sentences below the guidelines. One reason could be that judges and prosecutors are making low plea offers to resolve heavy caseloads. Indeed, some of the most populous areas such as Miami and West Palm Beach have the highest rate of downward departure sentences, however, large metropolitan areas including Jacksonville, Orlando and Tampa have departure rates slightly below the state average.

Another explanation could be that most defendants qualify for at least one of the mitigating circumstances for downward departure. Many defendants have addiction problems, many are youthful offenders, and many owe substantial restitution. On the other hand, fewer defendants may qualify for upward departure. A large proportion of crimes fit into three categories for which aggravating circumstances generally do not apply: 1. crimes against property; 2. possession or sale of controlled substances; and 3. domestic related offenses. Judges may also be more reluctant to impose an upward departure than a downward departure because prosecutors do not often appeal a court's decision, but defendants regularly appeal their sentences. Furthermore, many of the defendants who qualify for upward departure are being sentenced as habitual offenders.

Ninety-eight percent of cases that result in the imposition of a sentence are resolved by a plea either "straight up" to the court, or as is most often the case, by plea agreement with the prosecutor. Because of the nature of plea negotiations, sentences below the guideline range will often outnumber sentences above the guideline range. The starting point for most plea negotiations is the guideline range, and a common sense understanding of what a fair sentence would be. From that starting point there are two considerations that lower plea offers, and which play a part in almost every plea negotiation. First is the likelihood that a defendant will be found guilty after trial. There is always a chance that the prosecution will lose; witnesses may fail to show up for trial, a mistake could be made at trial, etc. Second, courts would be overwhelmed if more than a small percentage of cases go to a jury trial every year, therefore, a plea offer usually includes an incentive for the defendant not to go to trial. There are also a myriad of other factors which may be critically important in deciding whether the offer should go up or down, including: whether the defendant is a habitual offender, whether the victim is interested in the outcome, whether any of the aggravating or mitigation circumstances mentioned above exist, the relative experience of the attorneys, whether the defendant is

supporting a family, caring for a parent, has steady employment, or is studying for a college degree, etc. Because of all the variables involved in every plea negotiation and every sentence, it is difficult to make conclusions as to why downward departure sentences are imposed.

The mitigation rates are very high if only the population that scores "mandatory prison" is considered. The total downward departure rate for all cases is low because most defendants do not score prison "mandatory" prison, and no departure from the guidelines is needed to impose probation or county jail time. By statute, all sentences of incarceration for less than 1 year must be served in a county jail, and sentences of more than 1 year must be served in a state prison.

The Sentencing Commission

Chapter 921, Florida Statutes, establishes the current sentencing as well as the Sentencing Commission whose duties are evaluating the guidelines and recommending on a continuing basis changes to ensure incarceration of violent offenders and repeat nonviolent offenders who demonstrate an inability to comply with less restrictive penalties. The membership of the Sentencing Commission is composed of the following:

1. Two members of the Senate appointed by the President of the Senate.
2. Two members of the House of Representatives appointed by the Speaker of the House of Representatives.
3. The Chief Justice of the Supreme Court or a member of the Supreme Court designated by the Chief Justice.
4. Three circuit court judges.
5. One county court judge.
6. One representative of the victim advocacy profession, appointed by the Chief Justice of the Supreme Court.
7. The Attorney General or a designee.
8. The Secretary of the Department of Corrections or a designee.

Statistics on Present Situation.

The Department of Corrections calculates the probability of a prison sentence in the following manner:

- ◆ Of all felony offenses known to police, about **20%** result in an arrest.
- ◆ Of those arrested, about **two-thirds** result in a conviction.
- ◆ Of those convicted, about **20%** result in incarceration in state prison. (**55%** of all sentence felons do not score prison.)
- ◆ Therefore, a typical arrest produces a probability of **1 in 40** of state prison.

B. EFFECT OF PROPOSED CHANGES:

The bill repeals the sentencing guidelines and abolishes the Sentencing Commission, effective October 1, 1998. On that date, the current sentencing guidelines are replaced with the "Florida Criminal Punishment Code."

Currently, the court is required to impose, either a state sentence within 25% of a recommended guideline, or the court may depart to any sentence within the statutory maximum if there are sufficient reasons to depart from the sentencing guidelines. The bill allows a judge to impose any prison sentence up to the statutory maximum. The statutory maximum is 5 years for a third degree felony, 15 years for a second degree felony and 30 years for a first degree felony. However, under the new Punishment Code, a Judge may not impose a sentence below what is the equivalent of the present bottom of the guideline range without written reasons. Therefore, the sentencing "floor" that exists under the current guidelines will remain the same, but the "ceiling" will only be limited by the maximum sentence allowed by statute.

The Criminal Punishment Code leaves the current Offense Severity Ranking Chart intact. The Code will also utilize a worksheet that is basically identical to the current sentencing guidelines worksheet, however, the only calculation of any consequence is the current bottom the guideline range which will determine if a judge may impose a non-prison sanction without a written reason.

The bill allows judges to sentence any offender who has at least one prior felony conviction to state prison for up to 22 months, regardless of the offender's recommended guidelines sentence, effective July 1, 1997 (see HB 1033). This provision would only apply to those offenders who commit an offense on or after July 1, 1997, and before October 1, 1998.

The bill also prohibits judges from using the defendant's substance abuse or addiction as a mitigating factor supporting a downward departure from the sentencing guidelines, effective July 1, 1997. This prohibition is also included in the Criminal Punishment Code.

The bill reclassifies crimes committed while wearing hoods or masks to next offense level. For example, a crime which was classified as a first-degree misdemeanor will be reclassified as a third-degree felony, if committed while wearing a hood or mask. If it was a third-degree felony, it is reclassified to a second-degree felony.

The bill amends Sections 397.705 and 893.15, Florida Statutes to prevent a judge from dismissing a drug related case after a defendant successfully completes a drug rehabilitation program. See Florida v. Dugan and Burroughs 21 FLW S356 (Fla. 1996). A judge will still have the ability to dismiss offenses for the possession of controlled substances through "drug court" which is authorized under a separate chapter (948.08).

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

The bill increases a judge's discretion over criminal sentences imposed.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

No.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

Not applicable.

(2) what is the cost of such responsibility at the new level/agency?

Not applicable.

(3) how is the new agency accountable to the people governed?

Not Applicable.

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

Not Applicable.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

Not Applicable.

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

The bill would give more importance to judicial elections. Voters in a community could elect judges who represent the values of the community.

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

Not applicable.

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

Not Applicable.

(2) Who makes the decisions?

Not Applicable.

(3) Are private alternatives permitted?

Not Applicable.

(4) Are families required to participate in a program?

Not Applicable.

(5) Are families penalized for not participating in a program?

Not Applicable.

b. Does the bill directly affect the legal rights and obligations between family members?

Not Applicable.

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

Not Applicable.

(2) service providers?

Not Applicable.

(3) government employees/agencies?

Not Applicable.

D. SECTION-BY-SECTION RESEARCH:

Section 1: effective October 1, 1998, repeals section 921.001, F.S., except for crimes committed before October 1, 1998.

Section 2: establishes effective date of October 1, 1998 for enactment of the Florida Criminal Punishment Code.

Section 3: creates s. 921.001 -- the Florida Criminal Punishment Code.

Section 4: creates s. 921.0021 -- definition of terms.

Section 5: creates s. 921.0022 -- offense severity ranking chart.

Section 6: creates s. 921.0023 -- unlisted felony offenses.

Section 7: creates s. 921.0024 -- worksheet.

Section 8: creates s. 921.0026 -- mitigating circumstances.

Section 9: amending s. 20.315 -- the Florida Corrections Commission.

Section 10: amending s. 39.0581 -- maximum risk residential programs.

Section 11: amending s. 775.0823 -- offenses against law enforcement officers.

Section 12: amending s. 775.084 -- violent career criminals, habitual felony offenders and habitual violent felony offenders.

Section 13: amending s. 775.0845 -- wearing of mask while committing offenses.

Section 14: amending s. 775.087 -- possession of weapon during commission of felony.

Section 15: amending s. 775.0875 -- reclassification for taking of law enforcement officer's weapon while lawfully performing his duties.

Section 16: amending s. 777.03 -- accessory after the fact.

Section 17: amending s. 777.04 -- attempts, solicitation & conspiracy.

Section 18: amending s. 782.051 -- felony causing bodily injury.

Section 19: amending s. 784.08 -- assault or battery on persons over 65.

Section 20: amending s. 794.023 -- sexual battery by multiple perpetrators.

Section 21: amending s. 874.04 -- criminal street gang activity.

Section 22: amending s. 893.13 -- controlled substances.

Section 23: amending s. 893.135 -- trafficking in controlled substances.

Section 24: amending s. 893.20 -- continuing criminal enterprise.

Section 25: amending s. 921.187 -- disposition alternatives.

Section 26: amending s. 921.188 -- placement of certain state inmates.

Section 27: amending s. 924.06 -- appeal by defendant.

Section 28: amending s. 924.07 -- appeal by state.

Section 29: amending s. 944.17 -- commitments; classifications.

Section 30: amending s. 947.141 -- violations of conditional release.

Section 31: amending s. 947.146 -- control release authority.

Section 32: amending s. 947.168 -- consideration of parole eligible offense.

Section 33: amending s. 948.015 -- presentence investigation reports.

Section 34: amending s. 948.034 -- terms and conditions of probation.

Section 35: amending s. 948.51 -- community corrections assistance to counties.

Section 36: amending s. 958.04 -- youthful offenders.

Section 37: amending s. 921.0014 -- sentencing guidelines; worksheet; score sheet.

Section 38: amending s. 397.705 -- substance abuse offender referrals.

Section 39: amending s. 893.15 -- rehabilitation.

Section 40: amending s. 921.001 -- sentencing commission and sentencing guidelines, generally.

Section 41: amending s. 921.0016 -- recommended, guideline, departure sentences.

Section 42: establishes effective date as to the Florida Punishment Code.

Section 43: directs that sentencing guidelines are to remain in print for 10 years from October 1, 1998.

Section 44: establishing effective date of July 1, 1997 and "upon becoming law" for certain sections of this bill, not otherwise becoming effective on October 1, 1998.

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None.

2. Recurring Effects:

Indeterminate. See section D., Fiscal Comments.

3. Long Run Effects Other Than Normal Growth:

Indeterminate. See section D., Fiscal Comments.

4. Total Revenues and Expenditures:

Indeterminate. See section D., Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS a WHOLE:

1. Non-recurring Effects:

None.

2. Recurring Effects:

Indeterminate. See section D., Fiscal Comments.

3. Long Run Effects Other Than Normal Growth:

Indeterminate. See section D., Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

None.

2. Direct Private Sector Benefits:

None.

3. Effects on Competition, Private Enterprise and Employment Markets:

None.

D. FISCAL COMMENTS:

Repeal of the sentencing guidelines and the establishment of the new Code will give judges much more discretion to impose a sentence within the statutory maximum for most offenses. Because there is currently no available mechanism for projecting sentencing practices without a guidelines structure the impact of the bill cannot be estimated. The Criminal Justice Estimating Conference addressed the bill's impact on prison beds and decided that the bill will result in an indeterminate, but potentially significant, increase in future prison population.

To the extent that any increase in prison sentences results in more offenders incarcerated in county jail, the bill will have an indeterminate fiscal impact on local governments.

The Criminal Justice Estimating Conference did determine that two sections of the bill would have an impact on prison populations. The fiscal impact of the amended bill has

been determined by the Criminal Justice Estimating Conference to be 1,834 new admissions to the Department of Corrections by June 2000, due to the following two provisions: (1.) the provision prohibiting drug and alcohol use from being used as a reason for a downward departure sentence. (2.) to the provisions allowing a 22 month prison sentence for all felony offenders who are convicted of a second felony offense. The impact of the repeal of the guidelines is indeterminate until 10 years from now because it is not known how the sentence length provisions of the bill will change judicial practices.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill is exempt from the requirement of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities have to raise revenues in the aggravate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

Impact of Increasing Judicial Discretion

It is not possible to predict what effect the repeal of the guidelines would have on the prison population. An argument could be made that the high rate of downward departure sentences demonstrate that the courts and prosecutors are not willing to be more punitive. On the other hand, it could also be argued that the guidelines are the starting point of plea negotiations and the ending point is usually lower. If the starting point of prosecutors bargaining position is raised, then perhaps the outcome of plea negotiations would be higher sentences.

There is some reason to believe that the length of prison sentences may not increase for the more serious crimes. According to the Department of Corrections, the 1995 revision of the guidelines, which dramatically increased the number of points assigned to levels 7,8,9, and 10, had no effect on the average length of prison sentences. In fact, while the number of guilty dispositions has remained the same, the percentage of those guilty dispositions resulting in a prison sentence has decreased. Surprisingly, the percentage of sentences over 56 months has declined from 76.6% under the 1994 guidelines to 73.1% of cases sentenced under the 1995 revisions. This information has caused the Criminal Justice Estimating Conference to revise its forecast of prison population in the year 2002 from 116,205 to 84,099.

One possible reason the 1995 revision did not have much impact could be that judges and prosecutors are not willing or able to give longer sentences for the serious types of crimes whose penalties were increased by the revisions. The increase in downward departure rates more than compensated for the more severe sanctions allowed by the 1995 revisions. Many of the crimes affected by the revision, such as sex offenses, are often very difficult to prove. As mentioned earlier, drug offenses are often not very difficult to prove. It is likely that this bill would increase the rate of incarceration for drug offenses. (See section II.B., Effect of Proposed Changes.)

Unequal sentences

The guidelines thus far have allowed regional disparity and disparity between judges within a region. A majority of inmates receive downward departure sentences. Over 12% of inmates receive habitual offender or minimum mandatory sentences which would usually exceed the guidelines. It is not known whether disparities between similarly situated defendants would be increased by this bill. However, to the extent that regional differences increase, those differences could reflect the values of local voters who elect the judges and the State Attorney in their region.

Proponents

Proponents favor this bill because the guidelines limit the judges discretion and to some degree reduce issues of justice and fairness to a mathematical formula which can not always take into account all the variables that should be considered. Within individual crimes there are often tremendous differences that the guidelines do not consider. a hypothetical example of a less serious burglary would be person who used a key to retrieve property from a former roommate and while retrieving property from an unoccupied apartment, drank a soda belonging to the "victim". That hypothetical burglary scores "mandatory" prison the same as a burglary committed by a person who slips in through a window and steals jewelry while the victim is sleeping. Of course, in the first example the court and the prosecutor would be unlikely to require prison. The guidelines present another inequity in that a defendant who is sentenced at one time for two separate criminal acts scores fewer months in prison than the same defendant would score if each offense is resolved separately.

Proponents also argue that drug cases are not treated seriously, and that downward departures are easier and more frequent than upward departures. Another concern is that guidelines create more issues for a defendant to appeal.

Opponents

Opponents argue that giving the courts more discretion will cause more disparity between similarly situated defendants. In fact, the current guidelines allow disparity as evidenced by the fact that some counties have much higher rates of sentences that are below the guidelines than other counties.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The Senate adopted a "strike-everything" amendment so that CS/HB 241 is infact identical to CS/SB 714

VII. SIGNATURES:

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Prepared by:

Legislative Research Director:

J. Willis Renuart

J. Willis Renuart

AS REVISED BY THE COMMITTEE ON CRIMINAL JUSTICE APPROPRIATIONS:

Prepared by:

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Mary Cintron

Mary Cintron

FINAL RESEARCH PREPARED BY COMMITTEE ON CRIME AND PUNISHMENT:

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DATE: March 10, 1997

HOUSE OF REPRESENTATIVES
COMMITTEE ON
CRIME AND PUNISHMENT
BILL ANALYSIS & ECONOMIC IMPACT STATEMENT

BILL #: PCS/HB 241
RELATING TO: Sentencing
SPONSOR(S): Crime and Punishment Committee and Representative Valdes
STATUTE(S) AFFECTED: Sections 921.001 through Sections 921.016, F.S.
COMPANION BILL(S): SB 716(s)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) CRIME AND PUNISHMENT
- (2) CRIMINAL JUSTICE APPROPRIATIONS
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I. SUMMARY:

This bill would repeal the guidelines effective October 1, 1987. After that date a judge will be able to impose any sentence within the statutory maximum, unless otherwise prohibited by a statute requiring a mandatory minimum prison term for certain offenses. The statutory maximum for a third degree felony is 5 years in prison or any combination of prison and probation which does not exceed 5 years. The statutory maximum for a second degree felony is 15 years and the statutory maximum for a first degree felony is 30 years.

It is not possible to predict what effect the repeal of the guidelines would have on the prison population. The current high rates of downward departure suggest that there is already considerable flexibility to disregard the sentencing guidelines.

This bill abolishes the present Sentencing Commission and replaces it with the Sentencing Reform Commission on the date that this bill becomes law. On or before January 1, 1998, the new commission would be required to provide the Legislature with the recommendations for a sentencing policy and structure for the State.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

The Sentencing Guidelines

The Sentencing Guidelines as enacted on January 1, 1994, and revised on October 1, 1995, divide most felony crimes into 10 levels of rising degrees of severity. The points assigned to an offense within a particular level vary depending on whether the offense is the primary offense charged, an accompanying offense, or is part of a defendant's criminal record. When all the points are added up, the preparer of the score sheet is to subtract the total by 28 to get the number of months which become the middle of the guidelines. Any sentence 25% above or below the middle of the guidelines is still "within the guidelines" and is not considered a departure sentence. If the bottom of the guidelines is less than 12 months then the court may also give any nonstate prison sanction including a term in the county jail. The guidelines also assign additional points for such aggravating factors as victim injury, sexual penetration, violations of probation, and whether a firearm was used in the commission of a felony.

The Department of Corrections has just completed a study which analyzed whether implementation of the 1994 and 1995 guidelines met the goals set forth in section 921.001. Some of the conclusions are listed below:

Goal: Use of incarcerative sanctions is prioritized toward offenders convicted of serious offenses and certain offenders who have long prior records, in order to maximize the finite capacities of state and local correctional facilities.
Section 921.001(4)(a)(7), F.S.

According to the Department of Corrections, serious offenders represent a 14% larger proportion of state prison admissions in FY 1995-96 than in FY 1992-93.

Caveat: The relative increase in the admissions of violent offenders is consistent with a trend that began in 1990.

Goal: Sentencing is neutral with respect to race, gender, and social and economic status.
Section 921.001(4)(a)(1), F.S.

The study found that race has no meaningful affect on the sentencing decisions made by the courts under the 1994 and 1995 guidelines. The 5 most important factors for determining the length of a sentence were found to be: 1. Seriousness of Current Crime; 2. Victim Injury; 3. Plea or Trial Disposition; 4. The current crime is punishable by life; 5. Seriousness of prior record. Factors such as whether an offender is supporting a family or has had steady employment were not considered by this study.

According to a 1979 study of 1,000 felony cases by the Sentencing Study Commission, after holding legally relevant factors constant, non-white

offenders were more likely to receive a jail or prison sentence than white offenders. Florida first adopted a version of sentencing guidelines in 1983.

Goal: The penalty imposed is commensurate with the severity of the primary offense and the penalty increases with the length and nature of the offender's prior record F.S. 921.001(4)(a).

The study found that as the severity of the primary offense increases, the proportion of offenders sentenced to state prison increases, and the length of the prison sentence increases. As the number of prior felony convictions increases, the percentage of offenders sentenced to state prison increases. No comparison was made to previous years.

Departure Sentences

Section 921.0016, F.S., allows a court to impose a sentence above or below the guidelines if a court finds that a particular aggravating or mitigating circumstance exist. Grounds for departure are listed in Section 921.0016, F.S., however, the reasons for departure listed by statute are not exclusive. Examples of aggravating circumstances include: the departure results from a plea bargain; the offense was one of violence and was committed in a manner that was especially heinous, atrocious, or cruel; the offense was motivated by prejudice based on race, color, ancestry, ethnicity, religion, sexual orientation, or national origin of the victim, the defendant is not amenable to rehabilitation as evidenced by an escalating pattern of criminal conduct. Examples of mitigating circumstances include: departure results from a plea bargain; the capacity of the defendant to appreciate the criminal nature of the conduct... was substantially impaired; the defendant requires specialized treatment for addiction... and is amenable to treatment; the defendant is to be sentenced as a youthful offender; the need to repay restitution outweighs the need for a prison sentence.

In practice, for all defendants who score prison, sentences below the guidelines occur more often than sentences within the guideline range. According to the Department of Corrections, 62% of all defendants who score prison time receive sentences below the bottom of the guidelines. These figures vary region to region from 85% downward departure in Miami to 30% in Key West. New information indicates that the 1995 guidelines appear to be mitigated at a rate of 38% higher than the 1994 guidelines. In contrast, 1.1% of defendants are sentenced to prison when the guidelines score does not call for state prison. However, the 1.1% figure does not take into account habitual offender sentences and mandatory minimum sentences which provide some flexibility for upward departure.

Habitual Offender and Mandatory Minimum Sentences

Over 12% of inmates are sentenced as habitual offenders or receive mandatory minimum sentences that usually exceed the guideline range. An example of an often used minimum mandatory is section 775.087, F.S., which requires the imposition of a minimum three year sentence if a person carries a firearm during the commission of certain crimes such as robbery, aggravated assault, aggravated battery and burglary.

A person may be sentenced as a habitual offender if the following criteria is met:

1. The defendant has previously been convicted of any combination of two or more felonies in this state or other qualified offenses.
2. The felony for which the defendant is to be sentenced was committed within 5 years of the defendant's last felony, or within 5 years of the defendant's release from prison or parole.
3. The felony for which the defendant is to be sentenced, and one of the two prior felony convictions is not for possession of a controlled substance.

Reasons for High Frequency of Downward Departure Sentences

There are a number of possible reasons why so many defendants are receiving sentences below the guidelines. One reason could be that judges and prosecutors are making low plea offers to resolve heavy caseloads. Indeed, some of the most populous areas such as Miami and West Palm Beach have the highest rate of downward departure sentences, however, other large metropolitan areas including Jacksonville, Orlando and Tampa have departure rates slightly below the state average.

Another explanation could be that most defendants qualify for at least one of the mitigating circumstances for downward departure. Many defendants have addiction problems, many are youthful offenders and many owe substantial restitution. On the other hand, fewer defendants qualify for upward departure. A large proportion of crimes fit into three categories for which aggravating circumstances generally do not apply: 1. crimes against property; 2. possession or sale of controlled substances; 3. domestic related offenses. Judges may also be more reluctant to impose an upward departure than a downward departure because prosecutors do not often appeal a court's decision, but defendants regularly appeal their sentences. Furthermore, many of the defendants who could qualify for upward departure are being sentenced as habitual offenders.

Ninety-eight percent of cases that result in the imposition of a sentence are resolved by a plea either "straight up" to the court, or as is most often the case, by plea agreement with the prosecutor. Because of the nature of plea negotiations, sentences below the guideline range will often outnumber sentences above the guideline range. The starting point for most plea negotiations is the guideline range, and a common sense understanding of what a fair sentence would be. From that starting point there are two considerations that lower plea offers, and play a part in almost every plea negotiation. First is the likelihood that a defendant will be found guilty after trial. There is always at least a slight chance that the prosecution will loose; witnesses may fail to show up for trial, a mistake could be made, etc. Second, courts would be overwhelmed if more than a small percentage of cases go to a jury trial every year, therefore, a plea offer usually includes an incentive for the defendant not to go to trial. There are also a myriad of other factors which may be critically important in deciding whether the offer should go up or down, such as the following: whether the defendant is a habitual offender, whether the victim is interested in the outcome, whether any of the aggravating or mitigation circumstances mentioned above exist, the relative experience of the attorneys, whether the defendant is supporting a family, caring for a parent, has steady employment, or is

studying for a college degree, etc. Because of all the variables involved in every plea negotiation and every sentence, it is difficult to make conclusions as to why departure sentences are imposed.

The mitigation rates are very high if only the population that scores "mandatory prison" is considered. The total downward departure rate for all cases is low because most defendants do not score prison "mandatory" prison, and no departure from the guidelines is needed to impose probation or county jail time. By statute, all sentences of incarceration for less than 1 year must be served in a county jail, and sentences of more than 1 year must be served in a state prison.

The Sentencing Commission

Chapter 921, Florida Statutes, establishes the sentencing guidelines that are presently used as well as the Sentencing Commission whose duties are evaluating the guidelines and recommending on a continuing basis changes necessary to ensure incarceration of violent offenders and repeat nonviolent offenders who demonstrated an inability to comply with less restrictive penalties. The membership of the Sentencing Commission is composed of the following:

1. Two members of the Senate appointed by the President of the Senate.
2. Two members of the House of Representatives appointed by the Speaker of the House of Representatives.
3. The Chief Justice of the Supreme Court or a member of the Supreme Court designated by the Chief Justice.
4. Three circuit court judges.
5. One county court judge.
6. One representative of the victim advocacy profession, appointed by the Chief Justice of the Supreme Court.
7. The Attorney General or a designee.
8. The Secretary of the Department of Corrections or a designee.

Statistics on Present Situation.

The Department of Corrections calculates the probability of a prison sentence in the following manner:

- ◆ Of all felony offenses known to police, about 20% result in an arrest.
- ◆ Of those arrested, about two-thirds result in a conviction.
- ◆ Of those convicted, about 20% result in incarceration in state prison. (55% of all sentence felons do not score prison.)

◆ Therefore, a typical arrest produces a probability of 1 in 40 of state prison.

Despite the 1 in 40 odds, Florida's incarceration rate per 100,000 in 1995 ranked tenth in the nation. Florida's prison population has increased every year since 1988 when there were 33,681 inmates. In November of 1996 there were 64,531 inmates which left a surplus of 5,000 empty beds. The Department of Corrections estimates that they will have no further capacity to hold a larger number of inmates by the end of 1998.

On June 30, 1986, the racial and gender make up of the state prison population was as follows: 47.8% white; 49.9 % black; and 2.1% latin; 4.6% female and 95.4% male.

On June 30, 1996, the racial and gender make up of the state prison population was as follows: 42% white; 56.1% black; 1.5% latin; .4% other; 5.4% female; 94.6% male.

B. EFFECT OF PROPOSED CHANGES:

This bill would repeal the guidelines effective October 1, 1987. After that date a judge will be able to impose any sentence within the statutory maximum, unless otherwise prohibited by a mandatory minimum sentences required for certain offenses. The statutory maximum for a third degree felony is 5 years in prison or any combination of prison and probation which does not exceed 5 years. The statutory maximum for a second degree felony is 15 years and the statutory maximum for a first degree felony is 30 years.

One crime that is likely to penalized more seriously if the guidelines are repealed is possession and sale of cocaine. Drug offenses are often relatively easy to prove because drug offenders are usually caught in the commission of a crime by police officers. However, the present guidelines give a judge discretion to sentence a person for up to 16 months in prison only after the seventh conviction possession of cocaine, or fifth conviction for sale of cocaine (assuming no other offenses). While drug admissions as a percent of total admissions to state prison has steadily declined since 1991, the 1994 guidelines intentionally gave less weight to the scoring of felony drug offenses. Therefore, it is probable that this bill would increase prison admissions for felony drug offense.

The Sentencing Reform Commission

This bill abolishes the present Sentencing Commission and replaces it with the Sentencing Reform Commission on the date that this bill becomes law. On or before January 1, 1998, the new commission would be required to provide the Legislature with the recommendations for a sentencing policy and structure for the State. The members of the Sentencing Reform Commission would be as follows:

1. The president of the Public Defenders Association, or a designee.
2. The president of the Florida Prosecution Attorneys Association, or a designee.
3. The chair of the Conference of Circuit Judges of Florida, or a designee.
4. The president of the Florida Sheriffs Association, or a designee.
5. The executive director of the Florida Police Chiefs Association, or a designee.

6. One representative of a victim advocacy group, appointed by the commission at its first meeting.
7. One member appointed by the Speaker of the House of Representatives
8. One member appointed by the President of the Senate.
9. One member appointed by the Governor.
10. The Commissioner of the Florida Department of Law Enforcement or the Commissioner's designee.
11. The Attorney General or a designee.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

- (1) any authority to make rules or adjudicate disputes?

The bill increases a judges discretion over criminal sentences imposed.

- (2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

The bill replaces the Sentencing Commission with the Sentencing Reform Commission. The new commission's responsibilities, obligations and work is no greater than the committee that would be replaced.

- (3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

- (1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

The new commission's only obligation will be to recommend a sentencing policy and structure by January 1, 1998.

- (2) what is the cost of such responsibility at the new level/agency?

The Sentencing Reform Commission would cost no more than the Sentencing Commission that is being replaced.

- (3) how is the new agency accountable to the people governed?

Not Applicable.

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

Not Applicable.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

Not Applicable.

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

The bill would give more importance to judicial elections. Voters in a community could elect judges who represent the values of the community.

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

Not applicable.

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

Not Applicable.

(2) Who makes the decisions?

Not Applicable.

(3) Are private alternatives permitted?

Not Applicable.

(4) Are families required to participate in a program?

Not Applicable.

(5) Are families penalized for not participating in a program?

Not Applicable.

b. Does the bill directly affect the legal rights and obligations between family members?

Not Applicable.

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

Not Applicable.

(2) service providers?

Not Applicable.

(3) government employees/agencies?

Not Applicable.

D. SECTION-BY-SECTION ANALYSIS:

Section 1: The original bill repeals all of section 921.001, F.S. The committee substitute repeals that section as well, but leaves in and amends s. 921.001(4)(b) dealing with which guidelines apply before the repeal on October 1, 1998. The committee bill also leaves in s. 921.001(10) which deals with how gain time is to be awarded. Both the committee substitute and the original bill repeal: the Sentencing Commission and language setting forth the Commissions obligations; the principles of the guidelines; provisions under which departure sentences are allowed and reviewed.

Section 2: repeals section 921.0011, F.S., through and including section 921.0016, F.S., effective October 1, 1998. These sections relate to the substance or the actual mechanics of the sentencing guidelines, and repeal of these sections was not included in the original bill. Section 921.0011, F.S., lists definitions relevant to the guidelines. Section 921.0012, F.S., is the offense severity ranking chart which assigns crimes to the various levels. Section 921.0015, F.S., adopts the score sheet for the guidelines promulgated by the Supreme Court. Section 921.0016, F.S., lists the circumstances for which a departure sentence is permitted, however, the court is expressly not limited to these circumstances.

Section 3: The committee substitute amended section 921.001(4)(b), F.S., to allow current law regarding the guidelines to be in effect for all offenses committed before October 1, 1998. Section 921.001(4)(b) provided the effective dates for the 1994 guidelines that the original bill repealed effective October 1, 1998. Complete removal of the section would leave an ambiguous situation for offenses committed before October 1, 1998 and sentenced after the repeal became effective.

Section 4: abolishes the present Sentencing Commission and replaces it with the Sentencing Reform Commission on the date that this bill becomes law. On or before January 1, 1998, the new commission would be required to provide the Legislature with the recommendations for a sentencing policy and structure for the State.

Section 5: provides the effective date of the bill.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

See Fiscal Comments

2. Recurring Effects:

See Fiscal Comments

3. Long Run Effects Other Than Normal Growth:

See Fiscal Comments.

4. Total Revenues and Expenditures:

See Fiscal Comments

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

See Fiscal Comments

2. Recurring Effects:

See Fiscal Comments

3. Long Run Effects Other Than Normal Growth:

See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

See Fiscal Comments.

2. Direct Private Sector Benefits:

See Fiscal Comments.

3. Effects on Competition, Private Enterprise and Employment Markets:

See Fiscal Comments.

D. FISCAL COMMENTS:

The Department of Corrections can not calculate the impact of repealing the guidelines. It is probable that more drug offenders would go to prison. (See: Part II, Effect of Proposed Changes). The Department of Corrections has revised its forecast of prison population in the year 2002 from 116,205 to 84,099. The legislature has already agreed to fund 83,414 beds, with the funds to be appropriated in the year that the beds are to be occupied. There are currently almost 5,000 empty beds.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill is exempt from the requirement of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

Study of Guideline by Department of Justice

As of 1994, there were 9 states including Florida that have sentencing guidelines which are not merely voluntary. The U.S. Department of Justice, Office of Justice Programs, completed a study in February of 1996, which assessed "structured sentencing" nationwide. The conclusion of that study was that there are some benefits of well implemented sentencing guidelines, primarily, control of prison populations and limiting disparate treatment of similarly situated offenders. However, despite attempts to target violent and career offenders for lengthy prison stays, there is no evidence that guidelines have measurably reduced crime rates.

The study by the Department of Justice suggests that one reason that guidelines do not reduce the crime rate is that they typically impose longer sentences on older offenders with a long history of convictions even though that person is now "burning out" of his or her criminal career. On the other hand, youthful offenders who are in the earlier stages of their criminal career would receive lighter sentences. In Florida, section 921.0011, F.S., allows juvenile offenses to be scored only if they occurred within three years of the primary offense for which a defendant is being sentenced.

The Report by the U.S. Department of Justice did indicate that guidelines if implemented correctly could reduce disparate treatment of similarly situated offenders, however, those benefits can be nullified by excessive departure sentences and by the alleged selective use of minimum mandatory sentences. The report recommended that subjective reasons for departure should be kept to a minimum, and states should specify as much as possible the type of departures that are acceptable. The report also recommends that the use of minimum mandatory sentences also be limited.

Laws referring to the sentencing guidelines and not addressed by this Bill

This bill renders many statutory provisions meaningless and those provisions should be deleted or amended:

Section 20.315(4) F.S.: creates the Florida Corrections Commission which has 9 primary functions, one of which is to review the recommendations of the Sentencing Guideline Commission. This bill will leave the Corrections Commission with one less primary responsibility.

Sections 773.0823, 777.04, 784.08, 893.135, and 893.20, F.S.: these Sections, in part, require that people who commit crimes, such as battery on an elderly person, certain drug trafficking and violent offenses, to be sentenced according to the guidelines. That portion of these sections will be rendered meaningless and a judge will be able to impose any sentence up to the statutory maximum.

Section 921.188, F.S.: allows defendants to be sentenced to between 12 and 22 months in a local jail if there is a contractual agreement between the jail manager and the Department of Corrections. This section only allowed a prison sentence to be served at a local jail if a defendant scores between 40 and 52 points. If the State or the defendant object to a sentence under this provision, there may be grounds for appeal, because the sentence would be based on nonexistent criteria.

Section 924.06(1)(e) and 924.07(1)(l), F.S.: these subsections allow the State and the defendant to appeal a departure from the guidelines. Provisions allowing appeal for departure sentences will not have any meaning if this bill passes.

Section 944.275(2)(b), F.S.: provides for the award of gain-time depending on offense level for offenses occurring between January 1, 1994 and October 1, 1995. A system of awarding gain-time can not be taken from prisoners, therefore, this bill should have no effect on section 944.275, F.S.

Impact of Increasing Judicial Discretion

It is not possible to predict what effect the repeal of the guidelines would have on the prison population. An argument could be made that the high rate of downward departure sentences demonstrate that the courts and prosecutors are not willing to be more punitive. On the other hand, it could also be argued that the guidelines are the starting point of plea negotiations and the ending point is usually lower. If the starting point of prosecutors bargaining position is raised, then perhaps the outcome of plea negotiations would be higher sentences. Of course, if a judge indicates that he/she would impose a lower sentence than the current guideline range, then sentences will be lower.

There is some reason to believe that the length of prison sentences may not increase for the more serious crimes. According to the Department of Corrections, the 1995 revision of the guidelines, which dramatically increased the number of points assigned to levels 7,8,9, and 10, had no effect on the average length of prison sentences. In fact, while the number of guilty dispositions has remained the same, the percentage of those guilty dispositions resulting in a prison sentence has decreased. Surprisingly, the percentage of sentences over 56 months has declined from 76.6% under the 1994 guidelines to 73.1% of cases sentenced under the 1995 revisions. This information has caused the Department of Corrections to revise its forecast of prison population in the year 2002 from 116,205 to 84,099.

There are many possible explanations as to why the length and number of prison sentences are decreasing. Many of the people with lengthy criminal histories, who qualify for long prison sentences are already in prison. We also do not have statistics to show whether the rate of violent crime has increased since the 1995 revision became law on October 1, 1995. While the crime rate per 100,000 people has come down in recent years, the total number of violent crimes has remained fairly constant from 1991 through 1995.

Another possible reason the 1995 revision did not have much impact could be that judges and prosecutors are not willing or able to give longer sentences for the serious types of crimes whose penalties were increased by the revisions. The increase in downward departure rates more than compensated for the more severe sanctions allowed by the 1995 revisions. Many of the crimes affected by the revision, such as sex offenses, are often very difficult to prove. As mentioned earlier, drug offenses are often not very difficult to prove. It is likely that this bill would increase the rate of incarceration for drug offenses. (See Effect of Proposed Changes, pa. 6)

Unequal sentences

The guidelines thus far have allowed regional disparity and disparity between judges within a region. A majority of inmates received downward departure sentences. Over 12% of inmates received habitual offender or minimum mandatory sentences which would usually exceed the guidelines. It is not known whether disparities between similarly situated defendants would be increased by this bill. However, to the extent that regional differences increase, those differences could reflect the values of local voters who elect the judges and the State Attorney in their region. The Department of Corrections is also concerned that disparate sentences could make inmates more difficult to control. The Department is very much in favor of keeping the guidelines as a "management tool" that will help them to match capacity to prison populations.

Perspective of Judges and Prosecutors

Many judges and prosecutors favor this bill because the guidelines limit the judges discretion and to some degree reduce issues of justice and fairness to a mathematical formula which can not always take into account all the variables that should be considered. Within individual crimes there are often tremendous differences that the guidelines do not consider. A hypothetical example of a less serious burglary would be person who used a key to retrieve property from a former roommate and while retrieving property from an unoccupied apartment, drank a soda belonging to the "victim". That hypothetical burglary scores "mandatory" prison the same as a burglary committed by a person who slips in through a window and steals jewelry while the victim is sleeping. Of course, in the first example the court and the prosecutor would be unlikely to require prison. The guidelines present another inequity in that a defendant who is sentenced at one time for two separate criminal acts scores fewer months in prison than the same defendant would score if each offense is resolved separately.

Among prosecutors there is a belief that drug cases are not treated seriously, and that downward departure is easier and more frequent than upward departure. Another concern is that guidelines create more issues for a defendant to appeal.

If Judges are freed from the limitations imposed by the guidelines, then it would be useful to have a way to measure how the courts treat similarly situated offenders. Disparities could be reduced if judges and communities had a standard by which to compare sentences imposed for felony crimes. The current guidelines score sheet provides enough information for DOC to compare sentencing practices.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The original bill repealed all of section 921.001, F.S. The committee substitute repeals that section as well, but leaves in and amends section 921.001(4)(b), F.S., dealing with which guidelines apply before the repeal on October 1, 1998. The committee bill also leaves in section 921.001(10), F.S., which deals with how gain time is to be awarded. Pursuant to the request of the sponsor, the committee substitute changes the people who will make up the new Sentencing Reform Committee which is to replace the present Sentencing Commission.

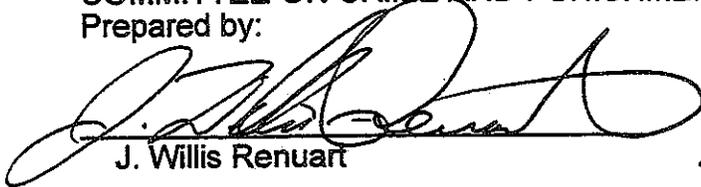
The committee substitute repeals sections not included in the original bill: Section 921.0011, F.S., through and including section 921.0016, F.S., would be repealed effective October 1, 1998. These sections relate to the substance or the actual mechanics of the sentencing guidelines.

VII. SIGNATURES:

COMMITTEE ON CRIME AND PUNISHMENT:

Prepared by:

Legislative Research Director:


J. Willis Renuart


J. Willis Renuart

DEPARTMENT OF CORRECTIONS
BILL ANALYSIS

Handwritten: I to SB-716

Bill # HB 241 Companion/Similar Bill # None Date: February 23, 1997

Relating to: Sentencing

Sponsor: Valdes Statute(s) Affected: Chapter 921, F.S.

Analyzed by: Leznoff/Arnold

Approved: *[Signature]*
(For use by Legislative Officers)

I. SUMMARY

This bill will repeal the sentencing guidelines by repealing portions of chapter 921. It also establishes a Sentencing Reform Commission to provide the legislature with recommendations on sentencing policy.

The attempt to repeal the guidelines is incomplete. The bill abolishes the Sentencing Commission and the effective dates for the various versions or revisions of the guidelines. It also abolishes the criteria for sentencing for offense dates prior to October 1, 1983.

II. ANALYSIS

A. PRESENT SITUATION :

The sentencing guidelines represent the state's comprehensive structured sentencing policy.

B. EFFECT OF THE PROPOSED CHANGES :

The effect of this bill is difficult to determine as the likely sentencing practices are unknown. Given that with 85% time served provisions in effect, the guidelines serve as the state's primary tool for projecting prison admissions. The state's ability to predict correctional resource needs could be diminished.

The repeal portion of the bill has technical problems as it only repeals one section of the statutes relating to the guidelines. The bill repeals s. 921.001, F.S., which contains the intent language of the guidelines, the language creating the Sentencing Commission, as well as the enactment dates of the various versions/revisions of the guidelines. Section 921.005, F.S., is repealed which addresses criteria to be evaluated when sentencing persons who committed crimes prior to October 1, 1983 and are not sentenced pursuant to the guidelines. Repealing this section of statute has no effect upon the guidelines whatsoever.

HOUSE AMENDMENT FOR COMMITTEE PURPOSES

Bill No. PCS/HB 241

Amendment No. (for drafter's use only)

COMMITTEE ACTION

1	ADOPTED	<u> </u>	<u> </u>	<u> </u>	:	FAILED TO ADOPT	<u> </u>	<u> </u>	<u> </u>
2	ADOPTED AS AMENDED	<u> </u>	<u> </u>	<u> </u>	:	WITHDRAWN	<u> </u>	<u> </u>	<u> </u>
3	ADOPTED w/o OBJECTION	<u> </u>	<u> </u>	<u> </u>	:	OTHER	<u> </u>	<u> </u>	<u> </u>

7 Committee hearing bill: Crime & Punishment

8 Representative(s) Meek offered the following:

10 **Amendment**

11 On page 4....., line(s) 13-16.....,
12 remove from the bill: all of said lines

14 and insert in lieu thereof:

15 (g) Two members appointed by the Speaker of the House
16 of Representatives, from the membership of the House. One
17 member shall be a member of the majority party and one member
18 shall be a member of the minority party.

19 (h) Two members appointed by the President of the
20 Senate from the membership of the Senate. One member shall be
21 a member of the majority party and one member shall be a
22 member of the minority party.



Full or Subcommittee on _____

Action _____

Date _____

HOUSE AMENDMENT FOR DRAFTING PURPOSES ONLY
(may be used in Committee, but not on House Floor)

Amendment No. 1

Bill No. pc624

(For filing with the Clerk, Committee and Member Amendments must be prepared on computer)

If amendment is text of another bill insert:
Bill No. _____ Draft No. _____

Representative(s)/The Committee on meck

offered the following amendment:

Amendment

on page 4, line 5 13-14,

delete all of said lines

and insert:

(g) Two members appointed by the
Speaker of the House of Representatives,
from the membership of the House.

One member shall be a member of
the majority party and one member
shall be a member of the minority
party.



Full or Subcommittee on _____

Action _____

Date _____

HOUSE AMENDMENT FOR DRAFTING PURPOSES ONLY
(may be used in Committee, but not on House Floor)

Amendment No. 2

Bill No. pcb 271

(For filing with the Clerk, Committee and Member Amendments must be prepared on computer)

If amendment is text of another bill insert:
Bill No. _____ Draft No. _____

Representative(s)/The Committee on hock

offered the following amendment:

Amendment

on page 4, lines 15-16

delete all of said lines
and insert:

(h) Two members appointed by the
President of the Senate from the
membership of the Senate. One member
shall be a member of the majority
party and one member shall be a
member of the minority party.



Full or Subcommittee on _____

Action _____

Date _____

HOUSE AMENDMENT FOR DRAFTING PURPOSES ONLY
(may be used in Committee, but not on House Floor)

Amendment No. _____

Bill No. PCS/HB 241

(For filing with the Clerk, amendment must be prepared and stored on the legislative computer.)

If amendment is text of another bill insert:
Bill No. _____ Draft No. _____

Representative(s)/The ~~Committee~~ on Rep. Ogles

offered the following amendment:

Amendment

conforming

On page 3, line 30,

AFTER "composed of", Remove: 11

and insert in lieu of: 13

STORAGE NAME: h0241s1a.cj
DATE: April 14, 1997

REPORTED TO
CLERK

HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
CRIMINAL JUSTICE APPROPRIATIONS
BILL ANALYSIS & ECONOMIC IMPACT STATEMENT

BILL #: CS/HB 241
RELATING TO: Sentencing
SPONSOR(S): Crime and Punishment Committee and Representative Valdes
STATUTE(S) AFFECTED: Sections 921.001 through Sections 921.016, F.S.
COMPANION BILL(S): SB 716(s)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) CRIME AND PUNISHMENT YEAS 8 NAYS 1
- (2) CRIMINAL JUSTICE APPROPRIATIONS YEAS 7 NAYS 1
- (3)
- (4)
- (5)

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I. SUMMARY:

This bill repeals the sentencing guidelines effective October 1, 1998. After that date, a judge will be able to impose any sentence within the statutory maximum, unless otherwise prohibited by a statute requiring a mandatory minimum prison term for certain offenses. The statutory maximum for a third degree felony is 5 years in prison or any combination of prison and probation which does not exceed 5 years. The statutory maximum for a second degree felony is 15 years and the statutory maximum for a first degree felony is 30 years.

This bill abolishes the present Sentencing Commission and replaces it with the Sentencing Reform Commission on the date that this bill becomes law. On or before January 1, 1998, the new commission will be required to provide the Legislature with the recommendations for a sentencing policy and structure for the State.

This bill is projected by the Criminal Justice Estimating Conference to have an indeterminate, but potentially significant, increase in the prison population. See section III. D., Fiscal Comments.

See Amendments section IV for explanation of a strike everything amendment adopted by the Committee on Criminal Justice Appropriations with significant changes to the bill.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

The Sentencing Guidelines

The Sentencing Guidelines as enacted on January 1, 1994, and revised on October 1, 1995, divide most felony crimes into 10 levels of rising degrees of severity. The points assigned to an offense within a particular level vary depending on whether the offense is the primary offense charged, an accompanying offense, or is part of a defendant's criminal record. When all the points are added up, the preparer of the score sheet is to subtract the total by 28 to get the number of months which become the middle of the guidelines. Any sentence 25% above or below the middle of the guidelines is still "within the guidelines" and is not considered a departure sentence. If the bottom of the guidelines is less than 12 months then the court may also give any nonstate prison sanction including a term in the county jail. The guidelines also assign additional points for such aggravating factors as victim injury, sexual penetration, violations of probation, and whether a firearm was used in the commission of a felony.

The Department of Corrections has just completed a study which analyzed whether implementation of the 1994 and 1995 guidelines met the goals set forth in section 921.001, F.S. Some of the conclusions are listed below:

Goal: Use of incarcerative sanctions is prioritized toward offenders convicted of serious offenses and certain offenders who have long prior records, in order to maximize the finite capacities of state and local correctional facilities. Section 921.001(4)(a)(7), F.S.

According to the Department of Corrections, serious offenders represent a 14% larger proportion of state prison admissions in FY 1995-96 than in FY 1992-93.

Caveat: The relative increase in the admissions of violent offenders is consistent with a trend that began in 1990.

Goal: Sentencing is neutral with respect to race, gender, and social and economic status. Section 921.001(4)(a)(1), F.S.

The study found that race has no meaningful affect on the sentencing decisions made by the courts under the 1994 and 1995 guidelines. The 5 most important factors for determining the length of a sentence were found to be: 1. the seriousness of current crime; 2. whether there was victim injury; 3. whether there was a plea or trial disposition; 4. whether the current crime is punishable by life; and, 5. seriousness of prior record. Factors such as whether an offender is supporting a family or has had steady employment were not considered by this study.

According to a 1979 study of 1,000 felony cases by the Sentencing Study Commission, after holding legally relevant factors constant, non-white offenders were more likely to receive a jail or prison sentence than white offenders. Florida first adopted a version of sentencing guidelines in 1983.

Goal: The penalty imposed is commensurate with the severity of the primary offense and the penalty increases with the length and nature of the offender's prior record. Section 921.001(4)(a), F.S.

The 1979 study found that as the severity of the primary offense increases, the proportion of offenders sentenced to state prison increases, and the length of the prison sentence increases. As the number of prior felony convictions increases, the percentage of offenders sentenced to state prison increases. No comparison was made to previous years.

Departure Sentences

Section 921.0016, F.S., allows a court to impose a sentence above or below the guidelines if a court finds that a particular aggravating or mitigating circumstance exist. Grounds for departure are listed in section 921.0016, F.S., however, the reasons for departure listed by statute are **not** exclusive. Examples of aggravating circumstances include: the departure results from a plea bargain; the offense was one of violence and was committed in a manner that was especially heinous, atrocious, or cruel; the offense was motivated by prejudice based on race, color, ancestry, ethnicity, religion, sexual orientation, or national origin of the victim; and the defendant is not amenable to rehabilitation as evidenced by an escalating pattern of criminal conduct. Examples of mitigating circumstances include: departure results from a plea bargain; the capacity of the defendant to appreciate the criminal nature of the conduct, and was substantially impaired; the defendant requires specialized treatment for addiction and is amenable to treatment; the defendant is to be sentenced as a youthful offender; and the need to repay restitution outweighs the need for a prison sentence.

In practice, for all defendants who score prison time, sentences below the guidelines occur more often than sentences within the guideline range. According to the Department of Corrections, 62% of all defendants who score prison time receive sentences below the bottom of the guidelines. These figures vary region to region from 85% downward departure in Miami to 30% in Key West. New information from the Department indicates that the 1995 guidelines appear to be mitigated at a rate of 38% higher than the 1994 guidelines. In contrast, 1.1% of defendants are sentenced to prison when the guidelines score does not call for state prison. However, the 1.1% figure does not take into account habitual offender sentences and mandatory minimum sentences which provide some flexibility for upward departure.

Habitual Offender and Mandatory Minimum Sentences

Over 12% of inmates are sentenced as habitual offenders or receive mandatory minimum sentences that usually exceed the guideline range. An example of an often used minimum mandatory is section 775.087, F.S., which requires the imposition of a minimum three year sentence if a person carries a firearm during the commission of certain crimes such as robbery, aggravated assault, aggravated battery, and burglary.

A person may be sentenced as a habitual offender if the following criteria are met:

1. The defendant has previously been convicted of any combination of two or more felonies in this state or other qualified offenses.

2. The felony for which the defendant is to be sentenced was committed within 5 years of the defendant's last felony, or within 5 years of the defendant's release from prison or parole.
3. The felony for which the defendant is to be sentenced, and one of the two prior felony convictions is not for possession of a controlled substance.

Reasons for High Frequency of Downward Departure Sentences

There are a number of possible reasons why so many defendants are receiving sentences below the guidelines. One reason could be that judges and prosecutors are making low plea offers to resolve heavy caseloads. Indeed, some of the most populous areas such as Miami and West Palm Beach have the highest rate of downward departure sentences, however, other large metropolitan areas including Jacksonville, Orlando and Tampa have departure rates slightly below the state average.

Another explanation could be that most defendants qualify for at least one of the mitigating circumstances for downward departure. Many defendants have addiction problems, many are youthful offenders, and many owe substantial restitution. On the other hand, fewer defendants qualify for upward departure. A large proportion of crimes fit into three categories for which aggravating circumstances generally do not apply: 1. crimes against property; 2. possession or sale of controlled substances; and 3. domestic related offenses. Judges may also be more reluctant to impose an upward departure than a downward departure because prosecutors do not often appeal a court's decision, but defendants regularly appeal their sentences. Furthermore, many of the defendants who qualify for upward departure are being sentenced as habitual offenders.

Ninety-eight percent of cases that result in the imposition of a sentence are resolved by a plea either "straight up" to the court, or as is most often the case, by plea agreement with the prosecutor. Because of the nature of plea negotiations, sentences below the guideline range will often outnumber sentences above the guideline range. The starting point for most plea negotiations is the guideline range, and a common sense understanding of what a fair sentence would be. From that starting point there are two considerations that lower plea offers, and which play a part in almost every plea negotiation. First is the likelihood that a defendant will be found guilty after trial. There is always a chance that the prosecution will lose; witnesses may fail to show up for trial, a mistake could be made at trial, etc. Second, courts would be overwhelmed if more than a small percentage of cases go to a jury trial every year, therefore, a plea offer usually includes an incentive for the defendant not to go to trial. There are also a myriad of other factors which may be critically important in deciding whether the offer should go up or down, including: whether the defendant is a habitual offender, whether the victim is interested in the outcome, whether any of the aggravating or mitigation circumstances mentioned above exist, the relative experience of the attorneys, whether the defendant is supporting a family, caring for a parent, has steady employment, or is studying for a college degree, etc. Because of all the variables involved in every plea negotiation and every sentence, it is difficult to make conclusions as to why departure sentences are imposed.

The mitigation rates are very high if only the population that scores "mandatory prison" is considered. The total downward departure rate for all cases is low because most defendants do not score prison "mandatory" prison, and no departure from the guidelines is needed to impose probation or county jail time. By statute, all sentences of

incarceration for less than 1 year must be served in a county jail, and sentences of more than 1 year must be served in a state prison.

The Sentencing Commission

Chapter 921, Florida Statutes, establishes the sentencing guidelines that are presently used as well as the Sentencing Commission whose duties are evaluating the guidelines and recommending on a continuing basis changes necessary to ensure incarceration of violent offenders and repeat nonviolent offenders who demonstrate an inability to comply with less restrictive penalties. The membership of the Sentencing Commission is composed of the following:

1. Two members of the Senate appointed by the President of the Senate.
2. Two members of the House of Representatives appointed by the Speaker of the House of Representatives.
3. The Chief Justice of the Supreme Court or a member of the Supreme Court designated by the Chief Justice.
4. Three circuit court judges.
5. One county court judge.
6. One representative of the victim advocacy profession, appointed by the Chief Justice of the Supreme Court.
7. The Attorney General or a designee.
8. The Secretary of the Department of Corrections or a designee.

Statistics on Present Situation.

The Department of Corrections calculates the probability of a prison sentence in the following manner:

- ◆ Of all felony offenses known to police, about **20%** result in an arrest.
- ◆ Of those arrested, about **two-thirds** result in a conviction.
- ◆ Of those convicted, about **20%** result in incarceration in state prison. (**55%** of all sentence felons do not score prison.)
- ◆ Therefore, a typical arrest produces a probability of **1 in 40** of state prison.

B. EFFECT OF PROPOSED CHANGES:

This bill repeals the guidelines effective October 1, 1998. After that date a judge will be able to impose any sentence within the statutory maximum, unless otherwise prohibited by mandatory minimum sentences required for certain offenses. The statutory maximum for a third degree felony is 5 years in prison or any combination of prison and probation which does not exceed 5 years. The statutory maximum for a second degree felony is 15 years and the statutory maximum for a first degree felony is 30 years.

One crime that is likely to be penalized more seriously if the guidelines are repealed is possession and sale of cocaine. Drug offenses are often relatively easy to prove because drug offenders are usually caught in the commission of a crime by police officers. However, the present guidelines give a judge discretion to sentence a person for up to 16 months in prison only after the seventh conviction for possession of cocaine, or fifth conviction for sale of cocaine (assuming no other offenses). While drug admissions as a percent of total admissions to state prison have steadily declined since 1991, the 1994 guidelines intentionally gave less weight to the scoring of felony drug offenses. Therefore, it is probable that this bill would increase prison admissions for felony drug offenses.

The Sentencing Reform Commission

This bill abolishes the present Sentencing Commission and replaces it with the Sentencing Reform Commission on the date that this bill becomes law. On or before January 1, 1998, the new commission would be required to provide the Legislature with the recommendations for a sentencing policy and structure for the State. The members of the Sentencing Reform Commission would be as follows:

1. The president of the Public Defenders Association, or a designee.
2. The president of the Florida Prosecution Attorneys Association, or a designee.
3. The chair of the Conference of Circuit Judges of Florida, or a designee.
4. The president of the Florida Sheriffs Association, or a designee.
5. The executive director of the Florida Police Chiefs Association, or a designee.
6. One representative of a victim advocacy group, appointed by the commission at its first meeting.
7. Two members of the House of Representatives appointed by the Speaker of the House of Representatives
8. Two members of the Senate appointed by the President of the Senate.
9. One member appointed by the Governor.
10. The Commissioner of the Florida Department of Law Enforcement or the Commissioner's designee.
11. The Attorney General or a designee.

No current member of the Sentencing Commission may be appointed to the new commission

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

The bill increases a judge's discretion over criminal sentences imposed.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

The bill replaces the Sentencing Commission with the Sentencing Reform Commission. The new commission's responsibilities, obligations and work is no greater than the committee that would be replaced.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

The new commission's only obligation will be to recommend a sentencing policy and structure by January 1, 1998.

(2) what is the cost of such responsibility at the new level/agency?

The Sentencing Reform Commission would cost no more than the Sentencing Commission that is being replaced.

(3) how is the new agency accountable to the people governed?

Not Applicable.

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

Not Applicable.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

Not Applicable.

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

The bill would give more importance to judicial elections. Voters in a community could elect judges who represent the values of the community.

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

Not applicable.

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

Not Applicable.

(2) Who makes the decisions?

Not Applicable.

(3) Are private alternatives permitted?

Not Applicable.

(4) Are families required to participate in a program?

Not Applicable.

(5) Are families penalized for not participating in a program?

Not Applicable.

b. Does the bill directly affect the legal rights and obligations between family members?

Not Applicable.

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

Not Applicable.

(2) service providers?

Not Applicable.

(3) government employees/agencies?

Not Applicable.

D. SECTION-BY-SECTION ANALYSIS:

Section 1: effective October 1, 1998, repeals section 921.001, F.S., except s. 921.001(4)(b) (relating to guidelines effective on October 1, 1983, and January 1, 1994) and s. 921.001(10) (specifying criteria for release from incarceration) are not repealed. The repealed sections relate to the Sentencing Commission and language setting forth the Commissions obligations; the principles of the guidelines, and provisions under which departure sentences are allowed and reviewed.

Section 2: effective October 1, 1998, repeals section 921.0011, F.S., through and including section 921.0016, F.S. These sections relate to the substance or the actual mechanics of the sentencing guidelines. Section 921.0011, F.S., lists definitions

relevant to the guidelines. Section 921.0012, F.S., is the offense severity ranking chart which assigns crimes to the various levels. Section 921.0015, F.S., adopts the score sheet for the guidelines promulgated by the Supreme Court. Section 921.0016, F.S., lists the circumstances for which a departure sentence is permitted, however, the court is expressly not limited to these circumstances.

Section 3: effective October 1, 1998, renumbers section 921.001(4)(b), F.S., as section 921.00165, F.S. and amends the section to allow current law regarding the guidelines to be in effect for all offenses committed before October 1, 1998.

Section 4: creates the Sentencing Reform Commission. Specifies the composition of the Commission. Requires the Commission to, on or before January 1, 1998, provide the Legislature with the recommendations for a sentencing policy and structure for the State.

Section 5: provides that except as otherwise provided, the bill shall take effect upon becoming a law.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None.

2. Recurring Effects:

Indeterminate. See section D., Fiscal Comments.

3. Long Run Effects Other Than Normal Growth:

Indeterminate. See section D., Fiscal Comments.

4. Total Revenues and Expenditures:

Indeterminate. See section D., Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None.

2. Recurring Effects:

Indeterminate. See section D., Fiscal Comments.

3. Long Run Effects Other Than Normal Growth:

Indeterminate. See section D., Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

None.

2. Direct Private Sector Benefits:

None.

3. Effects on Competition, Private Enterprise and Employment Markets:

None.

D. FISCAL COMMENTS:

Repeal of the sentencing guidelines will give judges the authority to impose any sentence within the statutory maximum for most offenses. Because there is currently no available mechanism for projecting sentencing practices without a guidelines structure the impact of the bill cannot be estimated. On March 21, 1997, the Criminal Justice Estimating Conference addressed the bill's impact on prison beds and agreed that the bill will result in an indeterminate, but potentially significant, increase in future prison population.

To the extent that any increase in prison sentences results in more offenders incarcerated in county jail, the bill will have an indeterminate fiscal impact on local governments.

A concern exists that repeal of the sentencing guidelines could jeopardize continued receipt of federal Truth in Sentencing funds. The Governors Office has written to the Department of Justice for an opinion about continued eligibility for Truth in Sentencing funds should the guidelines be repealed.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill is exempt from the requirement of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities have to raise revenues in the aggravate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

Study of Sentencing Guidelines by the Department of Justice

As of 1994, there were 9 states including Florida that have sentencing guidelines which are not merely voluntary. The U.S. Department of Justice, Office of Justice Programs, completed a study in February of 1996, which assessed "structured sentencing" nationwide. The conclusion of this study was that there are some benefits of well implemented sentencing guidelines, primarily, control of prison populations and limiting disparate treatment of similarly situated offenders. However, despite attempts to target violent and career offenders for lengthy prison stays, there is no evidence that guidelines have measurably reduced crime rates.

The study by the Department of Justice suggests that one reason that guidelines do not reduce the crime rate is that they typically impose longer sentences on older offenders with a long history of convictions even though that person is now "burning out" of his or her criminal career. On the other hand, youthful offenders who are in the earlier stages of their criminal career would receive lighter sentences. In Florida, 921.0011, F.S., allows juvenile offenses to be scored only if they occurred within three years of the primary offense for which a defendant is being sentenced.

The study by the U.S. Department of Justice did indicate that guidelines, if implemented correctly, could reduce disparate treatment of similarly situated offenders, however, those benefits can be nullified by excessive departure sentences and by the alleged selective use of minimum mandatory sentences. The report recommended that subjective reasons for departure should be kept to a minimum, and states should specify as much as possible the type of departures that are acceptable. The report also recommends that the use of minimum mandatory sentences be limited.

Laws referring to the sentencing guidelines and not addressed by this Bill

This bill renders many statutory provisions meaningless and these provisions should be deleted or amended:

Section 20.315(4) F.S.: creates the Florida Corrections Commission which has 9 primary functions, one of which is to review the recommendations of the Sentencing Guideline Commission. This bill will leave the Corrections Commission with one less primary responsibility.

Sections 773.0823, 777.04, 784.08, 893.135, and 893.20, F.S.: these Sections, in part, require that people who commit crimes, such as battery on an elderly person, certain drug trafficking and violent offenses, to be sentenced according to the guidelines. That portion of these sections will be rendered meaningless and a judge will be able to impose any sentence up to the statutory maximum.

Section 921.188, F.S.: allows defendants to be sentenced to between 12 and 22 months in a local jail if there is a contractual agreement between the jail manager and the Department of Corrections. This section only allows a prison sentence to be served at a local jail if a defendant scores between 40 and 52 points. If the State or the defendant object to a sentence under this provision, there may be grounds for appeal, because the sentence would be based on nonexistent criteria.

Section 924.06(1)(e) and 924.07(1)(l), F.S.: these subsections allow the State and the defendant to appeal a departure from the guidelines. Provisions allowing appeal for departure sentences will not have any meaning if this bill passes.

Section 944.275(2)(b), F.S.: provides for the award of gain-time depending on offense severity levels for offenses occurring between January 1, 1994 and October 1, 1995. A system of awarding gain-time can not be taken from prisoners, therefore, this bill should have no effect on section 944.275, F.S.

Impact of Increasing Judicial Discretion

It is not possible to predict what effect the repeal of the guidelines would have on the prison population. An argument could be made that the high rate of downward departure sentences demonstrate that the courts and prosecutors are not willing to be more punitive. On the other hand, it could also be argued that the guidelines are the starting point of plea negotiations and the ending point is usually lower. If the starting point of prosecutors bargaining position is raised, then perhaps the outcome of plea negotiations would be higher sentences. Of course, if a judge indicates that he/she would impose a lower sentence than the current guideline range, then sentences will be lower.

There is some reason to believe that the length of prison sentences may not increase for the more serious crimes. According to the Department of Corrections, the 1995 revision of the guidelines, which dramatically increased the number of points assigned to levels 7,8,9, and 10, had no effect on the average length of prison sentences. In fact, while the number of guilty dispositions has remained the same, the percentage of those guilty dispositions resulting in a prison sentence has decreased. Surprisingly, the percentage of sentences over 56 months has declined from 76.6% under the 1994 guidelines to 73.1% of cases sentenced under the 1995 revisions. This information has caused the Criminal Justice Estimating Conference to revise its forecast of prison population in the year 2002 from 116,205 to 84,099.

There are many possible explanations as to why the length and number of prison sentences are decreasing. Many of the people with lengthy criminal histories, who qualify for long prison sentences are already in prison. There are no statistics to show whether the rate of violent crime has increased since the 1995 revision became law on October 1, 1995. While the crime rate per 100,000 people has come down in recent years, the total number of violent crimes has remained fairly constant from 1991 through 1995.

Another possible reason the 1995 revision did not have much impact could be that judges and prosecutors are not willing or able to give longer sentences for the serious types of crimes whose penalties were increased by the revisions. The increase in downward departure rates more than compensated for the more severe sanctions allowed by the 1995 revisions. Many of the crimes affected by the revision, such as sex

offenses, are often very difficult to prove. As mentioned earlier, drug offenses are often not very difficult to prove. It is likely that this bill would increase the rate of incarceration for drug offenses. (See section II.B., Effect of Proposed Changes.)

Unequal sentences

The guidelines thus far have allowed regional disparity and disparity between judges within a region. A majority of inmates receive downward departure sentences. Over 12% of inmates receive habitual offender or minimum mandatory sentences which would usually exceed the guidelines. It is not known whether disparities between similarly situated defendants would be increased by this bill. However, to the extent that regional differences increase, those differences could reflect the values of local voters who elect the judges and the State Attorney in their region. The Department of Corrections is concerned that disparate sentences could make inmates more difficult to control. The Department is very much in favor of keeping the guidelines as a "management tool" that will help them to match capacity to prison populations.

Perspective of Judges and Prosecutors

Many judges and prosecutors favor this bill because the guidelines limit the judges discretion and to some degree reduce issues of justice and fairness to a mathematical formula which can not always take into account all the variables that should be considered. Within individual crimes there are often tremendous differences that the guidelines do not consider. A hypothetical example of a less serious burglary would be person who used a key to retrieve property from a former roommate and while retrieving property from an unoccupied apartment, drank a soda belonging to the "victim". That hypothetical burglary scores "mandatory" prison the same as a burglary committed by a person who slips in through a window and steals jewelry while the victim is sleeping. Of course, in the first example the court and the prosecutor would be unlikely to require prison. The guidelines present another inequity in that a defendant who is sentenced at one time for two separate criminal acts scores fewer months in prison than the same defendant would score if each offense is resolved separately.

Among prosecutors there is a belief that drug cases are not treated seriously, and that downward departures are easier and more frequent than upward departures. Another concern is that guidelines create more issues for a defendant to appeal.

If judges are freed from the limitations imposed by the guidelines, then it would be useful to have a way to measure how the courts treat similarly situated offenders. Disparities could be reduced if judges and communities had a standard by which to compare sentences imposed for felony crimes. The current guidelines score sheet provides enough information for DOC to compare sentencing practices.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The original bill repealed all of 921.001, F.S. The committee substitute repeals that section as well, but leaves in and amends section 921.001(4)(b), F.S., relating to which guidelines apply before the repeal on October 1, 1998. The committee bill also leaves in section 921.001(10), F.S., which relates to how gain time is to be awarded. Pursuant to

the request of the sponsor, and an amendment by Representative Meek, the committee substitute changes the people who will make up the new Sentencing Reform Committee which is to replace the present Sentencing Commission.

The committee substitute repeals sections not included in the original bill: Section 921.0011, F.S., through and including section 921.0016, F.S., are repealed effective October 1, 1998. These sections relate to the substance or the actual mechanics of the sentencing guidelines.

Committee on Criminal Justice Appropriations

On April 11, 1997, the Committee on Criminal Justice Appropriations reported CS/HB 241 favorably with a strike- everything amendment, which conforms the bill to CS/SB 716, as amended by the Senate Committee on Governmental Reform and Oversight. The strike-everything amendment:

- Repeals the sentencing guidelines and abolishes the Sentencing Commission, effective October 1, 1998. On that date, the current sentencing guidelines are replaced with the "Florida Criminal Punishment Code."
- The Criminal Punishment Code leaves the current Offense Severity Ranking Chart intact. The Code also utilizes a worksheet that is basically identical to the current sentencing guidelines worksheet. The difference between the current sentencing guidelines structure and the Criminal Punishment Code focuses on the determinate, or indeterminate, nature of the sentence. Currently, there are three sentencing ranges under the sentencing guidelines:
 - If an offender scores less than or equal to 40 points, the recommended sentence is not a state prison sentence. (However, the judge may increase the total sentence points by up to, and including, 15 percent, which would place an offender in the "discretionary" prison range.)
 - If an offender scores 40 points or greater, but less than or equal to 52 points, the judge has the discretion to sentence the offender to state prison.
 - If an offender's total sentence points are greater than 52, the judge must sentence the offender to state prison.

The judge has the discretion to increase or decrease an offender's state prison sentence by up to and including 25 percent. Also, the judge can depart from the sentencing guidelines and impose a prison sentence up to the applicable statutory maximum penalty (for example, 5 years for a third degree felony).

- The strike-everything amendment to CS/HB 241 repeals the three sentencing ranges and provides that:

"The lowest permissible sentence in prison months that may be imposed by the court, absent a valid reason to depart, shall be calculated by subtracting 28 points from the total sentence points and decreasing the remaining total by 25 percent. If the lowest permissible sentence in prison months is less than or equal to 12, a nonstate prison sanction may be imposed. The total sentence points shall be calculated only as a means of determining the lowest permissible sentence. The permissible range for sentencing shall be the lowest permissible

sentence up to and including the statutory maximum, as defined in s. 775.082, for the primary offense. "See pg. 41, lines 5 through 15 , of the strike - everything amendment.

As drafted, any felony offender could receive a state prison sentence. Also, it is unclear how the "lowest permissible prison sentence" will be calculated. For example, if a first-time offender commits a Level 3 offense (such as possession of cocaine), his or her sentence points would equal 16. Subtracting 28 points from the total sentence points, and decreasing the remaining total by 25 percent, results in a negative number. Since a negative number is less than 12, a nonstate prison sanction may be imposed. Presumably, a state prison sentence could be imposed, but the length of such sentence is unclear.

- Allows judges to sentence any offender who has at least one prior felony conviction to state prison for up to 22 months, regardless of the offender's recommended guidelines sentence, effective July 1, 1997 (see HB 1033). This provision would only apply to those offenders who commit an offense on or after July 1, 1997, and before October 1, 1998.
- Prohibits judges from using the defendant's substance abuse or addiction as a mitigating factor supporting a downward departure from the sentencing guidelines, effective July 1, 1997. This prohibition is also included in the Criminal Punishment Code. (See HB 417).
- The fiscal impact of the amended bill has been determined by the Criminal Justice Estimating Conference to be 1,834 new admissions to the Department of Corrections by June 2000, due to the provisions of HB 1033 and 417. The impact of the repeal of the guidelines is indeterminate until 10 years from now because it is not known how the sentence length provisions of the bill will change judicial practices.

VII. SIGNATURES:

COMMITTEE ON CRIME AND PUNISHMENT:

Prepared by:

Legislative Research Director:

J. Willis Renuart

J. Willis Renuart

AS REVISED BY THE COMMITTEE ON CRIMINAL JUSTICE APPROPRIATIONS:

Prepared by:

Legislative Research Director:

Mary Cintron
Mary Cintron

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