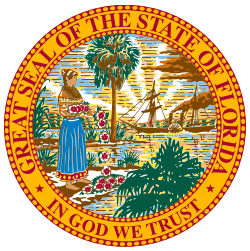
AGENDA

STATE OF FLORIDA
CRIMINAL PUNISHMENT CODE TASK FORCE

January 17, 2020 at 1:00 PM
Stetson University Law Center
1700 North Tampa Street
Tampa, Florida 33602

"Reviewing, evaluating, and making recommendations regarding sentencing for and ranking of noncapital felony offenses under the Criminal Punishment Code."
Chapter 2019-167, §152, Laws of Florida.

Welcome and Additional Introductions	The Honorable Michelle Sisco, Hillsborough County
Historical Overview of the Criminal Punishment Code	Marla Ferrera, Task Force Staff
Overview of State and Federal Sentencing Guidelines	Marla Ferrera, Task Force Staff
Caselaw Considerations	Richard Martin, General Counsel
Florida Public Defender Association	The Honorable Carey Haughwout, Fifteenth Judicial Circuit
Florida Prosecuting Attorneys Association	
Task Force Subcommittee Update and Recommendations (See Appendix)	Subcommittee Chairs
Discussion of Presentations and Recommendations	Task Force Members
Public Comment	Open to Public
Closing Remarks	The Honorable Michelle Sisco, Hillsborough County



Appendix

Criminal Punishment Code Task Force Subcommittee Recommendations

Enhancements (EN)-1: Amend section 775.082(9)(a)3.a., Florida Statute to read: For a felony punishable by life, by a term of imprisonment for life*, but where no firearm was discharged and no death or great bodily harm occurred, for a term of not less than 30 years and not more than a term of imprisonment for life.*

EN-2: Amend the language in section 775.087(2)(d) to give judges discretion to make the firearms sentences consecutive or concurrent. Amend section 775.087(2)(d), Florida Statute to read: … The court shall impose any term of imprisonment provided for in this subsection concurrently or consecutively to any other term of imprisonment imposed for any other felony offense.

EN-3: Amend section 893.135(1)(a)1., Florida Statute to read: If the quantity of cannabis involved: 1. Is in excess of 25 pounds, but less than 2,000 pounds, or is 300 or more cannabis plants, but not more than less than 2,000 cannabis plants, such person shall be sentenced to a mandatory minimum term if imprisonment of 3 years, and the defendant shall be ordered to pay a fine of $25,000.

Amend section 893.135(1)(a)2., Florida Statute to read: If the quantity of cannabis involved: 2. Is 2,000 pounds or more, but less than 10,000 pounds, or is 2,000 or more cannabis plants, but not more than less than 10,000 cannabis plants, such person shall be sentenced to a mandatory minimum term of imprisonment of 7 years, and the defendant shall be ordered to pay a fine of $50,000.

Scoresheets (SS)-1: Resolved that an Enhancement in Part IX should not be used if the enhancement is identical to an element of the Primary Offense of conviction. Instead, the Offense Level for each offense that involves an element identical to any Enhancement should be increased to reflect the failure to apply the multiplier, so this change does not reduce the total number of points a defendant would receive.

SS-2: Resolved that additional points should not be added for a Legal Status Violation in Part V when all of the offense(s) of which the defendant is convicted involve an element that is identical to the basis for that Violation. Instead, the Offense Level for each offense that involves an element identical to a Legal Status Violation should be adjusted to reflect the failure to add these extra points, so this change does not reduce the total number of points a defendant would receive.

SS-3: Resolved that Victim Injury Point Adjustments in Part III should not be applied to any offense for which the basis for the adjustment is identical to an element. Instead, the Offense Level for each offense that involves an element identical to any Victim Injury Point Adjustment should be adjusted to reflect the failure to apply the adjustment, so this change does not reduce the total number of points a defendant would receive.

SS-4: Resolved that additional points should not be added for a Firearms Violation in Part VII when the defendant is convicted of an offense involving an identical element. Instead, the Offense Level for the underlying firearms offense should be adjusted to reflect the failure to apply this adjustment, so this change does not reduce the total number of points a defendant would receive.

SS-5: State Attorneys shall ensure that score sheets are completed accurately, with all legally required enhancements, multipliers, and other adjustments consistently applied. The Task Force recommends that the Florida Supreme Court require the use of an electronic, computer-based scoresheet program that has been developed by the Department of Corrections, or another materially identical or superior program, that automatically populates points and applies enhancements, multipliers, and other adjustments. The Attorney General should also compile a "best practices" guide to assist State Attorneys in implementing a uniform sentencing system."

Historical Overview of Florida's Criminal Sentencing Laws

MARLA FERRERA, ESQ.

JANUARY 17, 2020

Pre 1983

Florida courts had broad discretion.

1970’s - prison over overcrowding became a major issue

1972 – Florida prisoners brought action against the FDOC

1983

Florida Sentencing Guidelines are adopted

Intent:

- Ensure that the penalties imposed were proportionate to the severity level of the primary offenses
- Provide uniformity in sentencing

Structure:

- Complex point system
- Abolished parole for most offenses

1983-1994

To comply with the consent decree, the legislature created the Control Release Authority to manage the prison population

Gain Time

Ch. 91-239, Laws of Fla.

- Directed EDR and Sentencing Commission to develop revisions to sentencing guidelines, establishing an offense severity ranking and scoring system.

HVFO - 1988

added to s. 775.084, F.S.

allowed the court to extend the term of imprisonment for an offender who had at least two prior felony convictions, one of which was for Arson, Sexual Battery, Robbery, Kidnapping, Aggravated Child Abuse, Aggravated Assault, Murder, Manslaughter, Unlawful Throwing or Discharge of a Destructive Device or Armed Burglary.

Enhanced sentence could be:

- 1st degree felony = life; (offender shall not eligible for release for 15 years- a term not exceeding 3 years)
- 2nd degree felony = not more than 30 years; (offender shall not be eligible for release for 10 years - in excess of a year),
- 3rd degree felony = not more than 10 years, (offender not eligible for release for 5 years)

1993-1994

Safe Streets Initiative of 1994, Ch. 93-406, Laws of Fla.

Intent:

- Ensure that offenders serve 70-75% of their imposed sentence.

Structure:

- Point system
- Eliminated multiple worksheets; Created single scoresheet
- Created offense severity rankings table with 10 levels
- Maintained upward and downward departures
- Repealed most minimum mandatory sentences

1995

Based on research from the early 1990s, the Legislature found "that a substantial and disproportionate number of serious crimes" committed in Florida were committed by a "relatively small number of repeat and violent felony offenders." Ch. 95-182, Laws of Fla.

– Ch. 95-184, Laws of Fla.

Attempted to toughen the recommended sentences, particularity for property crimes.

– Ch. 95-294, Laws of Fla.

Required offenders who committed their offense on or after October 1, 1995 to serve at least 85% of their sentence.

1995

, Ch. 95-182, Laws of Fla.

Provided for enhanced sentencing and minimum mandatory terms of imprisonment for VCC criminals.

Intent:

Strengthen Florida's criminal justice system through longer sentences for serious and violent offenders

Structure

If the defendant has previously been convicted as an adult three or more times for a qualified offense that is: any forcible felony, aggravated stalking, aggravated child abuse, LL conduct, escape, a violation of 790 using a FA;

The defendant's primary offense must also be a qualified offense listed above;

The priors must be within five years of the conviction date of the last prior enumerated felony, or release from prison, probation, community control;

Then the court impose the following sentence accordingly. 1st degree felony/life felony a term of life; 2nd degree felony, a term not more than 40 years, with a MM of 30 years; and 3rd degree felony, a term not more than 15 years, with a MM of 10 years.) not eligible for discretionary early release.

1996-97

Findings from Ch. 99-188, Laws of Fla.

- Since 1994, the violent crime rate had decreased 9.8 percent;
- In 1996, Florida had the highest violent crime rate of any state in the nation, exceeding the national average by 66 percent;
- Per capita violent crime rate increased 86 percent between 19741999;

Prison Releasee Reoffender Act, Ch. 97-239, Laws of Fla.

- Intent: Address violent offenders who have previously been sentenced to prison and continue to “prey on society by reoffending”.
- It was thought that if an offender knew they had to serve a mandatory sentence at 100% then it would deter the criminal behavior.

1998

Florida Criminal Punishment Code ("CPC") enacted.

- Focus on the punishment of offenders, with a primary emphasis on the violent offenders.
- Scoresheet calculation provides the "lowest permissible sentence" for prison sanctions.
- Authorized the court to deviate below the lowest permissible sentence range with written findings.
- Eliminated guideline ranges and upward departures – permit courts to sentence up to statutory maximum
- The maximum range is the statutory maximum for the offense – absent any minimum mandatory sentences.

1999

Florida Three Strikes Violent Felony Offender Act, Ch. 99188, Laws of Fla.

- Prior to 1999, Florida Statutes did not require the courts to impose mandatory prison terms on violent felons who committed three violent felonies.
- Based on the research that violent felonies were mostly committed by repeat, violent offenders, the Legislature saw a need to punish three-time violent felony offenders to mandatory prison terms to protect citizens.
- Intent: Improve public safety by incapacitating repeat offenders who were most likely to commit the most heinous and violent offenses on citizens within the community
- Structure:
  - If the defendant's primary offense plus two or more prior adult convictions were for an enumerated felony, Example: Arson, Sexual Battery, Robbery, Kidnapping…;
  - The priors must be within five years of the conviction date of the last prior enumerated felony, or release from prison, probation, community control;
  - Then the court sentence as follows: Life/1st PBL to life; 1st degree felony to 30 years; 2nd degree felony to 15 years; and 3rd degree felony to 5 years.

1999

10/20/Life Act – Ch. 99-12, Laws of Fla.

Intent:

Establish zero tolerance of criminals who use, threaten to use firearms in order to commit crimes and thereby demonstrate their lack of value for human life.

Structure:

Amended s. 775.087, F.S.

minimum mandatory sentences on criminals who possessed, discharged or caused great bodily harm/death during the commission of an enumerated felony

Florida Criminal Punishment Code Task Force

OVERVIEW OF STATE AND FEDERAL SENTENCING GUIDELINES

JANUARY 17, 2020

Overview of Research

- In preparation for discussions on Florida's sentencing structure, Task Force staff researched and compiled information on the sentencing structure of the Federal system and ten states:
  - Arizona, District of Columbia, Massachusetts, Michigan, Minnesota, North Carolina, New York, Ohio, Oklahoma, and Texas.
- Task Force staff researched states that use similar variables when sentencing, or "guideline" states.
- Task Force staff also researched states with vastly different sentencing structures from Florida; to investigate alternative sentencing practices.
- States researched are similar to Florida in terms of population, crime rate and/or demographics.

Federal

ADVISORY

- The Federal system is a guideline system.
- The guidelines are advisory,[1] but judges are required to consider them. *Peugh v. U.S.*, 133 S. Ct. 2072, 2084 (2013).
- A grid [2] is used to determine the suggested guideline sentence.[3] The grid considers the base (primary) offense level and the prior criminal history.[4]
- There are 43 offense severity levels.[5] The grid also has four zones: A, B, C and D. Zone A is the least severe and Zone D which is the most severe.
- Judges may depart upward or downward. Reasons for departure must be stated by the court.
- All sentences are subject to appellate review applying a general standard of reasonableness.

1. U. S. v. Booker, 543 U.S. 220 (2005)
2. Referred to as a sentencing table in the code. USSG Manual §5A (2018)
3. Id.
4. Id.
5. Id.

- To calculate the presumptive sentence, the severity level of the base offense (primary) is determined using Chapter 2 of the United States Sentencing Commission Guidelines Manual.[6]
- The guidelines also make "adjustments"[7] based on specific offense characteristics of each offense.[8] (Ex. Adjustments can be made to the base offense severity level for additional factors such as the offender's role in the offense.)[9]
- Once the base offense severity level is calculated, the offender's prior record is categorized into one of six categories using a point system.[10]

6. USSC Manual §1B1.1 (2018)
7. Increase or decrease the severity level
8. i.e. returning to the offense of Assault under §2A2.3(b)- if the victim sustained bodily injury the offense is increased by 2 levels. USSC Manual §2A2.3 (2018)
9. USSC Manual §3 A-E (2018)
10. USSC Manual §4 A-B (2018)

Fact Pattern

- Defendant committed a Robbery with a Firearm. One victim. No discharge of Firearm. No bodily harm to victim. Jewelry was stolen from the victim, valued at $25,000.
- Two priors were both in state court in Hillsborough County, Florida.
  - June 2016 - conviction for one count of Possession of Cocaine, a Third Degree Felony/ Level 3 offense. Defendant received an adjudication of guilt and 60 days Jail.
  - January 2017 - conviction for one count of Burglary of an Unoccupied Dwelling, no firearm or deadly weapon, no assault or battery, a Second Degree Felony/Level 7 offense. Received an adjudication of guilt and 18 months in state prison.

§2B3.1. Robbery

- (a) Base Offense Level: 20
- (b) Specific Offense Characteristics
- (1) If the property of a financial institution or post office was taken, or if the taking of such property was an object of the offense, increase by 2 levels.
- (2) (A) If a firearm was discharged, increase by 7 levels; (B) if a firearm was otherwise used, increase by 6 levels; (C) if a firearm was brandished or possessed, increase by 5 levels; (D) if a dangerous weapon was otherwise used, increase by 4 levels; (E) if a dangerous weapon was brandished or possessed, increase by 3 levels; or (F) if a threat of death was made, increase by 2 levels.

§2B3.1. Robbery Continued

- (3) If any victim sustained bodily injury, increase the offense level according to the seriousness of the injury:

Degree of Bodily Injury	Increase in Level
(A) Bodily Injury	add 2
(B) Serious Bodily Injury	add 4
(C) Permanent or Life-Threatening Bodily Injury	add 6

- (D) If the degree of injury is between that specified in subdivisions (A) and (B), add 3 levels; or
- (E) If the degree of injury is between that specified in subdivisions (B) and (C), add 5 levels.
- Provided, however, that the cumulative adjustments from (2) and (3) shall not exceed 11 levels.

§2B3.1. Robbery Continued

- (4) (A) If any person was abducted to facilitate commission of the offense or to facilitate escape, increase by 4 levels; or (B) if any person was physically restrained to facilitate commission of the offense or to facilitate escape, increase by 2 levels.
- (5) If the offense involved carjacking, increase by 2 levels.
- (6) If a firearm, destructive device, or controlled substance was taken, or if the taking of such item was an object of the offense, increase by 1 level.

§2B3.1. Robbery Continued

- (7) If the loss exceeded $20,000, increase the offense level as follows:
- Loss (Apply the Greatest) Increase in Level

(A)	$20,000 or less	no increase
(B)	More than $20,000	add 1
(C)	More than $95,000	add 2
(D)	More than $500,000	add 3
(E)	More than $1,500,000	add 4
(F)	More than $3,000,000	add 5
(G)	More than $5,000,000	add 6
(H)	More than $9,500,000	add 7.

§4A1.1. Criminal History Category

- The total points from subsections (a) through (e) determine the criminal history category in the Sentencing Grid in Chapter Five, Part A.
- 4A1.1(a)
- (a) Add 3 points for each prior sentence of imprisonment exceeding one year and one month.
- 4A1.1(b)
- (b) Add 2 points for each prior sentence of imprisonment of at least sixty days not counted in (a).
- 4A1.1(c)
- (c) Add 1 point for each prior sentence not counted in (a) or (b), up to a total of 4 points for this subsection.
- 4A1.1(d)
- (d) Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.
- 4A1.1(e)
- (e) Add 1 point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was treated as a single sentence, up to a total of 3 points for this subsection.

- Utilizing the grid, the severity level of the base (primary) offense; including all enhancements and adjustments are cross referenced with the criminal history category. The intersecting cell block provides the presumptive sentence range.[11] The sentence range will fall within one of the zones, which will aid the court in the imposition of the sentence.
- See Federal Sentencing table with zone ranges.

11. USSC Manual §4 A-B (2018)

SENTENCING TABLE
(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
Zone A	1	0–6	0–6	0–6	0–6	0–6	0–6
	2	0–6	0–6	0–6	0–6	0–6	1–7
	3	0–6	0–6	0–6	0–6	2–8	3–9
	4	0–6	0–6	0–6	2–8	4–10	6–12
	5	0–6	0–6	1–7	4–10	6–12	9–15
	6	0–6	1–7	2–8	6–12	9–15	12–18
	7	0–6	2–8	4–10	8–14	12–18	15–21
	8	0–6	4–10	6–12	10–16	15–21	18–24
Zone B	9	4–10	6–12	8–14	12–18	18–24	21–27
	10	6–12	8–14	10–16	15–21	21–27	24–30
	11	8–14	10–16	12–18	18–24	24–30	27–33
Zone C	12	10–16	12–18	15–21	21–27	27–33	30–37
	13	12–18	15–21	18–24	24–30	30–37	33–41
Zone D	14	15–21	18–24	21–27	27–33	33–41	37–46
	15	18–24	21–27	24–30	30–37	37–46	41–51
	16	21–27	24–30	27–33	33–41	41–51	46–57
	17	24–30	27–33	30–37	37–46	46–57	51–63
	18	27–33	30–37	33–41	41–51	51–63	57–71
	19	30–37	33–41	37–46	46–57	57–71	63–78
	20	33–41	37–46	41–51	51–63	63–78	70–87
	21	37–46	41–51	46–57	57–71	70–87	77–96
	22	41–51	46–57	51–63	63–78	77–96	84–105
	23	46–57	51–63	57–71	70–87	84–105	92–115
	24	51–63	57–71	63–78	77–96	92–115	100–125
	25	57–71	63–78	70–87	84–105	100–125	110–137
	26	63–78	70–87	78–97	92–115	110–137	120–150
	27	70–87	78–97	87–108	100–125	120–150	130–162
	28	78–97	87–108	97–121	110–137	130–162	140–175
	29	87–108	97–121	108–135	121–151	140–175	151–188
	30	97–121	108–135	121–151	135–168	151–188	168–210
	31	108–135	121–151	135–168	151–188	168–210	188–235
	32	121–151	135–168	151–188	168–210	188–235	210–262
	33	135–168	151–188	168–210	188–235	210–262	235–293
	34	151–188	168–210	188–235	210–262	235–293	262–327
	35	168–210	188–235	210–262	235–293	262–327	292–365
	36	188–235	210–262	235–293	262–327	292–365	324–405
	37	210–262	235–293	262–327	292–365	324–405	360–life
	38	235–293	262–327	292–365	324–405	360–life	360–life
	39	262–327	292–365	324–405	360–life	360–life	360–life
	40	292–365	324–405	360–life	360–life	360–life	360–life
	41	324–405	360–life	360–life	360–life	360–life	360–life
	42	360–life	360–life	360–life	360–life	360–life	360–life
	43	life	life	life	life	life	life

November 1, 2016

12. USSC Manual §5C1.1 (2018)
13. Id.
14. Id.

Massachusetts

ADVISORY

- Massachusetts uses a grid system for sentencing.[1] The grid has nine severity offense levels.[2]
- Sentencing recommendations are provided in ranges. The sentence range is found in a cell block and is provided in months.[3]
- The intersection of the severity level of the primary offense and the offender's criminal history is the cell block that should be used to determine the sentencing range.[4]

1. Mass. Sent. Comm. Advisory Sentencing Guidelines, Sentencing Guidelines Grid 47 (2017)
2. Id.
3. Id.
4. Id.

- The grid has four zones. The cell bock will fall into one of the following "zones":
- 1). No active supervision zone: no incarceration, probation, fees or fines;
- 2). Intermediate zone: usually community sanctions, to impose incarceration the judge would have to depart from the guidelines;
- 3). Discretionary zone: both incarceration and intermediate sanctions are within the guidelines;
- 4). Incarceration zone: the grid range is the maximum range that the judge can sentence an offender to prison and the minimum term that must be served is two-thirds of the term sentenced by the court.[5] [6]

5. Mass. Sent. Comm. Advisory Sentencing Guidelines, Step 5 (2017)
6. Id. The zones are identified by color on the grid.

- In order to score an offender on the Massachusetts grid, the severity level of the primary offense and the offender's criminal history must be determined.[7]
- The severity level of the primary offense is determined by utilizing the Massachusetts Sentencing Commission Master Crime List.[8]

7. Mass. Sent. Comm. Advisory Sentencing Guidelines, Sentencing Guidelines Grid 47 (2017)
8. Id.

- The offender's criminal history is categorized into a criminal history severity level category, A through E.[9]
- In order to determine the prior offender category, all the offender's prior convictions are assigned a severity level; then the Sentencing Guidelines Manual is used to assign a category level to the prior convictions.[10]
- Next, the offender's criminal history level is labeled as : A): No/Minor Record; B. Moderate Record; C. Serious record; D. Violent or Repetitive; or E. Serious Violent Record

9. Mass. Sent. Comm. Advisory Sentencing Guidelines, Step 4 (2017)
10. Mass. Sent. Comm. Advisory Sentencing Guidelines, Step 4 Figure 2 (2017) Example: Category E Serious Violent Record: is when the offender has two or more prior convictions in any combination for offenses in Level 7 through 9.

Massachusetts Sentencing Grid

Sentencing Guidelines Grid

Level	Example	Presumptive Sentence Range					Suggested Maximum Probation Term Range
9	Murder	Life	Life	Life	Life	Life	
8	Manslaughter (Voluntary)	96 - 144 Mos.	108 - 162 Mos.	120 - 180 Mos.	144 - 216 Mos.	204 - 306 Mos.	3 Years
7	Armed Robbery (Gun)	60 - 90 Mos.	68 - 102 Mos.	84 - 126 Mos.	108 - 162 Mos.	160 - 240 Mos.	
6	Manslaughter (Involuntary)	40 - 60 Mos.	45 - 67 Mos.	50 - 75 Mos.	60 - 90 Mos.	80 - 120 Mos.	
5	Indecent A&B on Child Under 14	12 - 36 Mos.	24 - 36 Mos.	36 - 54 Mos.	48 - 72 Mos.	60 - 90 Mos.	2 Years
4	Larceny From a Person	0 - 24 Mos.	3 - 30 Mos.	6 - 30 Mos.	20 - 30 Mos.	24 - 36 Mos.	
3	A&B DW (No or minor injury)	0 - 12 Mos.	0 - 15 Mos.	0 - 18 Mos.	0 - 24 Mos.	6 - 24 Mos.	
2	Assault		0 - 6 Mos.	0 - 6 Mos.	0 - 9 Mos.	0 - 12 Mos.	1 Year
1	Operating Aft Suspended Lic				0 - 3 Mos.	0 - 6 Mos.	
0	Lic Law Violation (not MV) Violation Town By-Law	IS-0					
	Criminal History Scale	A No/Minor Record	B Moderate Record	C Serious Record	D Violent or Repetitive	E Serious Violent	

Sentencing Zones

- Incarceration Zone
- Discretionary Zone (incarceration/intermediate sanction)
- Intermediate Sanction Zone
- No supervision, no fines, no fees zone

The numbers in each cell represent the range from which the judge selects the maximum sentence (Not More Than);
The minimum sentence (Not Less Than) is 2/3rds of the maximum sentence and constitutes the initial parole eligibility date.

North Carolina

BINDING

- North Carolina's structured sentences are based on a grid system.[1]
- There is a separate grid for misdemeanor and felony offenses.[2] Offenses are assigned a class by statute.[3.]
- There are 10 offense classes and each class has a point value.[4]
- In order to determine a defendant's sentence, NC uses the following:
- 1. A Prior Record Worksheet;
- 2. A current charge worksheet; and
- 3. The sentencing grid

1. N.C.G.S.A. § 15A-1340.17 (c) (Westlaw 2019)
2. Id.
3. All offenses in North Carolina are assigned a statute number. The definition and elements of each crime can be found in North Carolina Statutes Chapter 14. Each criminal offense is given a class ranking within the statute. i.e. the criminal offense Kidnapping is defined in N.C.G.S §14.39. Subsection b of N.C.G.S §14.39 categorizes kidnapping as a Class C felony.
4. N.C.G.S.A. § 15A-1340.14 (Westlaw 2019)

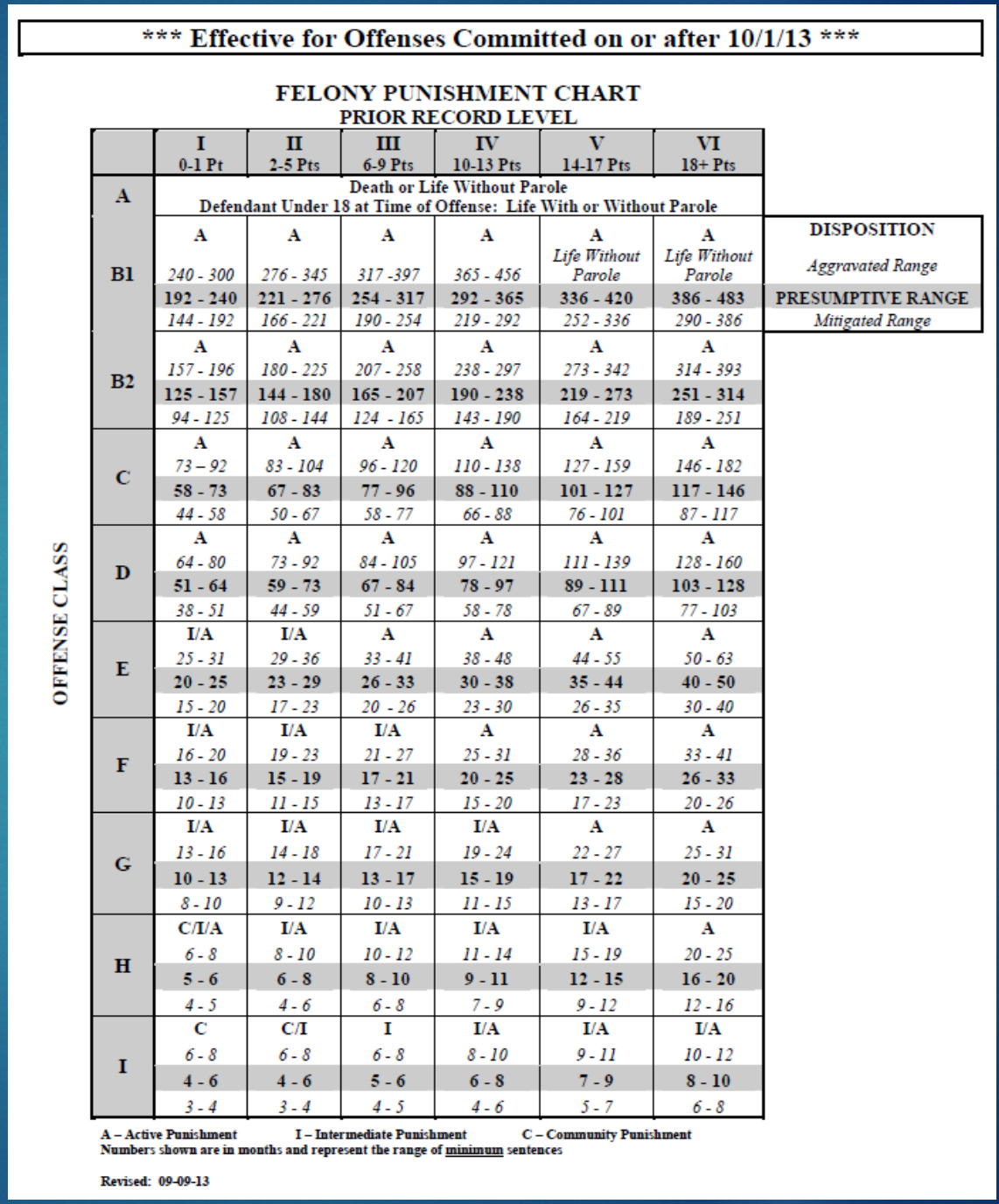
- To calculate the guideline sentence there is a six-step process:
- 1. Determine the offense class for the primary offenses;
- 2. Calculate the offenders prior record level [5];
- 3. Review mitigating and aggravating factors;
- 4. Determine the minimum sentence from the range provided in the grid;
- 5. Determine the maximum sentence from the range provided in the grid;
- 6. Look at the sentence disposition.[6] [7]

5. Prior record point values are determined using the point assignments provided Statute. Generally, point values are determined based on the felony class of each prior offense. N.C.G.S.A. § 15A-1340.14 (Westlaw 2019)
6. N.C. Structured Sentencing Training & Reference Manual (Dec. 1, 2014).
7. There are three types of sentencing dispositions to be discussed. N.C.G.S.A. § 15A-1340.17 (Westlaw 2019)

- On North Carolina's grid each "cell block" on the grid has three sentencing ranges: presumptive range, aggravated range and a mitigated range.[8]
- The court should sentence within the presumptive range absent aggravating or mitigating factors.[9]
- The decision to depart from the presumptive range lies with the court.[10]
- If the court sentences in either the aggravating or mitigating range a written finding must be provided by the court.[11]

8. N.C.G.S.A.S15A-1340.17 (Westlaw 2019); N.C. Structured Sentencing Training & Reference Manual (Dec. 1, 2014).
9. N.C.G.S.A. § 15A-1340.16 (c) (Westlaw 2019)
10. N.C.G.S.A. § 15A-1340.16 (a) (Westlaw 2019)
11. N.C.G.S.A. § 15A-1340.16 (c) (Westlaw 2019)

Sentencing Grid



*** Effective for Offenses Committed on or after 10/1/13 ***

FELONY PUNISHMENT CHART

PRIOR RECORD LEVEL

OFFENSE CLASS	I 0-1 Pt	II 2-5 Pts	III 6-9 Pts	IV 10-13 Pts	V 14-17 Pts	VI 18+ Pts	DISPOSITION
A	Death or Life Without Parole Defendant Under 18 at Time of Offense: Life With or Without Parole						
B1	A	A	A	A	A	A	
	240 - 300	*276 - 345*	*317 -397*	*365 - 456*	*Life Without Parole*	*Life Without Parole*	*Aggravated Range*
	192 - 240	**221 - 276**	**254 - 317**	**292 - 365**	**336 - 420**	**386 - 483**	**PRESUMPTIVE RANGE**
	144 - 192	*166 - 221*	*190 - 254*	*219 - 292*	*252 - 336*	*290 - 386*	*Mitigated Range*
B2	A	A	A	A	A	A	
	157 - 196	*180 - 225*	*207 - 258*	*238 - 297*	*273 - 342*	*314 - 393*	
	125 - 157	**144 - 180**	**165 - 207**	**190 - 238**	**219 - 273**	**251 - 314**	
	94 - 125	*108 - 144*	*124 - 165*	*143 - 190*	*164 - 219*	*189 - 251*	
C	A	A	A	A	A	A	
	73 – 92	*83 - 104*	*96 - 120*	*110 - 138*	*127 - 159*	*146 - 182*	
	58 - 73	**67 - 83**	**77 - 96**	**88 - 110**	**101 - 127**	**117 - 146**	
	44 - 58	*50 - 67*	*58 - 77*	*66 - 88*	*76 - 101*	*87 - 117*	
D	A	A	A	A	A	A	
	64 - 80	*73 - 92*	*84 - 105*	*97 - 121*	*111 - 139*	*128 - 160*	
	51 - 64	**59 - 73**	**67 - 84**	**78 - 97**	**89 - 111**	**103 - 128**	
	38 - 51	*44 - 59*	*51 - 67*	*58 - 78*	*67 - 89*	*77 - 103*	
E	I/A	I/A	A	A	A	A	
	25 - 31	*29 - 36*	*33 - 41*	*38 - 48*	*44 - 55*	*50 - 63*	
	20 - 25	**23 - 29**	**26 - 33**	**30 - 38**	**35 - 44**	**40 - 50**	
	15 - 20	*17 - 23*	*20 - 26*	*23 - 30*	*26 - 35*	*30 - 40*	
F	I/A	I/A	I/A	A	A	A	
	16 - 20	*19 - 23*	*21 - 27*	*25 - 31*	*28 - 36*	*33 - 41*	
	13 - 16	**15 - 19**	**17 - 21**	**20 - 25**	**23 - 28**	**26 - 33**	
	10 - 13	*11 - 15*	*13 - 17*	*15 - 20*	*17 - 23*	*20 - 26*	
G	I/A	I/A	I/A	I/A	A	A	
	13 - 16	*14 - 18*	*17 - 21*	*19 - 24*	*22 - 27*	*25 - 31*	
	10 - 13	**12 - 14**	**13 - 17**	**15 - 19**	**17 - 22**	**20 - 25**	
	8 - 10	*9 - 12*	*10 - 13*	*11 - 15*	*13 - 17*	*15 - 20*	
H	C/I/A	I/A	I/A	I/A	I/A	A	
	6 - 8	*8 - 10*	*10 - 12*	*11 - 14*	*15 - 19*	*20 - 25*	
	5 - 6	**6 - 8**	**8 - 10**	**9 - 11**	**12 - 15**	**16 - 20**	
	4 - 5	*4 - 6*	*6 - 8*	*7 - 9*	*9 - 12*	*12 - 16*	
I	C	C/I	I	I/A	I/A	I/A	
	6 - 8	*6 - 8*	*6 - 8*	*8 - 10*	*9 - 11*	*10 - 12*	
	4 - 6	**4 - 6**	**5 - 6**	**6 - 8**	**7 - 9**	**8 - 10**	
	3 - 4	*3 - 4*	*4 - 5*	*4 - 6*	*5 - 7*	*6 - 8*	

A – Active Punishment I – Intermediate Punishment C – Community Punishment
Numbers shown are in months and represent the range of minimum sentences

Revised: 09-09-13

Michigan

ADVISORY

- Michigan has nine felony classifications, M2 and A through H; A and M2 being the most severe felony classes.[1]
- Michigan has nine guideline grids; each grid represents a felony class.[2]
- On each grid there are different categories of cells: Intermediate sanction cells, Straddle cells sanction cells, and Prison cells
- Intermediate sanctions are indicated by and asterisk, straddle cells are shaded gray and prison cells are left white.

1. M.C.L.A. §777.61-.69 (Westlaw 2019)
2. Id.

- In order to determine an offender's sentence range, the following steps are followed:
- I. Score the offender's prior record;[3]
  - a. There are seven prior record variables,
  - b. All prior felony and juvenile conditions are scored,
- II. Score the [current] offense variables;[4]
  - a. Determine the crime group, i.e. crime against property or person,[5]
  - b. The statutes and manual provide 20 offense variable scores,
- III. Identify the crime class and proper sentencing grid;[6]
- IV. Determine the recommended minimum sentence range;[7] and
- V. Requirements for departing from the minimum range

3. MI Sentencing Guidelines Manual Step I (2019); M.C.L.A. § 777.50-770.57 (Westlaw 2019).
4. MI Sentencing Guidelines Manual Step II (2019); M.C.L.A § 777.31-777.49 (Westlaw 2019).
5. Id. There are also enhancements for use of weapon and harm caused to the victim.
6. MI Sentencing Guidelines Manual Step III (2019); M.C.L.A § 777.61-777.69 (Westlaw 2019).
7. As indicated above, the cell block where the offender's prior history score intersects with the primary offense score is the minimum sentence to be used. Sentence guidelines are provided in months.

Sentencing Grid for Class C Offenses

Sentencing Grid for Class C Offenses—MCL 777.64

Includes Ranges Calculated for Habitual Offenders (MCL 777.21(3)(a)-(c))

OV Level	PRV Level A 0 Points		B 1-9 Points		C 10-24 Points		D 25-49 Points		E 50-74 Points		F 75+ Points		Offender Status
I 0-9 Points	0	11*	0	17*	10	19	12	24	19	38	29	57	
		13*		21		23		30		47		71	HO2
		16*		25		28		36		57		85	HO3
		22		34		38		48		76		114	HO4†
II 10-24 Points	0	17*	5	17*	12	24	19	38	29	57	36	71	
		21		21		30		47		71		88	HO2
		25		25		36		57		85		106	HO3
		34		34		48		76		114		142	HO4†
III 25-34 Points	10	19	12	24	19	38	29	57	36	71	43	86	
		23		30		47		71		88		107	HO2
		28		36		57		85		106		129	HO3
		38		48		76		114		142		172	HO4†
IV 35-49 Points	12	24	19	38	29	57	36	71	43	86	50	100	
		30		47		71		88		107		125	HO2
		36		57		85		106		129		150	HO3
		48		76		114		142		172		200	HO4†
V 50-74 Points	19	38	29	57	36	71	43	86	50	100	58	114	
		47		71		88		107		125		142	HO2
		57		85		106		129		150		171	HO3
		76		114		142		172		200		228	HO4†
VI 75+ Points	29	57	36	71	43	86	50	100	58	114	62	114	
		71		88		107		125		142		142	HO2
		85		106		129		150		171		171	HO3
		114		142		172		200		228		228	HO4†

† Certain fourth habitual offenders may be subject to a mandatory minimum sentence of 25 years' imprisonment. See MCL 769.12(1)(a).

District of Colombia

ADVISORY

- The District of Columbia uses a grid system when sentencing an offender. There are two sentencing grids: a Master Grid and a Drug grid.[1]
- The Master grid has nine severity levels and the Drug grid has four severity levels. The Master and the Drug grids both have five prior history levels.[2]
- The cell blocks within the grids provide a suggested sentencing range (in months) for an offender's sentence.

1. DCVSG Appendix Grids A and B (2019)
2. Id.

- Appendix C is a chart that alphabetically lists criminal offenses. The chart provides the offense severity level, the maximum statutory penalties and the minimum penalties.[3]
- Once the severity level is determined, the offender's criminal history score must be calculated.[4]
- An offender's sentence is determined by cross refencing the severity group of the primary offense and the criminal history level, the point of intersection provides a sentencing range in months.[5]

3. DCVSG Chapter 2 and Appendix C (2019); Note: the chart provides additional information to what is listed above regarding each offense. See chart for details.
4. Id. at Chapter 2 (2019)
5. Id.

- The master grid and the drug grid have three types of dispositions based on the cell block.[6]
- This can be determined by the color of the cell block within grid. [7]
- The disposition recommendations range from community sanction recommendations to prison recommendations or a split thereof. [8]

6. Id. See also, comments under each grid. Appendix Grids A and B (2019)
7. Id.
8. DCVSG Chapter 7 (2019)

APPENDIX A -- MASTER GRID

July 2019

Sentencing Ranges Listed In Months

	Ranking Group Most Common Offenses	Criminal History Score 0 to ½ A	¾ to 1¾ B	2 to 3¾ C	4 to 5¾ D	6 + E
3 Points*	**Group 1** 1st degree murder w/armed 1st degree murder	360 - 720	360 - 720	360 - 720	360 - 720	360 +
3 Points*	**Group 2** 2nd degree murder w/armed 2nd degree murder 1st degree sex abuse 1st degree sex abuse w/armed	144 - 288	156 - 300	168 - 312	180 - 324	192 +
3 Points*	**Group 3** Voluntary manslaughter w/armed 1st degree child sex abuse Carjacking while armed Assault with intent to kill w/armed Armed burglary I	90 - 180	102 - 192	114 - 204	126 - 216	138 +
3 Points*	**Group 4** Aggravated assault w/armed Voluntary manslaughter	48 - 120	60 - 132	72 - 144	84 - 156	96 +
3 Points*	**Group 5** PFCOV Armed robbery Burglary I Obstruction of justice Assault with intent to kill	36 - 84	48 - 96	60 - 108	72 - 120	84 +
2 Points*	**Group 6** ADW Robbery Aggravated assault 2nd degree child sex abuse Assault with intent to rob	18 - 60	24 - 66	30 - 72	36 - 78	42 +
2 Points*	**Group 7** Burglary II 3rd degree sex abuse FIP-PCOV Negligent homicide Attempt 2nd degree sex abuse	12 - 36	18 - 42	24 - 48	30 - 54	36 +
1 Point*	**Group 8** Carrying a pistol (CPWL) UUV Attempt robbery/burglary FIP[1] 1st degree theft Assault w/significant bodily injury	6 - 24	10 - 28	14 - 32	18 - 36	22 +
1 Point*	**Group 9** Escape/prison breach BRA Receiving stolen property Forgery/uttering Fraud	1 - 12	3 - 16	5 - 20	7 - 24	9 +

*Criminal History Points for prior convictions in these groups.

White/unshaded boxes – prison or compliant long split only.

Green shaded boxes – prison, compliant long split, or short split permissible.

Yellow shaded boxes – prison, compliant long split, short split, or probation permissible.

[1] D.C. Code § 22-4503 provides that the offense of Unlawful Possession of a Firearm penalizes possession by a convicted felon, as well as possession by a person who has in the last five years been convicted of an intra-family offense, among other offenses.

New York

- New York uses a grid sentencing system.
- There are 5 separate sentencing grids.
- New York offenses are divided into five felony classes.
- Classes range: A through E; A being the most severe offense.[1]

1. McKinney's Penal Law § 55.05 (Westlaw 2019)

- Classes are then further subdivided into Violent offenses or Non-Violent offenses ***and*** Non-Drug offenses.[2]
- The grids are then even further subdivided into prior criminal history classifications.[3]
- Each class and class subdivision have a specified sentencing range or determinate sentence.[4]

2. McKinney's Penal Law § 70.02 (Westlaw 2019)
3. Chart IV sub-categorize priors further as Second Violent Felony Offender and Persistent Violent Felony Offender McKinney's Sentence Charts IV (Westlaw 2019)
4. McKinney's Penal Law § 70.00 (Westlaw 2019)

- First, determine the classification of the crime you are charged with (A, B, C, etc.)
- Second, determine whether or not it is a “violent” offense (drug or non drug)
- Third, determine whether you have any prior felony convictions, and whether they were violent (violent offenses and non-drug offense)

If the defendant has a PRIOR VIOLENT felony convictions, he will be sentenced as a "second felony offender." If the second offense is non-violent, the sentence will be determinate. If the second crime is violent, he will be sentenced as a "second violent felony offender" and the sentence will be determinate.

	VIOLENT PREDICATE NON-VIOLENT (PENAL LAW 70.04)		VIOLENT PREDICATE VIOLENT (PENAL LAW 70.04)	
	MIN.	MAX.	MIN.	MAX.
A-2	6 - 12 1/2	LIFE		
B	4 1/2 - 9	12 1/2 - 25	10	25
C	3 - 6	7 1/2 - 15	7	15
D	2 - 4	3 1/2 - 7	5	7
E	1 1/2 - 3	2 - 4	3	4

If the defendant has been imprisoned for at least TWO PRIOR FELONIES, he may at the court's discretion be treated as a "persistent felony offender," also known as a "discretionary persistent."

If the defendant has at least TWO PRIOR VIOLENT FELONIES, and the current crime is violent, the court must sentence the defendant as a "persistent violent felony offender," also known as a "mandatory persistent."

	PERSISTENT FELONY OFFENDER (PENAL LAW 70.10)		PERSISTENT VIOLENT FELONY OFFENDER (PENAL LAW 70.08)	
	MIN.	MAX.	MIN.	MAX.
A-2	15 - 25	LIFE		
B	15 - 25	LIFE	20 - 25	LIFE
C	15 - 25	LIFE	16 - 25	LIFE
D	15 - 25	LIFE	12 - 25	LIFE
E	15 - 25	LIFE	ANY	LIFE

- For Example, a class D offender could have five different possible sentences for the court to impose.
- A Class D offender that has a Non-Drug and Non-Violent offense, with no prior felonies will receive a minimum of no jail time and a maximum of 2 1/3 - 7 years in prison.[5]
- A Class D offender that has Non-drug and Non-violent offense but is a Second Felony Offender will receive a minimum of 2 - 4 years and a maximum of 3 - 7 years in prison.[6]
- A Class D Violent offender that has no prior felonies will receive a minimum of a 2 year determinate sentence and a maximum of a 7 year prison determinate sentence.[7]
- A Class D Violent offender and is a Second Felony Offender will receive a minimum of a 3 year determinate sentence and a maximum of a 7 year determinate prison sentence.[8]
- A Class D Violent offender that is a Second Violent Felony offender will receive a minimum of a 5 year determinate sentence and a maximum of a 7 year determinate sentence.[9]

5. McKinney's Sentence Charts, Chart VI (Westlaw 2019)
6. McKinney's Penal Law § 70.06 (Westlaw 2019)
7. McKinney's Penal Law § 70.02 (Westlaw 2019)
8. McKinney's Penal Law § 70.06 (Westlaw 2019)
9. McKinney's Penal Law § 70.04 (Westlaw 2019)

Ohio

PARTIALLY BINDING/PARTIALLY ADVISORY

- Ohio does not use a point system to classify crimes or a grid system to determine sentencing guidelines.
- There is no criminal history scoring system.
- Ohio classifies felonies into levels. There are five felony level classifications.[1]
- Level one offenses are the most serious and level five are the least serious offenses.[2] Each felony offense level has a definite sentence range. [3] [4]

1. OH R.C. §2929.14 (Westlaw 2019)
2. Id.
3. Id.
4. i.e., a level one offense has a definite prison term of 3,4,5,6,7,8,9,10,or 11 years. Id.

- If the offense does not have a mandatory prison sentence, then the felony offense level of the primary offense must be determined.[5]
- Once the felony level is determined, the court is required to go through detailed statutory factors and determine if they apply to the primary offense to assist in sentencing.[6]
- Some of the factors to be considered are the mental or physical injury of the victim, economic harm to the victim, occupation of the offender (especially is it was an elected position or a position of trust), the offender's relationship with the victim, if the offender committed the offense as a part of organized activity and if the offense was based on race.[7]

5. OH R.C. §2929.13 (Westlaw 2019)
6. OH R.C. §2929.14 (A) (1-5) (Westlaw 2019)
7. OH R.C. §2929.12 (Westlaw 2019) See statute for an exhaustive list of factors.

Felony sentencing based on the statutes

FELONY SENTENCING TABLE - MAY 2017						
Felony Level	Sentencing Guidance [§2929.13(B) through (E)]	Prison Terms [§2929.14(A)]	Maximum Fine [§2929.18(A)(2) and (3)]	Repeat Violent Offender Enhancement [§2929.14(B)(2)]	Is Post-Release Control (PRC) Required? [§2967.28(B) and (C)]	PRC Period [§2967.28(B)]
F-1	Presumption for prison (also applies to "in favor" drug offenses)	3, 4, 5, 6, 7, 8, 9, 10, or 11 years	$20,000	1, 2, 3, 4, 5, 6, 7, 8, 9, or 10 years	Yes	5 years
F-2		2, 3, 4, 5, 6, 7, or 8 years	$15,000			3 years 5 years, if sex offense
F-3	No guidance, other than PURPOSES AND PRINCIPLES (Also applies to "Div.(C)" drug offenses)	9, 12, 18, 24, 30, or 36 months or 12, 18, 24, 30, 36, 42, 48, 54, or 60 months[b]	$10,000	For F-2 involving attempted serious harm or for involuntary manslaughter: 1, 2, 3, 4, 5, 6, 7, 8, 9, or 10 years; otherwise none	Yes, if sex or violent offense; otherwise optional	3 years 5 years, if sex offense
F-4	Mandatory 1- year community control for non-violent, no prior felony, etc.[c] Otherwise: If any of 11 factors and not amenable to other sanction(s), guidance for prison.[c] If none of 11 factors, guidance against prison (Also applies to "Div.(B)" drug offenses)	6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, or 18 months	$5,000	None	Yes, if sex offense; otherwise optional	
F-5		6, 7, 8, 9, 10, 11, or 12 months	$2,500			

.19, .203], etc.

SENTENCING TABLE NOTES

Exceptions: Indeterminate sentences *for aggravated murder, murder, human trafficking, and certain sex offenses and crimes with sexual motivation.*

Drug Offenses – *Note penalties track degree of offense, but the sentencing guidance may be different than for other offenses at that felony level.*

Repeat Violent Offenders are [§2929.01(CC)]: *Being sentenced for aggravated murder, murder, a violent F-1 or F-2 that is an offense of violence, or an attempt to commit any of these offenses if the attempt is an F-1 or F-2, with a prior conviction for one or more of the same offenses or their equivalents.*

Post-Release Control [§2967.28D(3)]: *The board or court shall review the releasee's behavior and may reduce the duration. The reduction for offenses described in division (B)(1) shall not be a period less than the length of the stated prison term originally imposed, and in no case shall the board or court permit the releasee to leave the state without permission of the court or the releasee's parole or*

- These factors merely provide the court with guidance when sentencing.[8] The statute does not provide specifics as to how much weight should be given to each factor.[9]
- However, Ohio Code §2929.14(B)(- (K) allows or mandates certain prison terms for specific findings.
- For example, if the offender is found to be a violent repeat offender, the statute allows the court to impose additional years of prison to the longest minimum prison term authorized by the primary felony offense level.[10] [11]

8. Id.
9. Id.
10. OH R.C. §2929.14 B-K (Westlaw 2019)
11. OH R.C. §2929.14 B-K either mandate a certain number of years to be added to a sentence for certain enhancements like firearms or allows the court to add years to the base sentence for enhancements. Other examples: OH R.C. §2929.14 (B)(1)(a)(iii) A prison term of one year [shall be imposed] … on the offender if it is proven that there was a firearm on or about the offender's person or under the offender's control while committing the offense.

Minnesota

BINDING

- Felony offenses are not broken down into levels. Rather, each individual offense is broken down into categories with a specific punishment for each category.
- For example, there are five classifications for the offense of assault.[1] Assault in the first, second, third, fourth and fifth degree; each degree has a its own punishment term according to the statute.[2] [3]
- Accordingly, to determine the maximum punishment range for an offense, the offense is found in the statutes and the particular subsection will provide the maximum sentence and fine for that offense.

1. M.S.A. § 609.221, §609.222, §609.223, §609.224, §609.2231 &§609.224 (Westlaw 2019)
2. Id.
3. Example of punishment maximums: Assault in the first degree may be punished up to 20 years in prison and a maximum fine of $30,000; while Assault in the fifth degree may be punished up to 5 years in prison and a maximum fine of $10,000. M.S.A. § 609.221& 609.223 (Westlaw 2019)

- Multiple grids are used to provide guideline sentence ranges.[4]
- There are three grids: 1. Standard grid with 11 severity levels; 2. Drug offender grid with nine (9) severity levels; 3. Sex offender grid with eight severity levels.[5]
- Each grid considers the severity level (vertical) of an offense and the offender's criminal history (horizontal).

4. MSGC 2019 §4(a), §4(b) & §4(c)
5. Id.

- Cell blocks in the grid are either shaded or unshaded. The unshaded cells have a presumption of state prison; while the shaded cells have a “presumptive stayed sentence; at the discretion of the court, up to one-year confinement and other non-jail sanctions can be imposed as conditions of probation”.[6]
- The guidelines provide a range of 15% lower and 20% higher from the specific sentence provided in the cell block.[7]
- A sentence given within this range is not a departure from the guidelines.[8]

6. MSGC 2019 §4(a) quoting the commentary. If a charge has a mandatory sentence, the mandatory sentence trumps the grid.
7. MSGC 2019 §2C(1); See also M.S.A. §244.09
8. The italicized numbers on the grid is the discretionary range.

- In order to compute an offender's sentence the offense severity level must be determined by the primary ("conviction") offense.[9]
- The severity level for each offense is found on the Offense Severity Reference Table.[10]
- Next, an offender's criminal history is scored considering the offender's prior felonies, misdemeanors and juvenile convictions as well as the offenders custody status at the time of the offense.[11]

9. MSGC 2019 §2A(1)
10. MSGC 2019 §5A & 5B
11. MSGC 2019 §2B quoting the commentary

Arizona

- Arizona has six felony classes: Class one felonies are the most severe offenses and Class six felonies are the least severe.[1]
- Arizona's sentencing structure for felony offenses are categorized in two ways: First, the offenses are divided into dangerous and non-dangerous offenses.[2]
- Next, dangerous and non-dangerous offenses are further subdivided by first-time offender, second-time offender, third-time offender and repeat offenders.[3]

1. A.R.S. § 13-702 (Westlaw 2019)
2. Id. See also, A.R.S. § 13-704 (Westlaw 2019)
3. A.R.S. § 13-701- 705 (Westlaw 2019)

- The table has five sentencing categories for non-dangerous offenses: mitigated, minimum, presumptive, maximum and aggravated.
- Dangerous offenses have three categories: minimum, presumptive and maximum.[4]
- There is a statutory list of mitigating and aggravating factor that should be considered when determining a sentence using the table.[5]
- The presumptive range on the table should be sentenced by the court. If the court sentences outside the presumptive range, the court must make findings of aggravating or mitigating factors accordingly.

4. This is for non -dangerous offenses; dangerous offenses only have minimum, presumptive and maximum categories. A.R.S. § 13-702 (Westlaw 2019)
5. A.R.S. § 13-701 (Westlaw 2019)

The sentencing terms are as follows for a Non-Dangerous Felony, First Offense:

	Felony	Mitigated	Minimum	Presumptive	Maximum	Aggravated"[6]
	Class 2	3 years	4 years	5 years	10 years	12.5 years
	Class 3	2 years	2.5 years	3.5 years	7 years	8.75 years
	Class 4	1 year	1.5 years	2.5 years	3 years	3.75 years
	Class 5	.5 years	.75 years	1.5 years	2 years	2.5 years
	Class 6	.33 years	.5 years	1 year	1.5 years	2 years

6. A.R.S. § 13-702 (D) (Westlaw 2019)

Texas

- Texas does not have any type of structured sentencing system. Texas does not use a grid, point or guideline system to calculate an offender's sentence.
- Felony offenses are classified into five levels according to severity. The felony offenses levels are as follows[1]:
    1. Capital felony;
    2. First Degree felony;
    3. Second Degree felony;
    4. Third degree felony; and
    5. State Jail felony.[2]
- Texas' penal code provides a minimum and maximum range for the felony offense level.

1. Severity of offense is in descending order.
2. V.T.C.A., Penal Code § 12.04 (Westlaw 2019)

Felony	Penalty
Capital	Death or life in prison without parole
First-degree	5 to 99 years in a state prison and/or a fine of not more than $10,000
Second-degree	2 to 20 years in a state prison and/or a fine of not more than $10,000
Third-degree	2 to 10 years in a state prison and/or a fine of not more than $10,000
State jail	180 days to 2 years in a state jail and/or a fine of not more than $10,000

- Texas penal code chapter 12 (D) does provide the court with rules for certain aggravators.[3]
- The penal code takes into consideration an offender's prior record. If the prosecution proves that the offender has a prior felony conviction, then the court will upgrade the level of the primary charge.
- For example: If an offender is charged with a third degree felony and the prosecutor proves that the offender has been convicted of a prior felony; then the offender *shall* be sentenced as if he committed a second degree felony offense and will be sentenced within the second degree range.[4]

3. This subchapter is called Exceptional Sentences. V.T.C.A., Penal Code § 12.41 -§12.50
4. Essentially the code mandates the court to enhance the offender's status by one felony level. V.T.C.A., Penal Code § 12.42

- To determine the felony level of an offense; the offense is researched in penal code.
- The offense will be found in a specific subsection. The subsection will define the elements of the offense and specify the offense level.
- Certain offenses will be upgraded by one level within the subsection based on an aggravating factor.
- For example, Aggravated Assault is a second degree felony, unless the offender uses a deadly weapon and causes serious bodily harm to the victim. If a deadly weapon is used and there is serious bodily injury to the victim, then offense becomes a first degree felony and the offender shall be sentenced as such.[5]

5. V.T.C.A., Penal Code § 22.02(a) &(b)

- Texas is one of the few states that provides the court with this vast amount of discretion.
- An offender could have no prior record and commit a first degree (noncapital) felony and be punished anywhere from 5 to 99 years

Oklahoma

- Oklahoma is a statutory sentencing state. Therefore, they do not use a grid or point system.
- Oklahoma has felony and misdemeanor offenses.
- Oklahoma does not have a list of third degree, second, and first degree felonies. Instead, the statute defines a specific offense, its degree level, and its punishment.
- Statutory sentences are mandatory.

How to determine a sentence based on the primary offense:

- First you research the statute of an offense. For example, for the offense of burglary, there will be a separate statute for burglary in the First degree, Second degree, and Third degree.
- The statutes define the criteria that must be met to be considered a First, Second, Third degree burglary.
- Next, another statute is referenced to determine the sentence range.

- See Burglary example:

§ 1431. Burglary in First degree

- Every person who breaks into and enters the dwelling house of another, in which there is at the time some human being, with intent to commit some crime therein, either:
- 1. By forcibly bursting or breaking the wall, or an outer door, window, or shutter of a window of such house or the lock or bolts of such door, or the fastening of such window or shutter; or
- 2. By breaking in any other manner, being armed with a dangerous weapon or being assisted or aided by one or more confederates then actually present; or
- 3. By unlocking an outer door by means of false keys or by picking the lock thereof, or by lifting a latch or opening a window, is guilty of burglary in the first degree.

§ 1436. Burglary--Sentences

- Burglary is a felony punishable by imprisonment in the custody of the Department of Corrections as follows:
- 1. Burglary in the first degree for any term not less than seven (7) years nor more than twenty (20) years;
- 2. Burglary in the second degree not exceeding seven (7) years; and
- 3. Burglary in the third degree not exceeding five (5) years.

Thank You.

Florida Criminal Punishment Code Task Force

Caselaw Considerations

January 17, 2020

PURPOSE OF THE TASK FORCE

- Review, evaluate, and make recommendations regarding sentencing for and ranking of noncapital felony offenses under the Criminal Punishment Code (Code)
- Include an analysis of best practices in its review
- Staff reviewed over 100 judicial decisions since 1998 interpreting the Code.
- A substantial volume of caselaw has developed over downward departures.

DOWNWARD DEPARTURES

- Section 921.0026(1), F.S.(2019) states:
  - A downward departure from the permissible sentence, as calculated according to the total sentence points pursuant to section 921.0024, is prohibited *unless there are circumstances or factors that reasonably justify the downward departure*.

- A trial court may impose a downward departure below the lowest permissible sentence if it finds, by a preponderance of the evidence, mitigating circumstances or factors that reasonably justify the downward departure.
- Section 921.0026 includes a non-exhaustive list of statutory mitigating factors.
  - "Mitigating circumstances under which a departure from the lowest permissible sentence is reasonably justified include, but are not limited to…"
- A trial court may consider other non-statutory mitigating factors.

MITIGATING CIRCUMSTANCES INCLUDE, BUT ARE NOT LIMITED TO…

- The departure results from a legitimate, uncoerced plea bargain
- The defendant was an accomplice to the offense and was a relatively minor participant in the criminal conduct
- The capacity of the defendant to appreciate the criminal nature of the conduct or to conform that conduct to the requirements of law was substantially impaired
- The defendant requires specialized treatment for a mental disorder that is unrelated to substance abuse or addiction or for a physical disability, and the defendant is amenable to treatment
- The need for payment of restitution to the victim outweighs the need for a prison sentence
- The victim was an initiator, willing participant, aggressor, or provoker of the incident

MITIGATING CIRCUMSTANCES INCLUDE, BUT ARE NOT LIMITED TO…

- The defendant acted under extreme duress or under the domination of another person
- Before the identity of the defendant was determined, the victim was substantially compensated
- The defendant cooperated with the state to resolve the current offense or any other offense
- The offense was committed in an unsophisticated manner and was an isolated incident for which the defendant has shown remorse
- At the time of the offense the defendant was too young to appreciate the consequences of the offense
- The defendant is to be sentenced as youthful offender

Since October 1, 1998…

Most of the caselaw pertaining to the Code has addressed…

- Failure to give any reasons for downward departure
- Proper and improper interpretation and application of the statutory mitigating circumstances
- Valid and invalid non-statutory mitigating circumstances

Specialized Treatment – s. 921.0026(2)(d)

Statutory elements…

- The defendant has a mental disorder (unrelated to substance abuse or addiction) or a physical disability;
- Which requires specialized treatment; and
- The defendant is amenable to such treatment.

State v. Chubbuck, 141 So. 3d 1163 (Fla. 2014)

- Evidence Presented at VOP Hearing:
  - Defendant, a veteran, acknowledged he was undergoing treatment for PTSD at the VA hospital
  - Defendant's fiancé testified that defendant was very ill and that she takes him to the VA hospital all the time
- Defense counsel argued
  - Defendant was very ill and asked the trial court to sentence him to time served so he could get treatment for various ailments, including interferon treatment, at the VA hospital
  - Relied on 921.0026(2)(d) for a downward departure based on his mental condition and physical disabilities
- State argued
  - No evidence presented that the DOC would be ill-equipped to treat him

State v. Chubbuck, 141 So. 3d 1163 (Fla. 2014)

The trial court revoked his probation as unsuccessful and sentenced him to 96 days' county jail with credit for 96 days' county jail.

Holding: Plain language of s. 921.0026 does not require defendant, in seeking a downward departure, to prove the DOC cannot provide the required specialized treatment.

Considerations

Should section 921.0026(2)(d), Florida Statutes, be amended to:

(a) reflect the holding in *Chubbuck*?

or

(b) add the requirement that defendant prove that the required specialized treatment he needs is unavailable in the DOC?

Victim Initiator/Aggressor/Willing Participant – s. 921.0026(2)(f)

Statutory elements…

- The victim was an initiator;
- The victim was a willing participant;
- The victim was an aggressor; or
- The victim was a provoker of the incident.

State v. Rife, 789 So. 2d 288 (Fla. 2001)

Facts:

- Adult defendant admitted to having sex with a 17-year-old minor victim on numerous occasions but maintained, and the victim agreed, that the sexual activities were consensual
- The sexual activities with this minor, who moved in with the defendant because she had no other place to reside, began before the victim requested, and defendant agreed, that defendant become her guardian
- Both defendant and the victim testified that they had planned on marrying when the victim reached the legal age of 18
- The defendant was convicted of three counts of sexual battery in violation of section 794.011(8)(b) Florida Statutes

State v. Rife, 789 So. 2d 288 (Fla. 2001)

The trial court recognized that a minor victim's consent could not be used by the defendant as a defense to sexual battery when the victim was in familial or custodial authority of the defendant (s. 794.011(8)(b), F.S.).

The defendant's sentencing scoresheet provided for a minimum of 297.4 months' prison to 495.7 months' prison (pre-Code).

The trial court found that the victim's consent could be considered in imposing a downward departure on defendant finding that the record supported the fact that the victim "willingly participated in this sexual endeavor".

State v. Rife, 789 So. 2d 288 (Fla. 2001)

The trial court downwardly departed and sentenced defendant to three concurrent terms of 102 months followed by ten years' probation on each count and ordered that he receive sexual offender treatment as a condition of probation.

The state objected and requested that the defendant be sentenced within the guidelines.

State v. Rife, 789 So. 2d 288 (Fla. 2001)

Court's Analysis: It is clear that the Legislature expressly precluded defendants from asserting the minor's consent as a defense to section 794.011(8)

The plain language of the downward departure statute at issue does not limit its applicability to crimes in which the victims are adults

If the Legislature had intended to prohibit downward departures even if the minor consented to the activity, it would have expressly provided for such a prohibition in either the laws governing sexual crimes involving minors or the sentencing guidelines

Holding: Trial judges are not prohibited as a matter of law from imposing a downward departure sentence based on a finding that the minor victim was an initiator, willing participant, aggressor, or provoker of the incident.

Considerations

In light of the Florida Supreme Court's holding in *Rife*, should section 921.0026(2)(f) be amended to:

- (a) reflect the holding in *Rife*? Amend section 921.0026(2)(f) to state: The victim, including a minor, was the initiator, willing participant, aggressor, or provoker of the incident.
- or
- (b) expressly prohibit the trial court from imposing a downward departure pursuant to section 921.0026(2)(f) if the victim is a minor?

921.0026(2)(e) - Need for Restitution to the Victim

Numerous downward departure sentences have been reversed because there was insufficient evidence to prove that need for payment of restitution to the victim outweighed the need for a prison sentence.

-Evidence which would support a departure based on the need for restitution versus the need for imprisonment includes the nature of the victim's loss, the effectiveness of restitution, and the consequences of imprisonment. *See Banks v. State*, 732 So.2d 1065, 1069 (Fla. 1999).

921.0026(2)(e) - Need for Restitution to the Victim

When the trial court considers the "efficacy of restitution," as required by *Banks*, it must evaluate the power of the restitution plan to restore the victim to his or her previous state. This evaluation must include the defendant's ability to pay restitution, and the impact of the restitution plan on the victim. *Demoss v. State*, 843 So.2d 309, 312 (Fla. 1st DCA 2003).

When evaluating the nature of the victim's loss, the trial court must consider the impact of the crime on the victim. *Id.*

921.0026(2)(e) - Considerations

Should section 921.0026(2)(e) be amended to require evidence of the following:

-The nature of the victim's loss, including the impact of the crime on the victim;

-The effectiveness of restitution, including the defendant's ability to pay restitution and the impact of the restitution plan on the victim; and

-The consequences of imprisonment?

921.0026(2)(j) - Unsophisticated Manner Departure

In 1998, the Fourth DCA in *State v. Warner*, 721 So.2d 767, 769 (Fla. 4th DCA 1998) held that this reason for departure was not available in DUI cases.

"Given the state's strong public policy against DUI, we conclude that this reason for departure is not available in this case. If this DUI could be considered an isolated incident, then all first DUI's by people having clean records could be considered such. Nor do we think that drunk driving can be 'committed in an unsophisticated manner.'" *Id.*

921.0026(2)(j) - Unsophisticated Manner Departure

In 2001, the Second DCA in *State v. VanBebber*, 805 So.2d 918 (Fla. 2d DCA 2001) held that this reason for departure was available in DUI cases and certified conflict with the Fourth DCA's decision in *Warner*.

In 2003, the Florida Supreme Court held the unsophisticated manner mitigator in section 921.0026(2)(j) was available to support a downward departure from a sentence for a felony DUI conviction. *See VanBebber v. State*, 848 So. 2d 1046 (Fla. 2003).

921.0026(2)(j) - Unsophisticated Manner Departure

In *VanBebber*, the Florida Supreme Court based its decision on the following line of reasoning:

"Section 921.0026 plainly states, 'This section applies to any felony offense, except any capital felony, committed on or after October 1, 1998.' Because the mitigator in section 921.0026(2)(j) applies to any felony offense, except any capital felony committed on or after October 1, 1998, it is available to support a downward departure from a felony DUI conviction. The fact that the Legislature specifically exempted only capital felonies is further support for the conclusion that section 921.0026(2)(j) applies to felony DUI convictions." *VanBebber*, 848 So.2d at 1049.

921.0026(2)(j) - Unsophisticated Manner Departure

"...if the Legislature intended to specifically exempt felony DUI offenses from this statutory scheme this Court must presume that it would have explicitly done so in the statute." *Id.* at 1050.

The Florida Supreme Court based its decision on the clear and unambiguous language of section 921.0026 which provides that the mitigators found therein are applicable to all felonies, except capital felonies.

Did the Legislature intend for this mitigator to apply to DUIs?

Should the phrase "unsophisticated manner" be clarified or defined?

921.0026(2)(j) - Unsophisticated Manner Departure

The offense was committed in an unsophisticated manner…

<u>What does that mean?</u>

"[A] crime is committed in an unsophisticated manner when the acts constituting the crime are 'artless, simple and not refined.'" *State v. Salgado,* 948 So.2d 12, 17 (Fla. 3d DCA 2006) (quoting *Staffney v. State,* 826 So.2d 509, 512-13 (Fla. 4th DCA 2002)).

"[C]ourts have considered evidence of 'several distinctive and deliberate steps' as an analytical factor to determine sophistication." *State v. Fureman,* 161 So. 3d 403, 405 (Fla. 5th DCA 2014).

921.0026(2)(j) - Considerations

DUI manslaughter is not a specific intent crime, it is a general intent crime. *See Tollefson v. State*, 525 So.2d 957, 961 (Fla. 1st DCA 1988).

Is it ever possible for DUI manslaughter to be committed in an unsophisticated manner when it is not a sophisticated crime?

Sentence Manipulation by Police

Sentence manipulation by police is a valid non-statutory legal ground for a downward departure. *See State v. Steadman,* 827 So.2d 1022 (Fla. 3d DCA 2002). When considering sentence manipulation as a basis for downward departure, the trial court's inquiry should focus on law enforcement intent:

-was the sting operation continued only to enhance the defendant's sentence or did legitimate law enforcement reasons exist to support the police conduct, such as to determine the extent of the criminal enterprise, to establish the defendant's guilt beyond a reasonable doubt, or to uncover any co-conspirators?

-if legitimate law enforcement concerns exist, then a downward departure based on sentence manipulation is not warranted.

921.0026(2) - Considerations

Should section 921.0026(2) be clarified to address “sentence manipulation”?

Diminished Mental Capacity

Diminished mental capacity constitutes a valid non-statutory legal ground for a downward departure. *See State v. Williams,* 870 So.2d 938 (Fla. 5th DCA 2004).

In *Williams*, there was ample evidence that Defendant:

-suffers from diminished mental capacity as well as significant physical problems

-scored 68 and 70 on his IQ tests; was deemed minimally competent to stand trial

-has memory, concentration, and attention problems

-is morbidly obese with a pronounced difficulty in walking

-uses a cane and appears to have a long standing orthopedic malformation of his legs and/or feet; receives treatment and therapy on his legs, back, and spine

-lives with his mother and is very reliant on her to dress and prepare his meals

-has received Social Security Supplemental Income for many years

921.0026(2) - Considerations

Should section 921.0026(2) be amended to add "diminished mental capacity" as a statutory reason for a downward departure?

INVALID REASONS FOR DOWNWARD DEPARTURES

- Defendant's substance abuse or addiction at the time of the offense. *State v. Harvey,* 909 So. 2d 989 (Fla. 5th DCA 2005).
- Defendant seemed amenable to drug rehabilitation. *State v. Owens,* 848 So. 2d 1199 (Fla. 1st DCA 2003).
- No redeeming value in sending the defendant to prison. No injury or opportunity for the injury to the other person. *State v. Rogers,* 250 So. 3d 821 (Fla. 5th DCA 2018)
- Judge's opinion that lowest permissible sentence was "not appropriate in this particular situation". *State v. Subido,* 925 So. 2d 1052 (Fla. 5th DCA 2006).

INVALID REASONS FOR DOWNWARD DEPARTURES

- Defendant's intoxication at the time of the offense. *State v. Chapman*, 805 So. 2d 906 (Fla. 2d DCA 2001).
- Downward departure for co-defendant. *State v. Leverett*, 44 So. 3d 634 (Fla. 5th DCA 2010).
- Defendant's lack of criminal activity since his arrest for the charged offenses. Defendant's admission of guilt and entry of an open plea. Trial court's observations that the disposition of criminal cases is handled differently in one county than in other areas of the state. *State v. Robinson,* 149 So. 3d 1199 (Fla. 1st DCA 2017).

INVALID REASONS FOR DOWNWARD DEPARTURES

- Confession after arrest DOES NOT constitute "cooperation with the state to resolve the current offense" required to justify a downward departure. *State v. Garcia-Costa,* 86 So. 3d 562 (Fla. 2d DCA 2012).
- Lowest permissible sentence was "a bit harsh". *State v. Bowman,* 123 So. 3d 107 (Fla. 1st DCA 2013).
- Age of defendant's prior convictions because already taken into consideration by the Code. *State v. Isom,* 36 So. 3d 936 (Fla. 2d DCA 2010).
- Family support concerns. Crime was not committed in a more heinous manner. No redeeming value to sending defendant to prison. Defendant committed crime out of anger and stupidity. *State v. Thompkins,* 113 So. 3d 95

INVALID REASONS FOR DOWNWARD DEPARTURES

- Defendant had familial obligations and kept his “nose clean” since being released from prison in 2004 (short crime free period). *State v. Stephenson*, 973 So. 2d 1259 (Fla. 5th DCA 2008)
- Trial judge’s disagreement with the Code. *State v. Whiteside*, 56 So. 3d 799 (Fla. 2d DCA 2011).
- Work status or length of previous sentences. *State v. McKnight*, 35 So. 3d 995 (Fla. 5th DCA 2010).

INSUFFICIENT REASONS FOR DOWNWARD DEPARTURES

Prison overcrowding and strained DOC budget were insufficient reasons for downward departure when…

- No evidence was introduced regarding those factors

and

- Trial judge did not take judicial notice of any type of report or other information to support the reason.

- *State v. Holsey,* 908 So. 2d 1159 (Fla. 1st DCA 2005)

Considerations

Should s. 921.0026 be amended to provide a non-exhaustive list of factors which should not be considered in determining whether a downward departure is appropriate?

The list would provide guidance to the trial judges on specific reasons determined to be invalid by caselaw such as:

- Defendant's intoxication, substance abuse, or addiction at the time of the offense
- Defendant's amenability to drug rehabilitation
- The codefendant received a downward departure
- Defendant's lack of criminal activity since his arrest for the charged offense
- Age of Defendant's prior convictions
- Family support concerns
- Defendant confessed after his arrest
- Defendant's work status
- Length of Defendant's prior prison sentences
- The crime was not committed in a more heinous manner

- Federal system has list of prohibited departures. *See* USSG s. 5K2.0

A victim's consent or request for leniency

May a victim's consent or request for leniency be a valid basis for a downward departure?

Fifth DCA – No

State v. Hawkins, 225 So.3d 943, 946 (Fla. 5th DCA 2017) (holding that the officer's recommendation for a non-incarcerative sentence does not constitute a valid reason for departure)

State v. Ussery, 543 So.2d 457, 457 (Fla. 5th DCA 1989) (holding that a victim's request for downward departure is invalid as a matter of law)

State v. White, 532 So.2d 1083, 1084 (Fla. 5th DCA 1988) (finding that forgiving attitude of victim's mother was not a valid reason for departure)

A victim's consent or request for leniency

May a victim's consent or request for leniency be a valid basis for a downward departure?

<u>Second DCA – Yes</u>

State v. Eastridge, 5 So.3d 707, 709 (Fla. 2d DCA 2009) (stating "[a] victim's consent or request for lenient sentencing, however, may be a valid basis for a downward departure")

BUT...

The Second DCA in *Eastridge* cited *State v. Bernard* , 744 So.2d 1134, 1136 (Fla. 2d DCA 1999) and *State v. Powell*, 696 So.2d 789, 791 (Fla. 2d DCA 1997) to support that finding.

A victim's consent or request for leniency

In *Powell*, the Second DCA stated:

Whether a victim's request for leniency could ever be a proper reason for a downward departure sentence is a difficult issue. In the context of domestic violence, the victim may have many conflicting emotions. A defendant and other family members could easily pressure the victim to request leniency. We would not wish to encourage trial courts to rely upon this reason for a downward departure sentence in a case involving domestic violence. However, because the alternative ground for departure is valid, we do not need to resolve this issue. *Powell,* 696 So.2d at 791.

A victim's consent or request for leniency

In *Bernard*, the Second DCA stated:

The court in *Powell* expressed concern that domestic violence victims can be particularly vulnerable to family pressure to request leniency for the defendant. Although this case is slightly different factually, there is a family connection between the victim and the defendant. Of greater concern than the family tie, however, is that this victim was just a child, even at the time of sentencing. Because the policy behind the criminalizing of certain sexual offenses is to protect children of such age and to punish harshly the offenders, the trial judge at a minimum should be required to make record findings of credibility and lack of coercion. Without this evidence, the trial court abused its discretion in departing from the guidelines on this basis. *Bernard*, 744 So.2d at 1136.

Considerations

Should a victim’s consent or request for leniency be added to the list of valid or invalid reasons for departure?

Norvil v. State, 191 So. 3d 406 (Fla. 2016)

Do the terms "primary offense" and "prior record" include a *subsequent arrest* and its related charges?

- "Primary offense" means the offense at conviction pending before the court for sentencing for which the total sentence points recommend a sanction that is as severe as, or more severe than, the sanction recommended for any other offense committed by the offender and pending before the court at sentencing. § 921.0021(4), F.S. (2019)
- "Prior record" means a conviction for a crime committed by the offender, as an adult or a juvenile, prior to the time of the primary offense. § 921.0021(5), F.S. (2019).

Norvil v. State, 191 So. 3d 406 (Fla. 2016)

- Prior to Sentencing:
  - The state filed a sentencing memorandum recommending that the trial court consider a new charge pending against the defendant for burglary of a vehicle.
  - Defense counsel filed a sentencing memorandum objecting to the state's recommendation.

- Prior to pronouncing sentence, the trial court referred to the pending burglary charge, along with a trespass charge to which the defendant had already entered a plea, and noted that both arrests occurred while the defendant was out on bond awaiting trial in this case.

Norvil v. State, 191 So. 3d 406 (Fla. 2016)

Holding:The terms “primary offense” and “prior record,” included in the Code’s sentencing principles, do not include a subsequent arrest and related charges where the charges are still pending without any conviction. A trial court violates a defendant’s due process rights when it considers a subsequent arrest without conviction during sentencing for the primary offense.

SEE ALSO
FOX V. STATE, 281 So. 3d 498, 501 (Fla. 4th DCA 2019)

"[F]or a collateral crime to be considered as 'prior record' during sentencing for the primary offense, two conditions must exist: (1) the defendant committed the collateral crime before committing the primary offense; and (2) the defendant has been convicted of the collateral crime before being sentenced for the primary offense. It is not necessary that the defendant be convicted of the collateral crime before the defendant has committed the primary offense"

Considerations

Should the definitions for “primary offense”, “additional offense” or “prior record” be amended to make clear that they shall not include any pending charges?

Montgomery v. State, 897 So. 2d 1282 (Fla. 2005)

"Conviction" means a determination of guilt that is the result of a plea or a trial, regardless of whether adjudication is withheld.

- § 921.0021(2), Fla. Stat. (2019).

Defendant argued on appeal that his pleas of no contest followed by a withhold of adjudication should not be scored as prior convictions on the criminal punishment code scoresheet.

Montgomery v. State, 897 So. 2d 1282 (Fla. 2005)

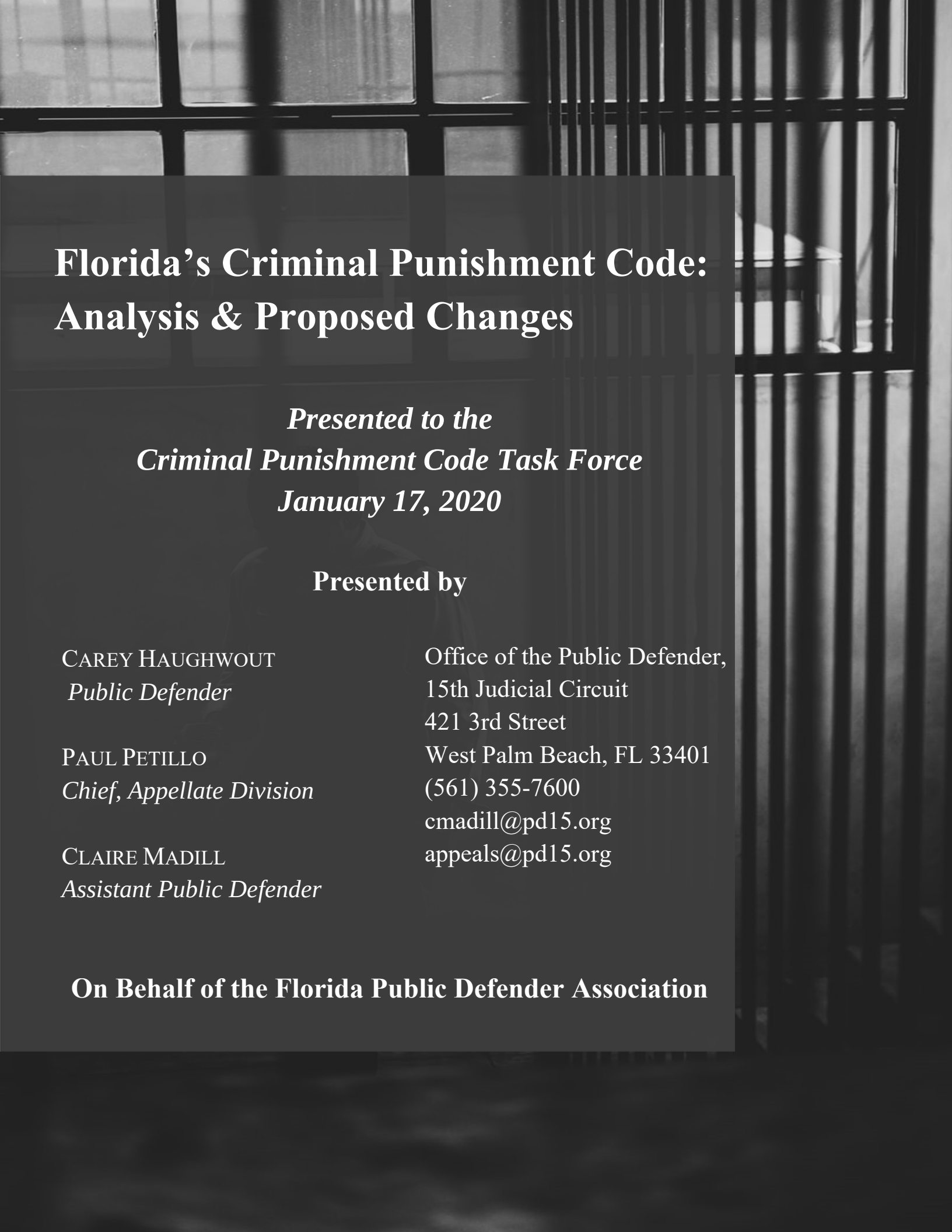
The Florida Supreme Court stated that a finding that a no contest plea is a prior conviction, regardless of adjudication being withheld, is consistent with section 921.0021(2).

The statute clearly indicates the Legislature wanted to include all determinations of guilt even where adjudication had been withheld.

Considerations

Should the definition of “conviction” in section 921.0021(2) be amended to include a “no contest plea” to make clear the holding in *Montgomery?*

Thank you!



Florida's Criminal Punishment Code: Analysis & Proposed Changes

Presented to the
Criminal Punishment Code Task Force
January 17, 2020

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On Behalf of the Florida Public Defender Association

Table of Contents

On behalf of the Florida Public Defender Association, we submit this white paper to the Criminal Punishment Code Task Force. It has four parts. The first part talks about the history of Florida sentencing, including the Criminal Punishment Code (CPC), and the second addresses corresponding problems inherent in the current system. The third part provides suggested amendments to Florida's sentencing regime. The last section discusses, globally, why this task force should be interested in the proposed changes.

I. How We Got Here

"Criminal sentencing in Florida has come full circle in 40 years."[1] That's not a good thing. It's time for a change.

Forty years ago, Florida, like most states, employed an indeterminate sentencing scheme.[2] There were no constraints on a judge's sentencing discretion (other than the statutory maximums). This resulted in a sentencing process "thoroughly lacking in uniformity and fraught with subjectivity,"[3] which led to geographic, judge-to-judge, and racial sentencing disparity.

The availability of parole tempered some of that disparity. *See*, *e.g.*, *Stanford v. State*, 110 So. 2d 1, 2 (Fla. 1959) ("[I]f the sentences are harsh and unjust, relief may be obtained upon proper showing before the parole authorities of this state.").[4] But it didn't temper it enough, and the parole-release process was itself subject to disparity.[5]

In the late 1970s there was a nationwide movement from indeterminate to determinate

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[1] *Alfonso-Roche v. State*, 199 So. 3d 941, 946 (Fla. 4th DCA 2016) (Gross, J. concurring).
[2] William H. Burgess, *Fla. Sentencing* § 2:1 (2018-19 ed.).
[3] *Manning v. State*, 452 So. 2d 136, 138 (Fla. 1st DCA 1984) (Ervin, C.J., specially concurring).
[4] *See also J.M. v. State*, 677 So. 2d 890, 897 (Fla. 3d DCA 1996) (recognizing that there was disparity in pre-guideline sentencing, but "the general theory was that any inconsistency in sentences was a matter which would be appropriately resolved by the parole authorities or as a matter of clemency by the pardon board.") (citations omitted) (Cope, J., dissenting).
[5] Alan C. Sundberg et al., *A Proposal for Sentence Reform in Florida*, 8 Fla. St. U. L. Rev. 1, 4 (1980).

sentencing.[6] The opening paragraph of this article captured the tenor of the times:

> Sentencing in America today is a national scandal. Every day our system of sentencing breeds massive injustice. Judges are free to roam at will, dispensing ad hoc justice in ways that defy both reason and fairness. Different judges mete out widely differing sentences to similar offenders convicted of similar crimes. There are no guidelines to aid them in the exercise of their discretion, nor is there any mechanism for appellate review of sentences.[7]

Florida joined the movement. In 1978, the Florida Supreme Court established a committee to address sentencing disparity, something it said required "immediate attention."[8] That sense of urgency was heightened when the committee "conducted an in-depth study" and found racial disparity in sentencing: "The committee found that, after holding legally relevant factors constant, non-white offenders were significantly more likely to receive a jail or prison sentence than white offenders."[9]

The work of the Sentencing Study Committee "led to the creation of a Sentencing Commission whose purpose was to develop a system of sentencing guidelines on a statewide basis."[10] This led to the replacement of the indeterminate sentencing system with the Florida Sentencing Guidelines, which became effective in 1983.[11] The judge's sentencing discretion was

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[6] Pamala L. Griset, *New sentencing laws follow old patterns: A Florida case study*, 30 Journal of Criminal Justice 287, 288 (2002).
[7] Kennedy, *Introduction to Hofstra Law Review Symposium on Sentencing, Part I*, 7 Hostra L. Rev. 1, 1 (1978); *see also* Marvin Frankel, CRIMINAL SENTENCES: LAW WITHOUT ORDER 5 (1973) ("[T]he almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law."). As explained later, this paragraph describes our current times.
[8] Alan C. Sundberg *et al.*, 8 Fla. St. U. L. Rev. at 1.
[9] Harry K. Singletary, *Sentencing Guidelines 1995-96 Annual Report: The Impact of the 1994 and 1995 Structured Sentencing Policies in Florida*, Florida Department of Corrections, (March 1997), at 34 (citing *A Report on the Analysis of Sentencing Procedures in Florida's Circuit Courts*, Sentencing Study Committee, Feb. 29, 1979).
[10] *Manning*, 452 So. 2d at 139 (Ervin, C.J., specially concurring).
[11] Ch. 82-145, Laws of Fla.

greatly narrowed and parole was abolished for nearly all offenses.[12] In the guidelines' last iteration, the judge's sentencing discretion was limited to 25% above and below the scoresheet computation, with exceptions for low scoring offenders and with limited departure grounds.[13]

The guidelines led to a great reduction in racial disparity (and arguably its elimination). In 1997, the Florida Department of Corrections found that an offender's race has no "meaningful effect on decisions made by Florida courts under the 1994 and 1995 sentencing guideline structure."[14]

While not perfect, the guidelines went a long way towards achieving the essential goals of determinate sentencing. "Presumptive sentencing guidelines, with their focus on articulated standards and bilateral appellate review, were meant to put boundaries on discretion, enhance fairness, promote certainty and systematic planning, and end racial discrimination and other unethical practices."[15] Unfortunately, over the next 15 years, the importance of those values were forgotten and antiguidelines sentiment grew.[16] "It is as if the Guidelines' concerns about sentencing fairness, subjectivity, neutrality, and equality had petered out by 1998."[17] By the 1997 legislative session, the abolition of the guidelines seemed assured.[18] Sentencing discretion would once again be unlimited, only this time there would be no safety valve of parole.[19]

The abolition of the guidelines was not done neutrally, but rather was "stacked" in favor

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[12] § 921.001(4)(a)&(8), Fla. Stat. (1983).
[13] § 921.0014(2), Fla. Stat. (1997); Fla. R. Crim. P. 3.991.
[14] Harry K. Singletary, *Sentencing Guidelines 1995-96 Annual Report: The Impact of the 1994 and 1995 Structured Sentencing Policies in Florida*, Florida Department of Corrections, (March 1997), at 36.
[15] Griset, 30 Journal of Criminal Justice at 289.
[16] *Id*. at 294.
[17] *Alfonso-Roche*, 199 So. 3d at 949 (Gross, J., concurring).
[18] Griset, 30 Journal of Criminal Justice at 295.
[19] By 1995, the maximum gain time an inmate could earn was 15%. § 944.275(4)(b)3., Fla. Stat. (1995) (inmates required to serve at least 85% of their sentence).

of prosecutors.[20] If the guidelines had been entirely abolished, the state and the defendant would at least be on equal footing: "Abolishing the guidelines and returning to indeterminate sentencing would have given judges virtually unfettered discretion to [impose more and longer prison sentences] but would have also given them the discretion to impose non-prison sentences and shorter prison sentences."[21] But the state attorney in the Eleventh Judicial Circuit worried that judges would sentence too leniently,[22] and so the drafting of Florida's sentencing policy moved from Tallahassee legislators and policymakers to the backrooms at a single State Attorney's office: "Staff of the State Attorney drafted a proposal for a new sentencing structure, named the Criminal Punishment Code, that limited downward departure sentences but gave judges more flexibility to impose prison sentences and increase prison sentence length than was available under the guidelines."[23] As one prosecutor said: "After we explained our plan to the Sheriff's Association, it started to roll. The Senate and House sponsors of the original abolition bills both bought the plan and substituted the CPC for abolition. It happened overnight. We're real proud of the CPC. It has a bottom but no top. It's the best of both worlds for us."[24]

Florida prosecutors made it clear that, in drafting the CPC, their goal was not to improve Florida sentencing or achieve certain philosophical or theoretical sentencing goals. Rather, it was

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[20] Griset, 30 Journal of Criminal Justice at 290.
[21] *Committee on Criminal Justice*, Review the Criminal Punishment Code and Sentencing Judges' Assessment, The Florida Senate (Nov. 2005), at 5, *available at* http://archive.flsenate.gov/data/Publications/2006/Senate/reports/interim_reports/pdf/2006-112cj.pdf.
[22] Griset, 30 Journal of Criminal Justice at 295.
[23] *Committee on Criminal Justice*, *supra* n.21, at 5.
[24] Griset, 30 Journal of Criminal Justice at 295.

intended to make it easier for prosecutors to coerce guilty pleas.[25] In doing so, the prosecutors violated the "the responsibility [to be] a minister of justice and not simply . . . an advocate"[26] and the duty to "serve[] the public interest" and "act with integrity and balanced judgment."[27] The prosecutors ignored the rule that "the severity of sentences imposed should not be used as a measure of a prosecutor's effectiveness,"[28] and that a prosecutor has a duty to "assure that a fair and informed sentencing judgment is made, and to avoid unfair sentences and disparities."[29] When "inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, the prosecutor should stimulate and support efforts for remedial action," not act as "merely a case-processor."[30]

Professor Griset summarized the results of this process:

> By rejecting the substance, but keeping the form of the guidelines scoring system, Florida policymakers had abdicated responsibility for structuring sentencing outcomes. In the process, prosecutors had further increased their already-powerful positions.
>
> . . .
>
> The prospects for unfairness were many. Even if most sentences remained within the guideline ranges, some long sentences would be imposed arbitrarily or discriminatorily. One interviewee speculated that "**some judges will just impose monstrous sentences**." Another agreed that "a few **judges will go hog wild**."[31]

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[25] In justifying and explaining the CPC, prosecutors said, among other things:

- "[we've] stacked the deck. Now, there's a much bigger hammer . . . a better position to strong arm pleas."
- "we've got to plea bargain from a few years down under the guidelines. Now we can plea bargain down from fifteen years, or whatever the statutory maximum is."
- "Now, if we can threaten everybody with prison, there will be more offenders going to prison."

Id. at 290.

[26] Rule 3-3.8, Rules Regulating The Florida Bar. cmt.

[27] ABA Standards, The Prosecution Function 3-1.2(b). Florida has adopted the American Bar Association Standards of Criminal Justice Relating to Prosecution Function. *Zeigler v. State*, 60 So. 3d 578, 580 n.1 (Fla. 2d DCA 2011).

[28] ABA Standards, The Prosecution Function 3-7.2(a).

[29] ABA Standards, The Prosecution Function 3-7.2(c).

[30] ABA Standards, The Prosecution Function 3-1.2(f).

[31] Griset, 30 Journal of Criminal Justice at 290-91 (emphasis added).

When the Legislature enacted the Criminal Punishment Code it knew that the guidelines had greatly reduced racial disparity in sentencing. The bill analysis discussed both the 1979 and 1997 studies,[32] and it acknowledged that "there are some benefits of well implemented sentencing guidelines, primarily, control of prison populations and limiting disparate treatment of similarly situated offenders."[33] The Legislature also knew that the Department of Corrections was "concerned that disparate sentences could make inmates more difficult to control" and that it was "very much in favor of keeping the guidelines as a 'management tool' that will help them to match capacity to prison populations."[34]

Nonetheless, the Legislature enacted the Criminal Punishment Code effective 1998 and the upper bound of the guidelines was removed. In essence, the "CPC kept the form, but not the substance, of the sentencing guidelines scoring system."[35] It also removed appellate review of sentences for criminal defendants, while retaining the right of the state to appeal perceived lenient sentences.[36]

II. Problems with the CPC

The CPC's track record has borne out the DOC and Professor Griset's fears. Pre-guidelines indeterminate sentencing was described as a "scandal," as judges would "mete out widely differing sentences to similar offenders convicted of similar crimes" without any "guidelines to aid them in the exercise of their discretion" and "without any appellate review of

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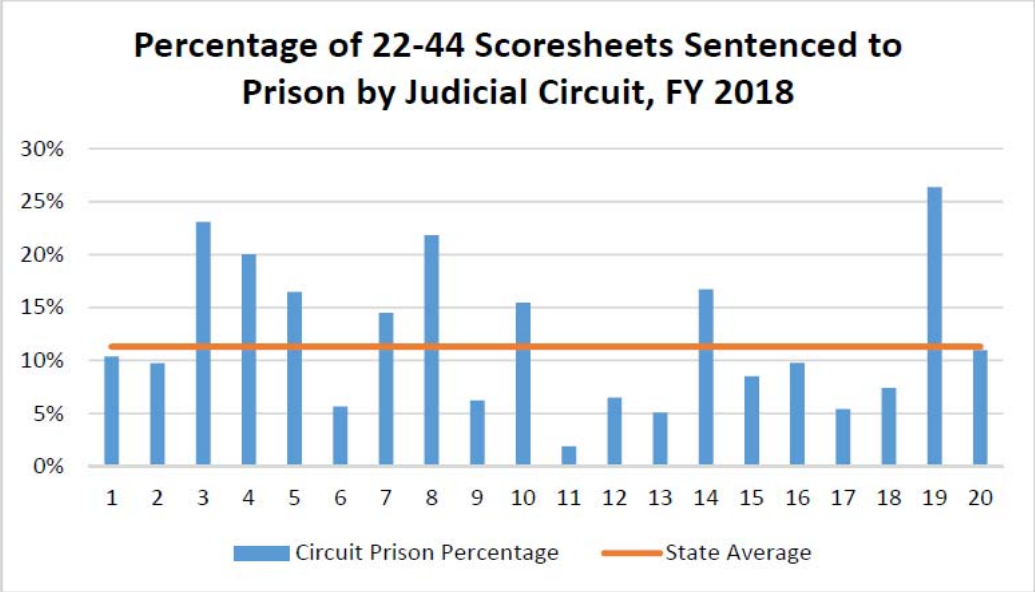
[32] "The Department of Corrections has just completed a study which analyzed whether implementation of the 1994 and 1995 guidelines met the goals set forth in section 921.001. . . . The study found that race has no meaningful affect [*sic*] on the sentencing decisions made by the courts under tile 1994 and 1995 guidelines." H.R. Comm. on Crim. Justice, Bill Analysis & Econ. Impact Statement, CS/HB 241 (Mar. 19, 1997), at 2.
[33] House Bill 241 Part 1 at pages 16-17, 26.
[34] House Bill 241 Part 1 at page 28.
[35] Griset, 30 Journal of Criminal Justice at 289.
[36] Griset, 30 Journal of Criminal Justice at 289.

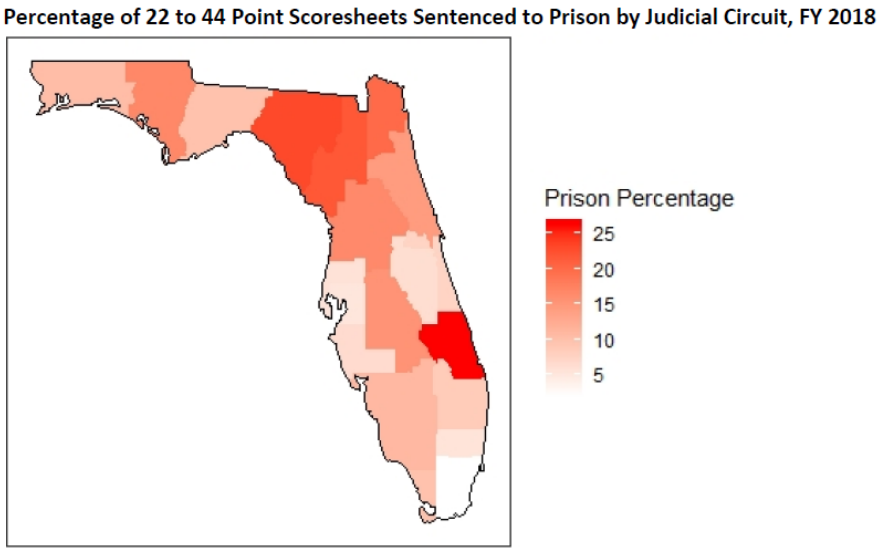
sentences."[37] That same description applies to contemporary Florida sentencing. More "unwarranted sentencing disparity," including geographic, racial, and judge-to-judge disparity, "exists under the CPC to a greater extent than under any of the previous guidelines."[38] Some judges are imposing "monstrous sentences" and going "hog wild" – but this time, without the safety valve of parole or appellate review.

A. Geographic Disparity

Sentences in Florida largely depend, not on the nature of the offense or the individualized characteristics of the offender, but rather a completely arbitrary factor: where the defendant is sentenced. The Crime and Justice Institute June 2019 report documented the geographic disparity, as exemplified by the disparate treatment of those defendants who scored 22.1 to 44 points (where prison is discretionary).[39]



[37] Kennedy, 7 Hostra L. Rev. at 1.
[38] *Committee on Criminal Justice*, *supra* n.21 at 6.
[39] Lisa Margulies, Sam Packard, and Len Engel, *An Analysis of Florida's Criminal Punishment Code*, Crime and Justice Institute, (June 2019), at 18-19, *available at* http://www.crj.org/assets/2019/06/An-Analysis-of-Florida-CPC-June-2019.pdf.



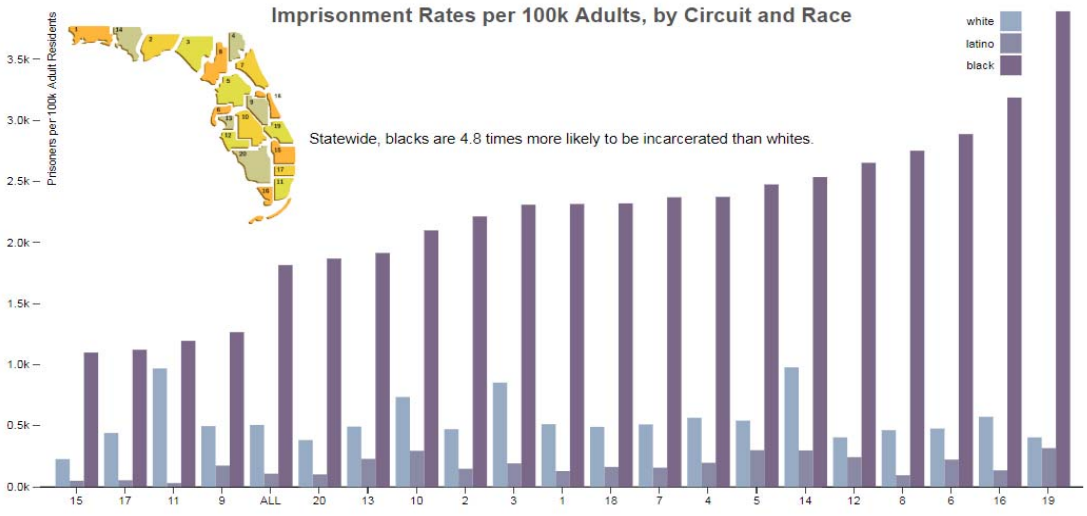
If sentencing were fair and not disparate, the percentage of individuals who scored 22.1 to 44 points would be roughly equal across circuits. These graphs show that it is not. And circuits cannot decide to have their own sentencing policy. "The CPC is a general law that applies uniformly across the state irrespective of the nature and size of the community in which the crime was committed." *State v. Robinson*, 149 So. 3d 1199, 1203 (Fla. 1st DCA 2014).

B. Racial Disparity

"Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Rose v. Mitchell*, 443 U.S. 545, 555 (1979). As Chief Justice Roberts stated, racial disparity in sentencing "injures not just the defendant, but the law as an institution, the community at large, and the democratic ideal reflected in the processes of our courts." *Buck v. Davis*, 137 S. Ct. 759, 778 (2017) (cleaned up). After all, he said, a "basic premise of our criminal justice system," is that people are "punishe[d] … for what they do, not who they are." *Id*. "Dispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle." *Id*.; *see also Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015) (explaining that

racial discrimination "poisons public confidence in the evenhanded administration of justice").

Unfortunately, the CPC has led to the return of racial discrimination in sentencing. This was documented in the bombshell articles published by the Sarasota Herald-Tribune in 2016.[40] Similarly, the Project on Accountable Justice—a policy think tank associated with the Florida State University College of Social Sciences and Public Policy, the St. Petersburg College Institute for Strategic Policy Solutions, and the Tallahassee Community College Florida Public Safety Institute—conducted a sentencing study in 2017, and it found that "[s]tatewide, blacks are 4.8 times more likely to be incarcerated than whites" and that the Nineteenth Judicial Circuit "had the most severe racial disparities."[41]



In *Delancy v. State*, 256 So. 3d 940, 946 (Fla. 4th DCA 2018), the defendant showed that

[40] Josh Salman, Emily Le Coz, and Elizabeth Johnson, *Bias on the Bench*, Sarasota Herald-Tribune, Dec. 8, 2016, available at http://projects.heraldtribune.com/bias/, *Florida's Broken Sentencing System: Designed for Fairness, It Fails to Account for Prejudice*, Sarasota Herald-Tribune, Dec. 8, 2016, available at http://projects.heraldtribune.com/bias/sentencing/, and *Tough on Crime: Black Defendants Get Longer Sentences in Treasure Coast System*, Sarasota Herald-Tribune, Dec. 8, 2016, available at http://projects.heraldtribune.com/bias/bauer/

[41] Cyrus O'Brien et al., *Florida Criminal Justice Reform: Understanding the Challenges and Opportunities, Florida State University Project on Accountable Justice* (2017), *available at* https://accountablejustice.github.io/report/.

the average sentence for white defendants with scores similar to his was 20.44 months, but the average sentence for black defendants was 40.28 months. The following year, the average white sentence was 31.42 months and the average black sentence was 39.67 months. *Id*. at 946-47. The Fourth District said that the "DOC statistics showing a disparity between average sentences for white defendants and minority defendants are disturbing." *Id.* at 947. It noted that "based upon recent investigations by the Sarasota Herald Tribune into racial disparity in sentencing, the Legislature has authorized a study of fairness in sentencing." *Id*. at 948 (footnote and citations omitted). The court said, "From that study, we certainly hope and desire that any necessary protections against actual racial bias in sentencing can be implemented to assure that it is not present in the criminal justice system." *Id*.

Racial bias in sentencing is a sensitive subject because no judge thinks his or her sentence was influenced by race. But "[o]ne never encounter[s] any judges who doubted the fair and just and merciful character of their own sentences," though they may "doubt whether all of their colleagues [are] equally splendid."[42] Nonetheless, the fact remains: there is a racial disparity in sentencing in Florida and in the United States.[43] Further, we now know much more about implicit biases, how they are "activated involuntarily and without an individual's awareness or intentional control."[44] The National Black Law Students Association's amicus brief in *Buck v.*

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[42] Marvin E. Frankel, *Sentencing Guidelines: A Need for Creative Collaboration*, 101 Yale L.J. 2043, 2044 (1992).
[43] *Alfonso-Roche*, 199 So. 3d at 951 n..5 (Gross, J., concurring).
[44] *Understanding Implicit Bias*, Ohio St. U. Kirwan Inst. For the Study of Race and Ethnicity, *available at* http://kirwaninstitute.osu.edu/research/understanding-implicit-bias; *see also* Justin D. Levinson & Robert J. Smith, *Systemic Implicit Bias*, 126 Yale L.J. Forum 406, 407-08 (2017); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 Calif. L. Rev. 945, 966 (2006) ("[A] substantial and actively accumulating body of research evidence establishes that implicit race bias is pervasive and is associated with discrimination against African Americans.").

Davis eloquently explained the bases of implicit racial bias.[45]

State prosecutors have an ethical obligation to "be proactive in efforts to detect, investigate, and eliminate improper biases, with particular attention to historically persistent biases like race, in all of its work."[46] We all must work towards ending racially disparate sentencing.

C. Monstrous Sentences

Because the CPC eliminated the upper bound of the guidelines, the concern that some judges would impose "monstrous" sentences and go "hog wild" has turned out be well-founded.

The Fourth District has lamented that it sees sentences "beg[ging] for justification that the record does not provide."[47] In *Alfonso-Roche*, the 55-year-old defendant with no prior record was sentenced to 35 years in prison for trying and failing to steal boat motors:

> The record in this case establishes that the sentence here was the type of "grossly disproportionate" sentence contemplated in *Adaway*. At the time of sentencing, appellant was 55 years old with no prior criminal record. He was not convicted of a crime of violence or intrusion into a dwelling. There was no physically injured victim. There was no weapon. He rejected a plea offer of 3 years. His recommended lowest sentence under the Code was 23.7 months in prison. After he was convicted at trial, the state argued for a 25–year sentence. The maximum sentence for the two charges was 35 years. The court sentenced him to consecutive sentences totaling 35 years. By comparison, appellant's co-defendant, a twice convicted felon whose lowest permissible sentence was 47.1 months and maximum was 60 years, received a 15–year sentence. Given appellant's age, the sentence was tantamount to a life sentence that violates the prohibition against cruel or unusual punishment.[48]

More recently, Judge Jacobus said the 45-year sentence imposed in *Cottier v. State*, 44

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[45] Brief for the National Black Law Students Association as Amicus Curiae in Support of Petitioner, Buck v. Davis, No. 15-8049, *available at* https://www.scotusblog.com/wp-content/uploads/2016/08/15-8049_amicus_pet_national_black_law_students_association.pdf.
[46] ABA Standards, The Prosecution Function 3-1.6(b).
[47] *Alfonso-Roche*, 199 So. 3d at 946.
[48] *Alfonso-Roche*, 199 So. 3d at 950 (Gross, J., concurring)

Fla. L. Weekly D2607 (Fla. 5th DCA Oct. 25, 2019), was "extraordinarily harsh" and a "manifest injustice":

> I concur with the affirmance of the convictions in this case. However, in my opinion, a 45-year sentence for a non-violent monetary crime is extraordinarily harsh. The defendant scored a minimum sentence of 55.425 months of incarceration on his Criminal Punishment Code scoresheet. To sentence him to what is essentially a life sentence is a manifest injustice. I would hope that if the defendant files a Florida Rule of Criminal Procedure 3.800(c) motion for mitigation of his sentence, the trial judge would give it great consideration.

It is extraordinary that the Fourth District and Fifth District even wrote about these cases. One defining feature of the CPC is that it eliminated appellate review for criminal defendants.[49] This undermines the ability to document instances of outrageous sentences because, given the lack of appellate relief, appellate courts have little reason to write about the issue. But as Justice Kennedy has stated, extreme punishments in the United States are an "ongoing injustice of great proportions," and perhaps the biggest problem is that no one pays attention to it even though "it's everybody['s] job to look into it."[50]

D. Financial Costs

Finally, "[t]here needs to be considered the cost of imprisonment to the government, which is not trivial." *United States v. Presley*, 790 F.3d 699, 702-03 (7th Cir. 2015). "Recognition of the practical 'downside of long sentences is recent and is just beginning to dawn on the correctional authorities and criminal lawyers.'" *Alfonso-Roche*, 199 So. 3d at 953 (Gross, J., concurring) (quoting *United States v. Presley*, 790 F.3d at 702).

[49] Griset, 30 Journal of Criminal Justice at 289.
[50] Liz Mineo, *Kennedy assails prison shortcomings*, The Harvard Gazette, (Oct. 22, 2015), *available at* https://news.harvard.edu/gazette/story/2015/10/kennedy-assails-prison-shortcomings/

In fiscal year 2017-2018 the average inmate cost was $21,743.05 a year ($59.57 per diem).[51] Mr. Alfonso-Roche's monstrous 35-year sentence will cost the state at least $567,695.45.[52] The monstrous 45-year sentence imposed on Mr. Cottier will cost the state $729,894.15.[53] And because they will be imprisoned into old age the costs will be even higher.[54]

III. Proposed Solutions

The previous section outlined our main criticism of the CPC: that it has created a widely unequal sentencing system, in terms of both racial and geographic disparity, and it has created an extraordinarily harsh system. We recommend returning to sentencing guidelines. Barring that, we recommend revising the CPC to increase the role of the lowest permissible sentence, require judges to explain their sentences, infuse parsimony into Florida sentencing, and provide judges with a list of proper sentencing factors.

A. Return to Sentencing Guidelines

The most obvious solution to the problem of sentencing disparity is to return to sentencing guidelines. Florida's prior sentencing guidelines greatly reduced racial disparity.[55] This is not unique to Florida; guidelines systems in other states achieved the same result. For example, Florida's sentencing history is similar to Washington's, which the United States

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[51] Florida Department of Corrections, 2017-18 ANNUAL REPORT 7, *available at* http://www.dc.state.fl.us/pub/annual/1718/FDC_AR2017-18.pdf

[52] The average year cost of an adult male inmate in fiscal year 2017-18 is $19,082.20. Mr. Alfonso-Roche would have to serve at least 85% of his 35-year sentence, or 29.75 years. 29.75 times $19,082.20 is $567,695.45.

[53] $19,082.20 times 38.25 (85% of 45) equals $729,894.15.

[54] *Adaway v. State*, 902 So. 2d 746, 754 (Fla. 2005) (Pariente, J., concurring) ("It is well known that older prisoners have higher health care costs than both younger prisoners and older persons who are not incarcerated, and these costs are almost always borne by the taxpayers.").

[55] Harry K. Singletary, *Sentencing Guidelines 1995-96 Annual Report: The Impact of the 1994 and 1995 Structured Sentencing Policies in Florida*, Florida Department of Corrections, (March 1997), at 36.

Supreme Court examined in *Blakely v. Washington*, 542 U.S. 296 (2004). When Washington adopted sentencing guidelines, it noted a "substantial reduction in racial disparity in sentencing across the State" that was "directly traceable to the constraining effects of the guidelines." *Blakely*, 542 U.S. at 317 (O'Connor, J., dissenting). In those cases where judges still retained "unreviewable discretion" (first-time offenders and certain sex offender cases) "unjustifiable racial disparities have persisted." *Id*. (O'Connor, J., dissenting). "'The lesson is powerful: racial disparity is correlated with unstructured and unreviewed discretion.'" *Id*. at 318 (O'Connor, J., dissenting) (citation omitted).

Thus, returning to a guidelines system will again reduce disparity.[56] In fact, the 2019 report commissioned by the Florida Legislature has already recommended that Florida consider some sort of guidelines or sentencing range system.[57]

It would not be difficult to return to the guidelines because, effectively, the system is already in place. As explained in the first section, the CPC kept the form but not the substance of the guidelines: it kept the same scaling and numerical calculations, but without providing any

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[56] *See United States v. Booker*, 543 U.S. 220, 250 (2005) (noting that Congress's goal in adopting guidelines was to reduce sentencing disparity); *id.* at 292 (Stevens, J., dissenting in part) (recognizing the same).

[57] Lisa Margulies, Sam Packard, and Len Engel, *An Analysis of Florida's Criminal Punishment Code*, Crime and Justice Institute, (June 2019), at 25, *available at* http://www.crj.org/assets/2019/06/An-Analysis-of-Florida-CPC-June-2019.pdf; *see also id.* at 28 (listing "using a recommended sentence range with lower and upper limits to guide judicial decision" as something "that Florida may want to consider in revising its criminal sentencing scheme"); *see also* H.R. Comm. on Crim. Justice, Bill Analysis & Econ. Impact Statement, CS/HB 241 (Mar. 19, 1997), at 2-3, 13 (recognizing the "benefits of well implemented sentencing guidelines, primarily, control of prison populations and limiting disparate treatment of similarly situated offenders").

To avoid Sixth Amendment problems, any newly adopted sentencing guidelines must be discretionary. *See Booker*, 543 U.S. 220. Presumably prosecutors and judges would prefer this system, as it still leaves them with discretion to depart from the recommended sentence.

constraining effect, and it also removed the ceiling of the guidelines.[58] Additionally, under the last iteration of the sentencing guidelines, a trial judge could depart up or down by 25%, and the CPC retains the downward part of this feature (by subtracting 25% to get to the lowest permissible sentence). [59] It would be easy to reinstitute the sentencing guidelines by keeping the CPC system, but adding the ceiling back and requiring that judges may only depart 25% above or below the score.

B. Alternative: Amendments to the CPC

If the Legislature does not wish to return to sentencing guidelines, then we recommend certain changes to the CPC. Specifically, the Legislature should provide judges with a baseline to guide sentencing discretion, either by augmenting the role of the lowest permissible sentence or creating a statute outlining appropriate sentencing factors. Additionally, the Legislature should require judges to explain their sentences and emphasize the importance of tempering the sentences.

1. Clarify the Role of the CPC Score

The CPC would promote uniformity and reduce sentencing disparity if it increased the importance and role of the lowest permissible sentence at sentencing. Currently, the CPC says:

> The lowest permissible sentence provided by calculations from the total sentence points pursuant to s. 921.0024(2) is assumed to be the lowest appropriate sentence for the offender being sentenced.

§ 921.00265(1), Fla. Stat.

We recommend amending that provision to state something like:

> The lowest permissible sentence provided by calculations from the total sentence points pursuant to s. 921.0024(2) is presumed to be the appropriate sentence for the offender being sentenced. That score must inform and guide the imposition of

[58] Griset, 30 Journal of Criminal Justice at 289.
[59] § 921.0014(2), Fla. Stat. (1997); Fla. R. Crim. P. 3.991; § 921.0024(2), Fla. Stat.

> sentence. As a general matter, a trial court should not impose a sentence above the lowest permissible sentence unless it articulates, on the record, reasons not already factored into the total sentence points that justify a higher sentence.

This language institutes two basic changes: (1) making the CPC score, as expressed in the lowest permissible sentence, an "anchor" to guide sentencing, and (2) permitting judges to impose a sentence above the lowest permissible sentence only based on factors not already factored into the score.

a) The CPC should anchor the sentence

Sentencing needs some sort of anchor to reduce disparity. The problem with indiscriminate sentencing is that "judges receive[] wide ranges within which to sentence, but no anchoring point from which to begin."[60] This is the problem under the CPC: judges can sentence anywhere from the lowest permissible sentence to the statutory maximum, a range that often spans decades,[61] but have no anchor to guide the imposition of sentence. This means that "personal preference," rather than articulable standards, "dictate[s] each judge's methodology."[62]

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[60] John A. Henderson, *A Square Meaning for a Round Phrase: Applying the Career Offender Provision's "Crime of Violence" To The Diminished Capacity Provision of the Federal Sentencing Guidelines*, 79 Minn. L. Rev. 1475, 1479 n.23 (1995) (quoting Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentences*, 101 Yale L.J. 1681, 1687 (1992)).

[61] *See, e.g.*, *Jackson v. State*, 191 So. 3d 423 (Fla. 2016) (upholding life sentence for 20-year-old scored 52.135 months' imprisonment); *Keith Allen Kalnas v. State*, 4D19-2564 (case pending) (sentencing exposure ranged from seven years to life); *Strong v. State*, 263 So. 3d 199, 200 (Fla. 5th DCA 2019) (noting that a defendant's "sentencing range was 16.85 years to life in prison"); *Montoya v. State*, 943 So. 2d 253, 254 (Fla. 3d DCA 2006) (range was 6.5 to 36 years); *Brown v. State*, 918 So. 2d 409, 410 (Fla. 5th DCA 2006) (sentencing range was 11 years to life).

[62] Freed, 101 Yale L.J. at 1688; *see also* Marvin E. Frankel, CRIMINAL SENTENCES: LAW WITHOUT ORDER 6 (1972) ("[T]rial judges, answerable only to their varieties of consciences, may and do send people to prison for terms that may vary in any given case from none at all up to five, ten, thirty, or more years."). Judges even recognize that sentencing is luck of the draw. *Exantus v. State*, 248 So. 3d 1200, 1201 (Fla. 4th DCA 2018) ("Notably, the court declined to resentence the Defendant as a youthful offender, noting that he 'got very lucky' with the assignment of a different judge in the prior case and that he 'would not be so lucky this time.'").

Under the CPC the "ultimate sentencing determination could turn as much on the idiosyncrasies of a particular judge as on the specifics of the defendant's crime or background,"[63] and the length of sentence may "depend on 'what the judge ate for breakfast' on the day of sentencing, on which judge you got, or on other factors that should not have made a difference to the length of the sentence."[64] Sentencing guidelines reduce these dangers by providing a "baseline" or "framing device."[65]

The CPC has a mechanism – the CPC score, as expressed in the lowest permissible sentence – through which the Legislature can provide this baseline or framing device. In practice, judges treat the lowest permissible sentence as a "sentencing floor" or mandatory minimum, rather than a recommended sentence or baseline.[66] This is what causes sentencing disparity in Florida; because the CPC score has no anchoring effect, judges feel free to impose any sentence from the lowest permissible sentence and statutory maximum without any limitations or

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[63] *Blakely*. 542 U.S. at 317 (O'Connor, J., dissenting).
[64] *Id*. at 332 (Breyer, J., dissenting).
[65] Daniel M. Isaacs, *Baseline Framing in Sentencing*, 121 Yale L.J. 426 (2011); Joshua M. Divine, *Booker Disparity and Data-Driven Sentencing*, 69 Hastings L.J. 771, 809 (2018) ("the evidence establishes that, in practice, the Guidelines have a similar anchoring effect on judges across the country."); Jalila Jefferson-Bullock, *How Much Punishment is Enough?: Embracing Uncertainty in Modern Sentencing*, 24 J.L. & Pol'y 345, 380 (2016) ("Judges[s] . . . sentencing decisions are greatly influenced by suggested sentences.").
[66] *See, e.g.*, *Moore v. State*, No. 2D18-1488, 2019 WL 6720492 (Fla. 2d DCA Dec. 11, 2019) (trial court opined that the "bottom of the guidelines are pretty much reserved for people who accept responsibility"); *Gallo v. State*, 272 So. 3d 418, 420 (Fla. 4th DCA 2019) (agreeing with trial court's statement that, because the defendant's lowest-permissible sentence was a non-state prison sanction, it was a "a completely wide open situation" where the trial court could impose "anywhere from time served" to "15 years in prison"); *Torres v. State*, 879 So. 2d 1254, 1255 (Fla. 3d DCA 2004) (noting that, under the CPC, the "score provides a sentencing floor, but the court can impose any sentence up to the legal maximum"); *Henry Claude Mondesir, Jr. v. State*, 4D19-1131 (Fla. 4th DCA) (trial judge said that he's "never viewed the lowest permissible prison sentence as some cap or some fixed immutable thing that I have to go to" and referring to the lowest permissible sentence as "just the floor"); Griset, 30 Journal of Criminal Justice at 295 (noting that the CPC "has a bottom but no top").

standards guiding that decision. Making it clear that the CPC places a role beyond setting a minimum would help resolve this problem by providing a frame of reference to guide a trial court's sentencing discretion.

Florida caselaw supports this proposal. Appellate courts have said that the scoresheet must "inform and guide the court in making its sentencing decision."[67] The problem is that this principle is too easily evaded, and judges routinely treat the CPC score as simply the floor, rather than something that should inform and guide their sentencing discretion.[68] We recommend codifying the existing judicial rule about informing and guiding.

b) Courts should not impose a sentence above the lowest permissible sentence based on considerations already factored into the CPC score

Sentencing disparity could be reduced by adopting a rule that prohibits judges from imposing a sentence above the lowest permissible sentence absent articulable reasons not already factored into the CPC score. For instance, a trial court could not rely on something "inherent" to an offense, like the fact that a firearm was used in an armed robbery, as the CPC already took into account this characteristic by assigning a higher offense level (and thus more points) to armed robbery than other types of robbery. But a trial court could rely on a factor not captured by the CPC score, like the fact that the victim was particularly vulnerable.

Florida courts have already recognized the benefit of such a rule. When Florida had

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[67] *Fernandez v. State*, 199 So. 3d 500, 502 (Fla. 2d DCA 2016); *Gomez v. State*, 220 So. 3d 495, 500 (Fla. 3d DCA 2017); *see also Tubwell v. State*, 922 So.2d 378, 379 (Fla. 1st DCA 2006) (scoresheet exists "to guide imposition of sentence"); *Cosme v. State*, 111 So. 3d 280 (Fla. 4th DCA 2013) (fundamental error to sentence defendant without first preparing a scoresheet).

[68] *See, e.g.*, *Moore*, 2019 WL 6720492, at *1 (trial court opined that the "bottom of the guidelines are pretty much reserved for people who accept responsibility"); *Gallo*, 272 So. 3d at 420 (upholding 10-year prison sentence for a first-time offender who scored nonprison, stating the CPC score was "an invalid" way to evaluate the appropriateness of the sentence).

sentencing guidelines, a trial court could not give a departure sentence based on a factor already incorporated into the guidelines calculation. For instance, a trial court could not rely on a defendant's criminal history (either extensive, or lack thereof) during sentencing because the guidelines already factored in prior criminal records in order to arrive at a presumptive sentence.[69] This rule had two main rationales: (1) respecting the legislature's will; and (2) promoting uniformity.[70] If a trial court could reconsider something already incorporated into the guidelines, then the court was "double-dipping" that factor.[71] This effectively meant that the guidelines meant nothing, as a court could reconsider or disregard whatever guidelines factors it wanted, resulting in "arbitrary and case-to-case sentencing based on identical acts." [72] The same thing happens under the CPC. When a trial judge imposes a sentence above the lowest permissible sentence based on, for example, a defendant's prior record, the court is "double-counting," or using the record twice; once to establish the lowest permissible sentence, and then again to increase the sentence beyond that. But the Legislature already explained how much time a particular prior conviction should warrant (by assigning it points that increased the sentence by a certain factor), and a trial court should not be permitted to ignore that recommendation and assign its own personal value to a prior record.

There's no principled reason the "double-counting" rule of the sentencing guidelines era should not apply to the CPC. The two animating rationales – promoting uniformity and

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[69] *Hendrix v. State*, 475 So. 2d 1218, 1220 (Fla. 1985).
[70] *Id.* at 1219-20; *Alfonso-Roche*, 199 So. 3d at 946-47 (Gross, J., concurring).
[71] *Smart v. State*, 124 So. 3d 347, 349 (Fla. 2d DCA 2013); *see also Hendrix*, 475 So. 2d at 1220 (increasing a defendant's sentence due to his prior record "would in effect be counting the convictions twice").
[72] *State v. Rousseau*, 509 So. 2d 281, 284 (Fla. 1987) (citation omitted); *see also Hendrix*, 475 So. 2d at 1220 (noting there is a "lack of logic in considering a factor to be an aggravation allowing departure from the guidelines when the same factor is included in the guidelines for purposes of furthering the goal of uniformity" (citation omitted)).

compliance with legislative will – also exist under the CPC.[73] And many courts have "resurrected"[74] the double-counting rule, holding that a trial court cannot grant a downward departure sentence under the CPC based on a factor already incorporated into the CPC score.[75] There's no reason this rule should apply only to sentences below the lowest permissible sentence and not to sentences above it.[76]

2. Require a Sentencing Explanation

We recommend amending the CPC to require sentencing explanations. The following provision could be added:

> In all felony cases, other than those where the specific sentence is contemplated by a plea agreement between the prosecution and the defense, the court shall state on the record its reasons for imposing the sentence.

Such a requirement would have numerous benefits. Having judges explain their sentences reduces racial and other unwarranted sentencing disparity because requiring judges to articulate a

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[73] *Mendoza-Magadan v. State*, 217 So. 3d 112, 113 (Fla. 4th DCA 2017) (noting that sentencing remains "a product of legislative decision" (quoting *Hall v. State*, 823 So. 2d 757, 763 (Fla. 2002)).

[74] *Reed v. State*, 192 So. 3d 641, 646-47 (Fla. 2d DCA 2016).

[75] *State v. Valdes*, 842 So. 2d 859 (Fla. 2d DCA 2003); *Adorno v. State*, 75 So. 3d 850 (Fla. 2d DCA 2011); *Cooper v. State*, 764 So. 2d 934, 935 (Fla. 4th DCA 2000).

[76] Adopting this rule is also necessary to comply with due process. A standardless sentencing regime violates due process. *McKinney v. State*, 27 So. 3d 160, 161 (Fla. 1st DCA 2010) ("Like any other exercise of judicial discretion, the trial court's sentencing decision must be supported by logic and reason and must not be based upon the whim or caprice of the judge."); *see also Paroline v. United States*, 572 U.S. 434. 471 (2014) (Roberts, C.J., dissenting) (noting that while "courts exercise substantial discretion in awarding restitution and imposing sentences in general," this does not mean that judges can sentence "by mere instinct;" rather, due process requires that they be "guided by statutory standards"). The Florida Supreme Court upheld the CPC against such a due process challenge, but only because the CPC provides "objective criteria, such as the severity and nature of the offense and the offender's criminal history" to guide the imposition of sentence. *Hall*, 823 So. 2d at 759. That "objective criteria" refers to the factors that go into calculating the CPC score. While *Hall* makes sense in theory, the problem is that, as currently implemented, judges ignore the "objective criteria" of the CPC score, as they treat the CPC score as a floor that should have no bearing on the ultimate sentence imposed.

reasoned process is a documented way to reduce cognitive biases.[77] Other benefits include ensuring compliance with due process,[78] assisting future legislatures when crafting sentencing policy,[79] and improving public perception of the judicial system.[80] In fact, the Assistant Attorney General representing the State of Florida just a few weeks ago agreed that "obviously from a policy standpoint we would like judges to be transparent in their thought process."[81]

Additionally, one of the most compelling reasons for requiring a sentencing explanation is that it reveals errors that would otherwise go undetected. We know of fourteen cases where the defendants were mistakenly sentenced to life imprisonment (because the trial court wrongly thought life was required), and the vast majority were resentenced to a lesser sentence after a successful appeal.[82] We also attach, as an Appendix, a list of hundreds of cases where a sentence was reversed because the trial court operated under a mistake of law or violated a defendant's

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[77] *State v. Thacker*, 862 N.W.2d 402, 407 n.3 (Iowa 2015); *Alfonso-Roche*, 199 So. 3d at 952 (Gross, J., concurring) ("sentences imposed without sufficient explanation can mask implicit biases, which are activated involuntarily and which generally occur without our awareness or intentional control.").

[78] *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973) (noting that the "minimum requirements of due process" include "a written statement by the factfinders as to the evidence relied on and reasons for" the decision to deprive someone's physical liberty"); Michael C. Berkowitz, *The Constitutional Requirement for a Written Statement of Reasons and Facts in Support of the Sentencing Decision: A Due Process Proposal*, 60 Iowa L. Rev. 205 (1974)).

[79] *Commonwealth v. Riggins*, 377 A.2d 140, 148 (Pa. 1977) ("Reasoned sentencing decisions may encourage the development of sentencing criteria."); *cf. Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1908 (2018) (noting that when sentencing errors "go uncorrected," the federal Sentencing Commission's "ability to make appropriate amendments is undermined"); *Rita v. United States*, 551 U.S. 338, 357 (2007) (noting that "by articulating reasons, even if brief, the sentencing judge . . . helps that [sentencing] process evolve").

[80] *State v. Hussein*, 229 P.3d 313, 322 (Haw. 201). ("The express statement by the court of its reasons for increased punishment will often provide a similar benefit for the victim and the community at large.").

[81] *Davis v. State*, No. SC19-716, Oral Argument (22:15-22:35).

[82] *See* Pages 174-75 of the Criminal Procedure Rules Committed Agenda, *available at* https://lsg.floridabar.org/dasset/cmdocs/cm220.nsf/c5aca7f8c251a58d85257236004a107f/2efe78a8dad44a24852583bc004eb268/$FILE/CrimPRC%20Agenda%2006%2028%2019%20ADA.pdf

due process rights. If any of those judges had remained silent at sentencing, these errors would have gone undetected. But "a judge who silently relies on improper factors violates the constitution no less than a judge who does so loudly."[83]

3. Emphasize Parsimony

Florida sentencing needs an infusion of parsimony. Parsimony is the principle that a court should impose a "sentence that is sufficient, but not greater than necessary to achieve the overarching sentencing purposes."[84] Stated otherwise, "offenders should be punished to the minimum extent necessary to secure the aims of punishment."[85] Parsimony is not inconsistent with punishment or retribution because, "in its philosophically pure, deontological form, retributive punishment must be proportionate to the harm caused–no more and no less."[86]

The criminal rules under the guidelines reflected the parsimony principle. To ensure the best use of finite prison resources, "sanctions used in sentencing convicted felons should be the least restrictive necessary to achieve the purposes of the sentence." Fla. R. Crim. P. 3.701(b)(7). We recommend reinstituting this principle, perhaps by amending section 921.002 to say something like:

> The primary purpose of sentencing is to punish the offender. Rehabilitation is a desired goal of the criminal justice system but is subordinate to the goal of punishment. The amount of punishment must be sufficient, but not greater than necessary, to achieve these overarching sentencing purposes.

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[83] *Davis v. State*, 268 So. 3d 958, 968 n.6 (Fla. 1s DCA 2019), *review granted* 2019 WL 2427789 (Fla. June 11, 2019).
[84] *Rosales-Mireles*, 138 S. Ct. at 1903 (internal citation and quotation marks omitted).
[85] Mirko Bagaric *et al.*, *Excessive Criminal Punishment Amounts to Punishing the Innocent: An Argument for Taking the Parsimony Principle Seriously*, 57 S. Tex. L. Rev. 1, 6 (2015).
[86] Mark R. Fondacaro & Megan J. O'Toole, *American Punitiveness and Mass Incarceration: Psychological Perspectives on Retributive and Consequentialist Responses to Crime*, 18 New Crim. L. Rev. 477, 481 (2015).

4. Adopt a Statute Outlining Sentencing Factors

If the legislature is unwilling to enhance the role of the CPC score and lowest permissible sentence, then it should consider adopting a statute outlining what factors judges should consider at sentencing. For instance, Congress has adopted a statute outlining "factors to be considered in imposing a sentence," such as "the nature and circumstances of the offense," "the history and characteristics of the defendant," and "the need to avoid unwarranted sentence disparities."[87] Illinois has a statute listing aggravating sentencing factors and a separate statute listing mitigating sentencing factors.[88] As it currently stands, nothing instructs judges on what to consider when imposing sentence.

IV. Benefits of Fair Sentencing

Fair sentencing makes us safer. "[P]erceptions of procedural fairness . . . may promote systemic compliance with substantive law, cooperation with legal institutions and actors, and deference to even unfavorable outcomes. . . . By contrast, a criminal justice system perceived to be procedurally unfair or substantively unjust may provoke resistance and subversion, and may lose its capacity to harness powerful social and normative influence."[89] "Conversely, the system's moral credibility, and therefore its crime-control effectiveness, is undermined by a distribution of liability that conflicts with community perceptions of just desert."[90]

Recall, too, that DOC was "concerned that disparate sentences could make inmates more

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[87] 18 U.S.C. § 3553(a).
[88] 730 ILCS 5/5-5-3.1(a); 730 ILCS 5/5-5-3.2(a).
[89] Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 Wake Forest L. Rev. 211, 211-12 (2012).
[90] Paul H. Robinson, A*re We Responsible for Who We Are? The Challenge for Criminal Law Theory in the Defenses of Coercive Indoctrination and "Rotten Social Background"*, 2 Ala. C.R. & C.L.L. Rev. 53, 65 (2011).

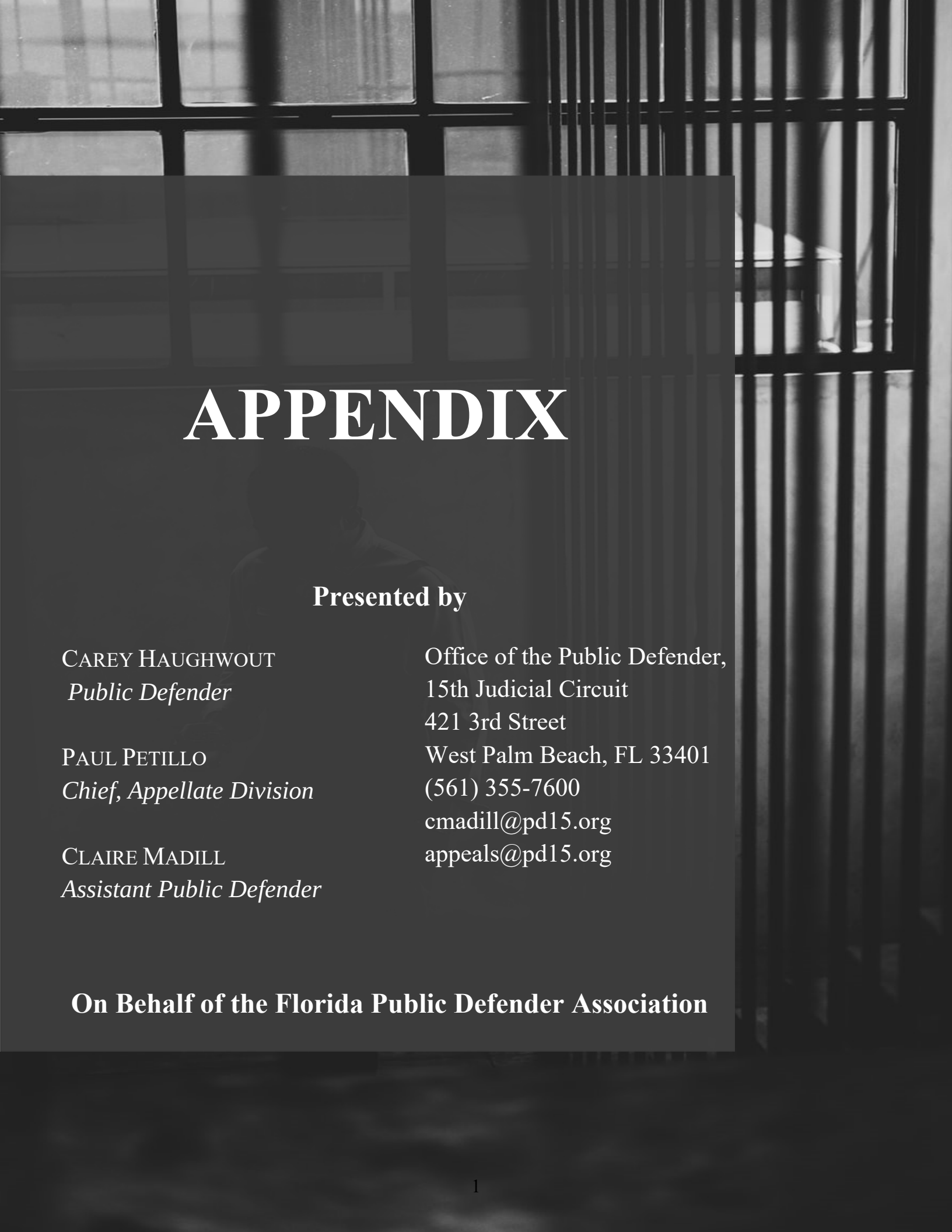
difficult to control."[91] James V. Bennett, a former director of the Federal Bureau of Prisons, eloquently explained the basis of that fear:

> The prisoner who must serve his excessively long sentence with other prisoners who receive relatively mild sentences under the same circumstances cannot be expected to accept his situation with equanimity. The more fortunate prisoners do not attribute their luck to a sense of fairness on the part of the law but to its whimsies. The existence of such disparities is among the major causes of prison riots, and it is one of the reasons why prisons so often fail to bring about an improvement in the social attitudes of their charges.[92]

Conclusion

As it currently stands, trial judges are invited to proceed by hunch, by unspoken prejudice, by untested assumptions, and not by 'law'" at sentencing. Marvin Frankel, CRIMINAL SENTENCES: LAW WITHOUT ORDER 83 (1973). "It is our duty to see that the force of the state, when it is brought to bear through the sentences of our courts, is exerted with the maximum we can muster of rational thought, humanity, and compassion." *Id.* at 124. We respectfully request that this Task Force undertake major reforms to Florida sentencing to improve the fairness of that system and the safety of Floridians.

[91] H.R. Comm. on Crim. Justice, Bill Analysis & Econ. Impact Statement, CS/HB 241 (Mar. 18, 1997), at 15.
[92] J. Bennett, Of Prisons and Justice, S. Doc. No. 70, 88th Cong., 2d Sess. 319 (1964).



APPENDIX

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Table of Contents

Judicial Sentencing Errors

Enclosed is a list of cases in which the trial court was reversed because something they said indicated that they misunderstood or violated the law. Had the trial judges not voluntarily stated their reasons for sentencing on the record, these errors would not have been discovered. Part I lists cases where the trial court misunderstood the law or its discretion. Part II lists cases where the trial court relied on an improper sentencing factor.

I. Mistakes of Law and Discretion

Mistaken belief life sentence was necessary

There are at least 14 cases where defendants were mistakenly sentenced to life imprisonment. Most of these mistakes occurred because the judges believed that the HFO or HVFO statutes required a life sentence. This same mistake likely occurs in cases where judges say nothing.

Case Name	County	Sentence	Resentenced	DOC#
McMillan v. State, 254 So. 3d 1002 (Fla. 4th DCA 2018)	Broward	Life	21	189318
Davis v. State, 227 So. 3d 137 (Fla. 4th DCA 2017)	Palm Beach	Life	25	083406
Broadway v. State, 179 So. 3d 560 (Fla. 4th DCA 2015)	Broward	Life	40	L68243
Prince v. State, 98 So. 3d 768 (Fla. 4th DCA 2012)	Broward	Life	22	37488
Johnson v. State, 9 So. 3d 640, 642 (Fla. 4th DCA 2009)	Broward	Life	30	671250
Stephens v. State, 974 So. 2d 455 (Fla. 2d DCA 2008)	Sarasota	Life	23	577055
Galarraga v. State, 770 So. 2d 1250 (Fla. 4th DCA 2000)	Broward	Life	Life	894839
Bristol v. State, 710 So. 2d 761, 761 (Fla. 2d DCA 1998)	Sarasota	Life	25	143882
Bedford v. State, 706 So. 2d 947 (Fla. 1st DCA 1998)	Leon	Life	20	673957
Adams v. State, 617 So. 2d 474 (Fla. 4th DCA 1993)	St. Lucie	Life	Life	792455
Crumitie v. State, 605 So. 2d 543 (Fla. 1st DCA 1992)	Jefferson	Life	Unknown	Unknown
Williams v. State, 596 So.2d 791 (Fla. 4th DCA 1992)	Palm Beach	Life	20	600410
Burdick v. State, 594 So. 2d 267 (Fla. 1992)	Santa Rosa	Life	15	751912
Henry v. State, 581 So. 2d 928 (Fla. 3d DCA 1991)	Miami-Dade	Life	Unknown	Unknown

Mistaken belief mandatory minimum sentence was required. *Williams v. State*, 44 Fla. L. Weekly D2674 (Fla. 2d DCA Nov. 6, 2019); *Pitts v. State*, 202 So. 3d 882 (Fla. 4th DCA 2016) ("[B]ecause the trial court erroneously believed it did not have discretion to sentence appellant to a mandatory minimum term of less than life in prison under the 10/20/Life statute, we reverse and remand for resentencing."); *Figueroa-Montalvo v. State*, 10 So. 3d 173, 175-76 (Fla. 5th DCA 2009).

Mistaken belief consecutive sentences required. *James v. State*, 244 So. 3d 1142 (Fla. 2d DCA 2018) (firearm mandatory minimum); *Patterson v. State*, 206 So. 3d 64 (Fla. 4th DCA 2016) (court erroneously believed it was required to impose PRR sentence consecutively); *Wilchcombe v. State*, 842 So. 2d 198, 200 (Fla. 3d DCA 2003); *Eblin v. State*, 743 So. 2d 94 (Fla. 2d DCA 1999).

Mistaken belief consecutive mandatory minimum sentence required. *Arutyunyan v. State*, 863 So. 2d 410 (Fla. 4th DCA 2003).

Mistaken belief downward departure prohibited. *Geliga v. State*, 44 Fla. L. Weekly D2530 (Fla. 4th DCA Oct. 16, 2019) (court erred in denying downward departure on ground the mental health condition for which defendant requires treatment had to be connected to the criminal conduct); *Rowe v. State*, 175 So. 3d 947 (Fla. 1st DCA 2015); *Colletta v. State*, 126 So.3d 1090 (Fla. 4th DCA 2012); *Kezal v. State*, 42 So. 3d 252, 254 (Fla. 2d DCA 2010); *Daniels v. State*, 884 So. 2d 220, 222 (Fla. 2d DCA 2004) ("Because it appears that the trial court misapprehended the evidence to conclude that it lacked the authority to depart from the sentencing guidelines, we reverse Daniels' sentences and remand for resentencing."); *Hines v. State*, 817 So. 2d 964, 965 (Fla. 2d DCA 2002); *Ficklin v. State*, 686 So. 2d 708, 709-710 (Fla. 1st DCA 1996); *see also Childers v. State*, 171 So. 3d 170 (Fla. 1st DCA 2015); *Camacho v. State*, 164 So. 3d 45 (Fla. 2d DCA 2015) (reversing because record unclear why court denied downward departure).

Mistaken belief that downward departure grounds were limited to those enumerated in statute. *McCorvey v. State*, 872 So. 2d 395 (Fla. 1st DCA 2004).

Mistaken belief that downward departure was restricted to imposing statutory maximum in case when CPC score exceeds statutory maximum. *Rudd v. State*, 177 So. 3d 1015 (Fla. 1st DCA 2015).

Mistaken belief that HFO sentence must exceed statutory maximum. *Peek v. State*, 143 So. 3d 1101 (Fla. 5th DCA 2014).

Mistaken belief that court had to sentence youthful offender to six years. *Siler v. State*, 135 So. 3d 1126 (Fla. 1st DCA 2014).

Mistaken belief VCC sentence mandatory. *Williams v. State*, 249 So. 3d 721 (Fla. 5th DCA 2018); *Soanes v. State*, 31 So. 3d 914 (Fla. 4th DCA 2010); *Harris v. State*, 849 So. 2d 449, 450 (Fla. 3d DCA 2003); *Calderon v. State*, 745 So. 2d 535 (Fla. 3d DCA 1999).

Mistaken belief HVFO sentence mandatory. *Ellis v. State*, 816 So. 2d 759 (Fla. 4th DCA 2002); *Lovett v. State*, 773 So. 2d 574, 576 (Fla. 3d DCA 2000).

Mistaken belief Resentencing was not on a "clean slate." These are cases where the trial court incorrectly failed to realize the defendant was entitled to a de novo resentencing. *Spires v. State*, 44 Fla. L. Weekly D2750 (Fla. 4th DCA Nov. 13, 2019); *Edward v. State*, 271 So. 3d 125, 127 (Fla. 3d DCA 2019) (successor judge stated: "[W]e're here today only because [the original judge's] pronouncement of the defendant's sentence was not clear. I don't see a reason, whereby, I can or should substitute my thoughts for that of the trial judge" & "I think [the original judge] had ample opportunity to view the case and ample opportunity to be there for the proceedings, so I don't see that you have presented sufficient evidence to have me change that."); *Davis v. State*, 227 So. 3d 137, 140 (Fla. 4th DCA 2017) (successor judge "acknowledged it was 'permitted,' by our remand instructions, to go through an evaluation process and change the length of the initial sentence, but announced 'I am not going to revisit that,' referring to the prior sentence, and 'I am not prepared to do that,' referring to consideration of Davis's performance while in prison.");

Branton v. State, 187 So. 3d 382 (Fla. 5th DCA 2016) (court denied defendant due process and committed fundamental error when it commended defendant's efforts at rehabilitation since original sentencing but said it couldn't consider such evidence otherwise "we'd be resentencing everybody in the state prison system because everybody would want to come back and say, 'Well, gee whiz, I'm a different guy.'").

Mistaken factual information. These are cases where the defendant was sentenced based on material information in violation of due process. *Hadley v. State*, 190 So. 3d 217, 219 (Fla. 4th DCA 2016) (trial court under impression defendant had committed prior capital felony); *McCray v. State*, 851 So. 2d 221, 222 (Fla. 3d DCA 2003) (trial court imposed prison sentence for violation of community control based on mistaken belief he had warned defendant that would happen if he violated community control: "In these circumstances, in which it appears that the sentence actually imposed resulted from a misapprehension of fact, we deem it appropriate to vacate the sentence and remand for resentencing in the light of this conclusion and other pertinent circumstances."); *Craun v. State*, 124 So. 3d 1027 (Fla. 2d DCA 2013) (court incorrectly attributed to Craun his codefendant's misconduct, and counsel was IAC for not objecting to it).

Mistaken belief CPC applied. *Torres v. State*, 879 So. 2d 1254, 1255 (Fla. 3d DCA 2004).

Mistaken belief court had to impose full term of suspended sentence. *Harvey v. State*, 156 So. 3d 583 (Fla. 5th DCA 2015); *Casey v. State*, 50 So. 3d 782 (Fla. 2d DCA 2010); *Nadzo v. State*, 24 So. 3d 690, 691-92 (Fla. 2d DCA 2009); *Lacey v. State*, 831 So. 2d 1267, 1269-70 (Fla. 4th DCA 2002); *Munnerlyn v. State*, 795 So. 2d 171 (Fla. 4th DCA 2001).

Mistaken belief court could not impose youthful offender sentence. *Eustache v. State*, 248 So. 3d 1097, 1102 (2018) ("[T]he trial judge imposed Eustache's current sentence after being incorrectly told by both the state and defense counsel that he had no discretion to impose a sentence below the ten-year minimum mandatory term, when the judge did have the discretion to reimpose a youthful offender sentence with no minimum mandatory."); *Stewart v. State*, 201 So. 3d 1258 (Fla. 1st DCA 2016); *Gallimore v. State*, 100 So. 3d 1264 (Fla. 4th DCA 2012); *Wright v. State*, 96 So. 3d 1145 (Fla. 4th DCA 2012); *Goldwire v. State*, 73 So. 3d 844 (Fla. 4th DCA 2011); *Bennett v. State*, 24 So. 3d 693 (Fla. 1st DCA 2009); *Postell v. State*, 971 So. 2d 986 (Fla. 5th DCA 2008).

Mistaken belief about sentencing options upon revocation of probation. *Washington v. State*, 82 So. 3d 828 (Fla. 4th DCA 2011) (court was unaware it could reinstate probation without a departure ground; "where a trial court erroneously believes it does not have the discretion to impose a certain sentence, resentencing is warranted.").

Mistaken belief court had to adjudicate defendant guilty. *Fowler v. State*, 225 So. 3d 1005 (Fla. 1st DCA 2017).

Mistaken belief that juvenile sentencing statute did not apply. *Burger v. State*, 232 So. 3d 1 (Fla. 4th DCA 2017) ("Additionally, the trial court did not sentence Burger under the new

sentencing scheme for nonhomicide juvenile offenders, as it believed the statutes did not apply to Burger based on the date of his offense).

II. Improper Sentencing Factors

Race, gender, and social and economic status. *Senser v. State*, 243 So. 3d 1003, 1011 (Fla. 4th DCA 2018) (prosecutor argued that defendant should be held to higher standard because of privilege afforded by his race); *Olivera v. State*, 494 So. 2d 298, 300 (Fla. 1st DCA 1986) (socioeconomic status not a proper sentencing consideration).

Exercise of constitutional rights (vindictive sentencing). *Toye v. State*, 44 Fla. L. Weekly D2944 (Fla. 2d DCA Dec. 11, 2019); *Austin v. State*, 239 So. 3d 93 (Fla. 4th DCA 2018); *Forman v. State*, 231 So. 3d 580 (Fla. 2d DCA 2017); *White v. State*, 199 So. 3d 497 (Fla. 4th DCA 2016); *Battle v. State*, 198 So. 3d 915 (Fla. 5th DCA 2016); *Nunez v. State*, 191 So. 3d 547 (Fla. 5th DCA 2016); *Floyd v. State*, 198 So. 3d 718 (Fla. 2d DCA 2016); *Somers v. State*, 162 So. 3d 1077 (Fla. 5th DCA 2015); *Little v. State*, 152 So. 3d 770 (Fla. 5th DCA 2014); *Hernandez v. State*, 145 So. 3d 902 (Fla. 2d DCA 2014); *Davis v. State*, 146 So. 3d 1198 (Fla. 5th DCA 2014); *Herman v. State*, 161 So. 3d 452 (Fla. 5th DCA 2014); *Simplice v. State*, 134 So. 3d 555 (Fla. 5th DCA 2014); *Walek v. State*, 129 So. 3d 1185 (Fla. 2d DCA 2014); *Baxter v. State*, 127 So. 3d 726 (Fla. 1st DCA 2013); *Pierre v. State*, 114 So. 3d 319 (Fla. 4th DCA 2013); *Lebron v. State*, 127 So. 3d 597 (Fla. 4th DCA 2012); *Green v. State*, 84 So. 3d 1169 (Fla. 3d DCA 2012); *Salter v. State*, 77 So. 3d 760, 764 (Fla. 4th DCA 2011); *Vardaman v. State*, 63 So. 3d 925 (Fla. 4th DCA 2011); *Zeigler v. State*, 60 So. 3d 578 (Fla. 2d DCA 2011); *Mendez v. State*, 28 So. 3d 948, 950 (Fla. 2d DCA 2010); *Wilson v. State*, 845 So. 2d 142, 150 (Fla. 2003); *Aliyev v. State*, 835 So. 2d 1232, 1234 (Fla. 4th DCA 2003); *Johnson v. State*, 679 So. 2d 831 (Fla. 1st DCA 1996); *Cavallaro v. State*, 647 So.2d 1006, 1007 (Fla. 3d DCA 1994); *Harden v. State*, 428 So. 2d 1983); *City of Daytona Beach v. Del Percio*, 476 So. 2d 197, 205 (Fla. 1985); *Gillman v. State*, 373 So. 2d 935, 938 (Fla. 2d DCA 1979); *Gallucci v. State*, 371 So. 2d 148 (Fla. 4th DCA 1979).

Arbitrary sentences; sentences based on whim or caprice. *Cromartie v. State*, 70 So. 3d 559 (Fla. 2011) (court arbitrarily increased appellant's sentence by rounding up); *McKinney v. State*, 27 So. 3d 160, 161 (Fla. 1st DCA 2010) (court couldn't reject youthful offender sentence based on personal opinion of that program: "[L]ike any other exercise of judicial discretion, the trial court's sentencing decision must be supported by logic and reason and must not be based upon the whim or caprice of the judge."); *Pressley v. State*, 73 So. 3d 834, 837 (Fla. 1st DCA 2011).

Applying a sentencing policy at odds with State law. *Desantis v. State*, 240 So. 3d 751 (Fla. 4th DCA 2018) (court would not consider youthful offender sentence in cases involving death); *Concha v. State*, 225 So. 3d 390 (Fla. 4th DCA 2017); *Fraser v. State*, 201 So. 3d 847 (Fla. 4th DCA 2016) (court wouldn't consider downward departure based on mental illness); *Barnhill v. State*, 140 So. 3d 1055 (Fla. 2d DCA 2014); *Goldstein v. State*, 154 So. 3d 469 (Fla. 2d DCA 2015) ("It is true that the purpose of uniform sentencing laws is to create 'general policies' for the sentencing of defendants, but here the judge applied a personalized general policy that was at odds with Florida law."); *Pressley v. State*, 73 So. 3d 834 (Fla. 1st DCA 2011) (court wouldn't consider boot camp program).

Religion. *Torres v. State*, 124 So. 3d 439 (Fla. 1st DCA 2013) (judge assumed Torres was Catholic and mentioned it at sentencing); *Santisteban v. State*, 72 So. 3d 187 (Fla. DCA 4th DCA 2011) (judge erred in using religious concept of 'chai' in determining extent of downward departure).

National origin. *Nawaz v. State*, 28 So. 3d 122, 124 (Fla. 1st DCA 2010).

Lifestyle. *Kenner v. State*, 208 So. 3d 271, 277 (Fla. 5th DCA 2016) ("During sentencing, the trial court described Appellant's attitude during trial as surly and noted that Appellant had no job and failed to support his children. These facts were not relevant to the crime charged."); *Williams v. State*, 586 So. 2d 1081, 1082 (Fla. 1st DCA 1991) ("[A] defendant's lifestyle is an impermissible consideration for departure."); *Vega v. State*, 498 So. 2d 1294, 1296 (Fla. 5th DCA 1986) ("style of life"); *Bradley v. State*, 509 So. 2d 1137 (Fla. 2d DCA 1987) ("The fact that he has fathered two illegitimate children is patently an improper reason for enhancing his sentence.").

Acquitted conduct. *Love v. State*, 235 So. 3d 1037, 1039 (Fla. 2d DCA 2018); *Ortiz v. State*, 264 So. 3d 1032 (Fla. 4th DCA 2019); *Randall v. State*, 249 So. 3d 799 (Fla. 1st DCA 2018); *Theophile v. State*, 240 So. 3d 15 (Fla. 4th DCA 2018); *Dinkines v. State*, 122 So. 3d 477 (Fla. 4th DCA 2013); *Pavlac v. State*, 944 So. 2d 1064 (Fla. 4th DCA 2006); *Doty v. State*, 884 So. 2d 547, 549 (Fla. 4th DCA 2004) ("It is a violation of due process for the court to rely on conduct of which the defendant has actually been acquitted when imposing the sentence."); *Cook v. State*, 647 So. 2d 1066 (Fla. 3d DCA 1994); *McCammon v. State*, 510 So. 2d 657 (Fla. 2d DCA 1987); *Epprecht v. State*, 488 So. 2d 129, 130 (Fla. 3d DCA 1986); *Watkins v. State*, 498 So. 2d 576 (Fla. 3d DCA 1986) ("In addition, the trial court's finding that the defendant 'was shooting to kill' contradicts the jury verdict finding defendant guilty of aggravated battery with a firearm rather than of attempted first-degree murder."); *Owen v. State*, 441 So. 2d 1111 (Fla. 3d DCA 1983) (TC's finding that murder was "a deliberate act" contradicts jury finding D guilty of second-degree murder, rather than first-degree murder; "'Deliberation' is often used interchangeably with 'premeditation' to describe the essential element of first-degree murder.").

Alleged conduct for which no conviction was obtained. *Taylor v. State*, 238 So. 3d 896 (Fla. 5th DCA 2018) ("The trial court's consideration of the firearm possession was foreclosed by the State's decision not to proceed on the charges that alleged possession of a firearm.").

Failure to show remorse. *Strong v. State*, 263 So. 3d 199 (Fla. 5th DCA 2019); *Chiong-Cortes v. State*, 260 So.3d 1154 (Fla. 3d DCA 2018); *Pierre v. State*, 259 So. 3d 859 (Fla. 4th DCA 2018); *Stone v. State*, 249 So. 3d 763 (Fla. 3d DCA 2018); *Szymanski v. State*, 238 So. 3d 934 (Fla. 2d DCA 2018); *Shepard v. State*, 227 So. 3d 746 (Fla. 1st DCA 2017); *Parague v. State*, 222 So. 3d 567 (Fla. 4th DCA 2017); *Allen v. State*, 211 So. 3d 48 (Fla. 4th DCA 2017): *Lawton v. State*, 207 So. 3d 359 (Fla. 3d DCA 2016); *Postaski v. State*, 203 So. 3d 967 (Fla. 2d DCA 2016); *Pehlke v. State*, 189 So. 3d 1036 (Fla. 2d DCA 2016); *Macan v. State*, 179 So. 3d 551 (Fla. 1st DCA 2015); *Williams v. State*, 164 So. 3d 739 (Fla. 2d DCA 2015); *Davis v. State*, 149 So. 3d 1158 (Fla. 4th DCA 2014); *Gage v. State*, 147 So. 3d 1020 (Fla. 2d DCA 2014); *Adkison v. State*, 133 So. 3d 607 (Fla. 1st DCA 2014); *Dinkines v. State*, 122 So. 3d 477 (Fla. 4th DCA

2013); *Robinson v. State*, 108 So. 3d 1150 (Fla. 5th DCA 2013); *Johnson v. State*, 120 So. 3d 629 (Fla. 2d DCA 2013) (counsel IAC for not objecting to court's reliance on lack of remorse); *Dumas v. State*, 134 So. 3d 1048 (Fla. 1st DCA 2013); *Green v. State*, 84 So. 3d 1169 (Fla. 3d DCA 2012); *Jackson v. State*, 39 So. 3d 427 (Fla. 1st DCA 2010); *Brown v. State*, 27 So. 3d 181, 183 (Fla. 2d DCA 2010); *Whitmore v. State*, 27 So. 3d 168 (Fla. 4th DCA 2010); *Hannum v. State*, 13 So. 3d 132 (Fla. 2d DCA 2009); *Johnson v. State*, 948 So. 2d 1014 (Fla. 3d DCA 2007); *Ritter v. State*, 885 So. 2d 413, 414 (Fla. 1st DCA 2004); *Soto v. State*, 874 So. 2d 1215 (Fla. 3d DCA 2004); *K.N.M. v. State*, 793 So. 2d 1195, 1198 (Fla. 5th DCA 2001); *A.S. v. State*, 667 So. 2d 994 (Fla. 3d DCA 1996); *K.Y.L. v. State*, 685 So. 2d 1380, 1381 (Fla. 1st DCA 1997); *Cavallaro v. State*, 647 So.2d 1006, 1007 (Fla. 3d DCA 1994); *Hubler v. State*, 458 So. 2d 350 (Fla. 1st DCA 1984).

Maintaining innocence. *Piccinini v. State*, 275 So. 3d 210, 213 (Fla. 5th DCA 2019); *Beauchamp v. State*, 273 So. 3d 247 (Fla. 5th DCA 2019); *Sanchez v. State*, 270 So. 3d 515 (Fla. 2d DCA 2019); *James v. State*, 264 So. 3d 982 (Fla. 4th DCA 2019); *Allen v. State*, 211 So. 3d 48 (Fla. 4th DCA 2017); *Kenner v. State*, 208 So. 3d 271 (Fla. 5th DCA 2016); *Heatley v. State*, 192 So. 3d 584 (Fla. 2d DCA 2016); *Molina v. State*, 150 So. 3d 1280, 1281 n.1 (Fla. 3d DCA 2014); *Gage v. State*, 147 So. 3d 1020 (Fla. 2d DCA 2014); *Adkison v. State*, 133 So. 3d 607 (Fla. 1st DCA 2014); *Johnson v. State*, 120 So. 3d 629 (Fla. 2d DCA 2013) (counsel IAC for not objecting to this consideration); *Robinson v. State*, 108 So. 3d 1150 (Fla. 5th DCA 2013); *Dumas v. State*, 134 So. 3d 1048 (Fla. 1st DCA 2013); *Green v. State*, 84 So. 3d 1169 (Fla. 3d DCA 2012); *Mentor v. State*, 44 So. 3d 195 (Fla. 3d DCA 2010); *Holt v. State*, 33 So. 3d 811 (Fla. 4th DCA 2010); *T.R. v. State*, 26 So. 3d 80 (Fla. 3d DCA 2010); *Jiles v. State*, 18 So. 3d 1216 (Fla. 5th DCA 2009); *Donaldson v. State*, 16 So. 3d 314 (Fla. 4th DCA 2009); *Bracero v. State*, 10 So. 3d 664, 665-66 (Fla. 2d DCA 2009); *Johnson v. State*, 948 So. 2d 1014 (Fla. 3d DCA 2007); *Ritter v. State*, 885 So. 2d 413, 414-15 (Fla. 1st DCA 2004); *Lyons v. State*, 730 So. 2d 833, 834 (Fla. 4th DCA 1999); *A.S. v. State*, 667 So. 2d 994 (Fla. 3d DCA 1996); *Holton v. State*, 573 So. 2d 284, 292 (Fla. 1990); *Fraley v. State*, 426 So. 2d 983 (Fla. 3d DCA 1983).

Post-offense conduct (*Norvil*). *Garcia v. State*, 279 So. 3d 148 (Fla. 4th DCA 2019); *Price v. State*, 278 So. 3d 697 (Fla. 4th DCA 2019); *Tharp v. State*, 273 So. 3d 269 (Fla. 2d DCA 2019) (uncharged subsequent conduct); *Walker v. State*, 253 So. 3d 1 (Fla. 4th DCA 2018) (jailhouse behavior); *C.J. v. State*, 244 So. 3d 299 (Fla. 4th DCA 2018); *Bradshaw v. State*, 240 So. 3d 33 (Fla. 4th DCA 2018); *Baehren v. State*, 234 So. 3d 799 (Fla. 4th DCA 2018); *N.D.W. v. State*, 235 So. 3d 1001 (Fla. 2d DCA 2017) (error to consider state's assertion that there were unfiled charges 'waiting in the wings.'); *Smith v. State*, 232 So. 3d 430 (Fla. 4th DCA 2017); *Hillary v. State*, 232 So. 3d 3 (Fla. 4th DCA 2017); *Brown v. State*, 225 So. 3d 947 (Fla. 5th DCA 2017); *Schwartzberg v. State*, 215 So. 3d 611 (Fla. 4th DCA 2017); *Fernandez v. State*, 212 So. 3d 494 (Fla. 2d DCA 2017); *A.R.M. v. State*, 198 So. 3d 1132 (Fla. 4th DCA 2016) (applying *Norvil* in juvenile case); *Johnson v. State*, 201 So. 3d 521 (Fla. 4th DCA 2016); *Norvil v. State*, 191 So. 3d 406 (Fla. 2016); *Tanner v. State*, 188 So. 3d 52 (Fla. 1st DCA 2016); *Yisrael v. State*, 65 So. 3d 1177, 1178 (Fla. 1st DCA 2011); *Mirutil v. State*, 30 So. 3d 588, 590 (Fla. 3d DCA 2010); *Gray v. State*, 964 So. 2d 884 (Fla. 2d DCA 2007); *Seays v. State*, 789 So. 2d 1209 (Fla. 4th DCA 2001).

Uncharged or dismissed offenses. *Nicols v. State*, 44 Fla. L. Weekly D2721 (Fla. 2d DCA Nov. 8, 2019); *Petit-Homme v. State*, 44 Fla. L. Weekly D2711 (Fla. 5th DCA Nov. 8, 2019); *Mullaly v. State*, 262 So. 3d 858 (Fla. 1st DCA 2018); *Randall v. State*, 249 So. 3d 799 (Fla. 1st DCA 2018); *Hernandez v. State*, 145 So. 3d 902, 905 (Fla. 2d DCA 2014); *Martinez v. State*, 123 So. 3d 701, 703 (Fla. 1st DCA 2013) ("Relying on pending or dismissed charges, in effect deeming such charges established without proof or a conviction, violates a defendant's right to due process."); *Yisrael v. State*, 65 So. 3d 1177, 1178 (Fla. 1st DCA 2011).

Unsubstantiated allegations of misconduct. *Shelko v. State*, 268 So. 3d 1003 (Fla. 5th DCA 2019); *Berben v. State*, 268 So. 3d 235 (Fla. 5th DCA 2019); *Lundquist v. State*, 254 So. 3d 1159 (Fla. 2d DCA 2018); *Strong v. State*, 254 So. 3d 428 (Fla. 4th DCA 2018); *Larry v. State*, 211 So. 3d 357 (Fla. 5th DCA 2017) ("[T]he trial court speculated about Appellant's past behavior for which there was no record basis."); *Williams v. State*, 193 So. 3d 1017 (Fla. 1st DCA 2016); *MacIntosh v. State*, 182 So. 3d 888 (Fla. 5th DCA 2016); *Mosley v. State*, 198 So. 3d 58 (Fla. 2d DCA 2015); *McGill v. State*, 148 So. 3d 531 (Fla. 5th DCA 2014) (unsubstantiated allegations of gang affiliation, robberies); *Craun v. State*, 124 So. 3d 1027 (Fla. 2d DCA 2013) (court incorrectly attributed to Craun his codefendant's misconduct, and counsel was IAC for not objecting to it); *Martinez v. State*, 123 So. 3d 701 (Fla. 1st DCA 2013) (appellate counsel was IAC for failing to raise issue; should have raised it by rule 3.800(b)(2) motion); *Reese v. State*, 639 So. 2d 1067 (Fla. 4th DCA 1994) (judge considered argument by prosecutor that defendant was seen in other videotaped drug sales).

Disputing Allegations: *McGill v. State*, 148 So. 3d 531, 532 (Fla. 5th DCA 2014); *Jackson v. State*, 588 So. 2d 1085, 1086 (Fla. 5th DCA 1991) ("Once the truth of the hearsay information presented at the sentencing hearing was specifically disputed, the state was obligated to carry its burden of corroborating the accuracy of the [information]." (citation omitted)).

Subsequent Misconduct Unrelated to Charged Offense. *Love v. State*, 235 So. 3d 1037 (Fla. 2d DCA 2018) (error to admit over objection evidence of defendant's misconduct in jail).

Speculation that defendant's offense caused deaths. *Challis v. State*, 157 So. 3d 393 (Fla. 2d DCA 2015) (judge speculated at sentencing that defendant's drug trafficking offense caused the deaths of users; appellate counsel IAC for not raising this fundamental sentencing error).

Speculation that defendant committed other crimes. *Epprecht v. State*, 488 So. 2d 129, 130 (Fla. 3d DCA 1986).

Speculation that defendant may commit future crimes. *Goldstein v. State*, 154 So. 3d 469, 475 (Fla. 2d DCA 2015) (evidence at hearing showed that defendant, who was convicted of possession of child pornography, had not touched children and was unlikely to do so; but judge said risk was uncertain and he would not take it; court reversed: "It seems even more evident to us that a court cannot rely on crimes it fears the defendant might possibly commit in the future simply because he has admitted the charged offenses.").

Failure to confess, repent, or admit guilt. *McDowell v. State*, 211 So. 3d 373 (Fla. 1st DCA 2017); *Allen v. State*, 211 So. 3d 48 (Fla. 4th DCA 2017); *Gilchrist v. State*, 938 So. 2d 654 (Fla. 4th DCA 2006); *Soto v. State*, 874 So. 2d 1215 (Fla. 3d DCA 2004); *K.N.M. v. State*, 793 So. 2d 1195, 1198 (Fla. 5th DCA 2001); *Harden v. State*, 428 So. 2d 316, 317 (Fla. 4th DCA 1983).

Relying on the (improper) cross-examination of the defendant after the allocution. *Guerra v. State*, 212 So. 3d 541, 542 (Fla. 4th DCA 2017).

Disagreeing with the leniency of the statute. *Casper v. State*, 187 So. 3d 255 (Fla. 1st DCA 2016) (Makar, J., concurring dubitante) (judge expressed "his belief that the sentencing statute ought to be changed to increase the score for Casper's offense"); *see also Scurry v. State*, 489 So. 2d 25, 29 (Fla. 1986) ("Reason ten, that a lesser sentence is not commensurate with the seriousness of the crime, flies in the face of the rationale for the guidelines. In effect this reason reflects a trial judge' disagreement with the Sentencing Guidelines Commission and is not a sufficient reason for departure.").

Emotional and personal response to the crime. *Morgan v. State*, 198 So. 3d 812 (Fla. 2d DCA 2016) (convicted of burglary, Morgan scored nonstate prison sanction but was sentenced to 15 years in prison (the maximum); judge said his daughter was same age as young girl present during burglary and "I can't imagine my child sitting up and seeing somebody standing at their door like that. That's the reason I'm doing the fifteen years"; although court reversed for new trial, it cited case that says judges shouldn't be guided by emotion).

Public opinion. *Hamilton v. State*, 128 So. 3d 872 (Fla. 4th DCA 2013) (stating in dicta that it was improper of prosecutor to tell judge that he had citizen petition with 3000 signatures demanding maximum sentence: "[W]e are compelled to note that such conduct is an affront to the very notion of due process of law granted to a criminal defendant in an American courtroom. 'The constitutional safeguards relating to the integrity of the criminal process attend every stage of a criminal proceeding . . . . There can be no doubt that they . . . exclude influence or domination by either a hostile or friendly mob.'" (c.o.)).

Inability to pay. *Tate v. Short*, 401 U.S. 395, 397-99 (1971) (equal protection clause prohibits judge from conditioning lower sentence on payment of money); *Vasseur v. State*, 252 So. 3d 387 (Fla. 2d DCA 2018) (State's recommendation contingent on payment); *Noel v. State*, 191 So. 3d 370 (Fla. 2016); *Nezi v. State*, 119 So. 3d 517 (Fla. 5th DCA 2013) ("While a defendant's willingness and capacity to pay restitution can be among the reasons a judge may decide to impose a lower sentence, the equal protection clause prohibits a judge from conditioning a lower sentence on the payment of restitution."); *DeLuise v. State*, 72 So. 3d 248, 253 (Fla. 4th DCA 2011) (receded from by *Noel v. State*, 127 So. 3d 769 (Fla. 4th DCA 2013), which was quashed by *Noel v. State*, 191 So. 3d 370 (Fla. 2016)).

Outsiders. *Andrews v. State*, 207 So. 3d 889 (Fla. 4th DCA 2017).

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A PROPOSAL FOR SENTENCE REFORM IN FLORIDA

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Sentence disparity and sentencing procedures are currently receiving critical scrutiny from academicians, the news media, state legislatures, and also the judiciary. The increasing crime rate indicates that current sentencing practices are unsuccessful in reducing criminal activity. The visibility of the judicial sentencing process has focused most of the criticism of sentencing procedures upon the judiciary.[1]

Alleged sentence disparity is one of several policy areas identified by the Florida Supreme Court's Judicial Planning Committee as requiring immediate attention. In response to the Judicial Planning Committee's interest in sentence disparity, the court established a Sentencing Study Committee to examine the state's current sentencing practices.[2] The primary objectives of the Sentencing Study Committee (the Committee) were to examine the extent and causes of sentence disparity and to explore the vari-

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1. *See generally* THE AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA (1971); COUNCIL OF STATE GOVERNMENTS, DEFINITE SENTENCING: AN EXAMINATION OF PROPOSALS IN FOUR STATES (1976); D. FOGEL, ". . . WE ARE THE LIVING PROOF . . ." THE JUSTICE MODEL FOR CORRECTIONS (1975); M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1972); N. MORRIS, THE FUTURE OF IMPRISONMENT (1974); THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT (1975) [hereinafter cited as TASK FORCE]; A. VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENT (1975); and Bagley, *Why Illinois Adopted Determinate Sentencing*, 6 JUDICATURE 390 (1979).

2. The Sentencing Study Committee, created in January, 1978, now consists of two Justices of the Florida Supreme Court, one appellate court judge, six circuit court judges, two county court judges, five members of the Florida Legislature (two senators and three representatives), the Attorney General, one public defender, one state attorney, one private attorney and a law school professor. Other topics to be addressed by the Committee include the impact of plea bargaining on the sentencing process and the use of presentence investigation reports as an aid to sentencing.

ety of sentencing alternatives available—judicial, legislative, and administrative—to reduce unreasonable sentence variation.

During the first year of its study, the Committee primarily reviewed felony sentencing practices. In April, 1978 the Committee presented its preliminary findings to the Chief Justice of the Florida Supreme Court.[3] This article presents the Committee's recommendations for the development and implementation of sentencing policy along with the rationale underlying those recommendations. In addition, this article will discuss the institutional problems encountered in attempts to change sentencing structure or policy.

I. The Sentencing Reform Movement

Most contemporary sentence reform movements are initiated and executed primarily by legislative bodies reacting to public dissatisfaction with increasing crime rates. They have as a basic goal the elimination of sentence disparity by controlling the discretion exercised by trial judges in the sentencing process. Usually, the reform movements are founded on one dominant philosophy of the purpose of sentencing to the exclusion of all others. As a result, contemporary sentence reform movements tend to embrace one particular approach to structural reform of the sentencing process—again to the exclusion of all others.[4]

Although the state legislature is perhaps the most visible source of sentencing policy, a number of other organizations and individuals play key roles in policy definition and implementation. These include law enforcement agencies, state attorneys and public defenders, all levels of the judiciary, probation staff, prison personnel, and parole authorities. The interdependence of these offices gives each one an integral role in the sentencing process. Therefore, the involvement of all participants is required in order to de-

3. Interim Report of the Sentencing Study Committee to the Florida Supreme Court (1978) (on file with the Office of the State Courts Administrator at the Florida Supreme Court) [hereinafter cited as Interim Report].

4. *See* R. Dawson, Sentencing: The Decision as to Type, Length, and Conditions of Sentence 215-21 (1969). References to sentencing "structure" or "policy" refer to any constitutional, statutory or procedural dictates or practices which affect the manner in which sentence determinations are made in a particular state or local jurisdiction. These may include formal policies such as: (1) the classification and codification of crimes and criminal sanctions, whether indeterminate or definite; (2) the adoption of objective parole criteria by parole authorities; (3) the establishment of procedures for sentence review; and (4) the use of sentencing councils to assist the trial judge; or informal policies such as (1) the priorities which govern plea or sentence negotiations, and (2) criteria applied by correctional authorities in awarding gain time.

velop a comprehensive and acceptable reform program. The Committee has taken advantage of the collective expertise of the parties noted above, hoping thereby to encourage a holistic approach to sentence reform in Florida.

In addition to the task of giving recognition to the roles of the participants in the sentencing process, any assessment of reform is further complicated by the value-based nature of sentencing decisions. To begin with, the perception of a sentence as "disparate" will be governed largely by the perceived purpose of the sentence. A sentence which is reasonably calculated to effect rehabilitation may be unreasonable if retribution is the primary purpose. Correspondingly, the goals of incapacitation or deterrence may require yet another sanction.[5] Unfortunately, the contribution that sentencing reform may make to the accomplishment or frustration of any of these purposes is difficult to forecast with certainty,[6] particularly since criminal sanctions can and do serve overlapping needs.[7]

The debate over the relative merits of the various purposes of sentencing has resulted in a lack of consensus about reform strategy. Lack of consensus has in turn resulted in uneven attempts at implementaton of reforms within jurisdictions. In order to foster consistency, predictability and uniform implementation, the Committee did not attempt to promote one philosophy of criminal punishment over any other.[8] Instead, the Committee's fundamental goal has been to devise a system in which individuals of similar backgrounds would receive roughly equivalent sentences when they commit similar crimes, regardless of the differing penal philosophies of legislators, correctional authorities, parole authorities, or judges.[9]

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5. The rehabilitation concept stems from a belief that society has shaped the offender's behavior beyond his control. Since most offenders will eventually re-enter society, they should be sentenced to ensure rehabilitative opportunities. The retribution model is based on the view that man is responsible for his actions and for his behavior and, therefore, should receive punishment proportionate to the wrong which he has inflicted upon society. The incapacitation theory is based on the concept of preventive restraint or detention, while deterrent sentences are imposed as a general means of threatening or educating potential offenders to refrain from criminal violations or as a means of dissuading a specific individual offender from returning to crime. COUNCIL OF STATE GOVERNMENTS, DEFINITE SENTENCING: AN EXAMINATION OF PROPOSALS IN FOUR STATES 11 (1976).

6. *See* J. HOGARTH, SENTENCING AS A HUMAN PROCESS 4-5 (1971).

7. Bagley, *supra* note 1, at 392.

8. Interim Report, *supra* note 3, at 3.

9. For a brief discussion of the problem of disparate sentencing, see Kennedy, *Introduction to Hofstra Law Review Symposium on Sentencing, Part I*, 7 HOFSTRA L. REV. 1 (1978).

Although the perception of sentence disparity partially arises out of philosophical differences, the majority of the criticism regarding sentencing practices has focused upon judicial discretion.[10] No reform movement can be expected to succeed if it is based solely on the assumption that the limitation of judicial discretion will automatically result in less sentence disparity.[11] Sentencing reform aimed at the judicial function merely shifts discretion from one of the many participants in the sentencing process to another.[12] Therefore, the impact of any sentencing reform program must be thoroughly assessed in terms of the shift of discretion. Concern regarding the exercise of discretion is stimulated by instances of perceived capriciousness. Accordingly, the criteria which govern the exercise of discretion by judges, prosecutors and parole boards must all be made more explicit. This will allow reformers to develop a system to control or guide discretion without eliminating it altogether.

A number of schemes have been developed for classifying alternative sentencing structures. One scheme classifies sentencing structures as legislative, administrative, or judicial in nature, depending on the *locus* of primary discretion.[13] Another labels sen-

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10. *See* sources cited *supra*, note 1.

11. Law enforcement agencies exercise discretion at the initial point of contact with the defendant by determining whether to arrest and what charges to file. The prosecutor exercises discretion in filing charges and is limited by the boundaries of internal policy, with different prosecutors emphasizing different crimes. There is also discretion in a jury's determination of guilt or innocence. The judge exercises discretion with respect to the type and length of sentence, and his decision is influenced by the information provided by the probation officer in the presentence investigation report. Correctional authorities, by classifying and placing inmates, also may affect parole decisions. The legislature oversees the entire process by setting substantive policy. *See generally* R. DAWSON, *supra* note 4.

12. For example, statutes which provide minimum mandatory terms of imprisonment shift some discretion from judges to prosecutors, who then are in a better bargaining position and thus control more discretion. Similarly, flat-time sentencing places initial discretion concerning time served not in the hands of parole authorities, but in the hands of the legislature. *See* Hoffman & DeGostin, *An Argument for Self-Imposed Explicit Judicial Sentencing Standards*, 3 J. CRIM. JUST. 195, 203 (1975). *But see* Orland, *From Vengeance to Vengeance: Sentencing Reform and the Demise of Rehabilitation*, 7 HOFSTRA L. REV. 29, 44-45 (1978):

> [T]he effect of the Illinois and Indiana sentencing schemes [good time provisions] is to delegate power to prison disciplinary committees to cut time in half or to double it in much the same way that parole boards extend or reduce time. . . . All that Indiana and Illinois have done is shift the locus of potential arbitrary power from the parole board to the prison disciplinary committee.

13. TASK FORCE, *supra* note 1, at 79-80. The use of minimum mandatory sentences precluding judicial or administrative discretion are examples of a legislative scheme. An administrative scheme is one in which wide discretion is exercised by parole authorities. A judicial scheme is one in which the courts govern not only the sentence imposed but also the actual

tencing structures as indeterminate or determinate, depending on the *extent* of the discretion.[14] For example, California has adopted presumptive sentencing. This structure allows the legislature to identify specific aggravating or mitigating factors for consideration by judges when making sentencing decisions. Identification of these factors lends more structure to the judicial role in sentencing.[15] Another approach which attempts to structure judicial discretion is the sentencing guidelines concept. This concept involves an attempt by the judiciary to make explicit the underlying policies governing the sentencing decision process. Both the Florida Department of Corrections and the Florida Parole and Probation Commission are currently attempting a similar approach by developing criteria for the classification of inmates and the establishment of guidelines for the purposes of making release decisions.[16]

The differences among the various sentencing systems are largely a matter of semantics. Each system contains elements of the others. For instance, in a so-called pure indeterminate sentencing structure the outside limits of incarceration for a particular crime may be set at a range of one to fifty years.[17] Establishment

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time served. *Id.*

14. Indeterminate sentencing rests on the premise that punishment should be a remedy for the moral disease of crime and that release should occur only when the cure has been effective. A determinate sentence, on the other hand, is fixed before the offender begins to serve it. *See generally* DETERMINATE SENTENCING: REFORM OR REGRESSION? PROCEEDINGS OF THE SPECIAL CONFERENCE ON DETERMINATE SENTENCING [National Institute of Law Enforcement and Criminal Justice ed. 1978] [hereinafter cited as DETERMINATE SENTENCING]; TASK FORCE, *supra* note 1.

In short, the extent to which the legislature: (1) specifies the criteria to be considered in sentencing; (2) increases the number of classifications of crime; or (3) delimits the ranges or types of sentences that the judge might impose for such classes of crimes, renders the sentencing structure more or less definite. Decision-making related to the substantive foundation of any sentencing structure may be characterized as a process of locating the point on a continuum where policymakers feel that the best interests of the state will be served, rather than a process of choosing from a number of well-defined discrete alternatives. The use of sentencing councils, the availability of sentence review, enhancements in methods of prisoner classification, or the award of "gain time" in the state correctional system, can be regarded as clarifying the definition of the sentencing structure or procedure for a particular state.

15. *See generally* Messinger & Johnson, *California's Determinate Sentence Statute, History and Issues*, in DETERMINATE SENTENCING, *supra* note 14, at 13.

16. Bureau of Planning, Research & Statistics, Florida Department of Corrections, Research Report: Development of an Inmate Classification System for the Florida Department of Corrections (Jan. 1979) (on file with the Florida Department of Corrections); Florida Parole & Probation Commission, Objective Parole Guidelines Application Manual (Dec. 1978) (on file with the Florida Parole & Probation Commission).

17. Zalman, *The Rise and Fall of the Indeterminate Sentence, (Pt. 2)*, 24 WAYNE L. REV. 45, 88 (1977); TASK FORCE, *supra* note 1, at 101.

of such a range restricts the role of the judge to simply deciding whether or not to incarcerate the criminal. The final decision as to the length of sentence rests with parole authorities. Another possibility in the category of indeterminate sentences is for a judge to set an indeterminate sentence range (such as "not less than five, but not more than ten years") within the context of statutorily specified parameters.[18] In this instance, discretion is shared by the judge and the parole authorities.

Florida's sentencing system may be termed a modified indeterminate sentencing structure. The legislature establishes a maximum sentence for each category of criminal offense but provides the judiciary with the discretion to sentence an offender either to a specific period of incarceration or to a minimum-maximum range within the legislatively established limits.[19] Despite a few highly publicized cases and statistics reflecting an increase in crime rates,[20] little consensus exists regarding the efficacy of Florida's current sentencing structure, and even less exists as to which of its component parts is in greatest need of reform.[21] The extent to which the adoption of sentence reform proposals will alleviate unwarranted sentence variation is speculative at present. The data currently available to evaluate sentence disparity in Florida lack both uniformity and consistency.[22] This inadequacy creates problems in the examination of past sentencing practices. Statistically standardized evaluation capability should be established in order to gather a quantitative and longitudinal data base. A properly assembled data base could be used to assess the potential impact of sentencing policy issues on all the components of the sentencing system. Sentencing reform cannot be viewed simply as a question of determinate sentencing versus indeterminate sentencing or judicial discretion versus the discretion of other participants; rather, sentencing reform must be regarded as an effort to develop a total system in which all of the alternatives are considered.

Whether policymakers are interested in merely refining the cur-

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18. *Id.*
19. *See* FLA. STAT. chs. 775-899 (1979).
20. *See* sources cited *supra*, note 1.
21. Interim Report, *supra* note 3, at 4-6; A Report on the Analysis of Sentencing Procedures in Florida's Circuit Courts, Staff Report to the Sentencing Study Committee (1980) (on file with the Office of the State Courts Administrator at the Florida Supreme Court) [hereinafter cited as Staff Report].
22. Staff Report, *supra* note 21.

rent sentencing structure or in exploring additional changes, a review of past attempts at sentencing reform shows that the reform process should be characterized as follows.

1. All of the agencies associated with the sentencing process should have a voice in all policy-making or operational decisions in order to ensure some level of continuity.
2. Changes must be approached cautiously over a minimum period of two to three years. This period of time is necessary because of the complexity of the sentencing problem and the need to gather and analyze base line data regarding the adequacy of the current sentencing structure.
3. The design should avoid reliance upon any particular sentencing philosophy as the single foundation for reform and concentrate instead on the need for consistency and predictability in sentencing systems.
4. The stated norms must be predicated on a thorough understanding of the manner in which discretion will be allocated. If discretion is to be shifted, the implications of such shifts must be evaluated in terms of types of sentences and actual time served by those imprisoned.
5. The system must embody a determined effort to make more explicit the internal policies, criteria, or rules which govern the exercise of discretion by each of the participants in the sentencing process.
6. The design should be based on a serious consideration of all the major alternatives for structural change, with the aim of striking a balance between executive, judicial, and legislative controls. Less sweeping refinements to the sentencing process must also be considered. These include the use of judicial sentencing councils, improvement of presentence investigation reports, procedural improvement of the plea negotiation process, and establishment of methods for sentence review.
7. A capacity to adapt and change must be built in, based on a capability to gather quantitative data regarding Florida's sentencing process. This base line data will provide for identification of problems in the existing system and for monitoring and evaluating the effects of changes implemented by sentencing reform.[23]

The Committee completed its review of the current sentencing structure with these principles in mind. Implementation of its pol-

23. *Id.*

icy recommendations will be a significant and positive step toward improving the sentencing process. The immediate problem confronted by the Committee was the identification of the factors applied in the exercise of judicial discretion. The task was to make these factors more explicit.

II. RECOMMENDATIONS

In its report to the supreme court, the Committee endorsed, "in principle, the exercise of judicial discretion in the sentencing process. However, in order to achieve a greater degree of consistency and fairness in the sentencing process throughout the state, the committee recommend[ed] the development and implementation of structured sentencing guidelines in combination with a sentence review panel."[24]

The guidelines concept is based on federal parole guidelines developed for the United States Board of Parole (now the United States Parole Commission).[25] The federal guidelines were established to assist the hearing examiner and the Parole Commission in achieving equity in parole decisions. Within the federal guidelines a "range (in months) is provided for each combination of seriousness and risk within which hearing examiners must usually set the length of incarceration. Departures from these limits are permitted, if written reasons are given. Such departures are [then] reviewed, by panels or by the full Commission, for both individual [merit] and for policy implications."[26]

The Parole Commission had "initially declared that it had no overall official policy, but rather that each case was decided on its individual merits."[27] After reviewing a number of past parole decisions, however, the parole research staff discovered that "release

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24. Interim Report, *supra* note 3, at 7. The guidelines format recommended by the Committee consists of a "series of two-dimensional grids relating specific offense and offender characteristics to length of sentence. Guideline sentences are computed by assigning weights, based upon a statistical analysis of past sentencing decisions," to selected offense and offender-related characteristics. The recommended length and type of sentence is found by plotting the intersection of the "Offense Score (seriousness of the offense)," located along one axis of the grid, and the "Offender Score (prior record and social stability dimension)," located on the other grid axis. *Id.*

25. *See* L. WILKINS, J. KRESS, D. GOTTFREDSON, J. CALPIN, & A. GELMAN, SENTENCING GUIDELINES: STRUCTURING JUDICIAL DISCRETION 5 (1978) (supported by a grant from the National Institute of Law Enforcement and Criminal Justice) [hereinafter cited as L. WILKINS].

26. D. GOTTFREDSON, C. COSGROVE, L. WILKINS, J. WALLERSTEIN & C. RAUH, CLASSIFICATION FOR PAROLE DECISION POLICY, xxvii (1978).

27. *See* L. WILKINS, *supra* note 25, at 5.

decisions . . . fell into recognizable patterns."[28] Three factors were isolated as crucial in the Commission's decisions: "(1) the seriousness of the criminal behavior involved in the offense, (2) the probability of recidivism, and (3) the institutional behavior of the individual."[29]

The basic assumption underlying the entire guidelines concept is that "while judges in a particular jurisdiction are making sentencing decisions on a case-by-case or individual level, they are simultaneously and as a byproduct making decisions on the policy level."[30] Accordingly, the first step in the development of sentencing guidelines must be to gather the empirical data necessary to describe the implicit sentencing policy operating within the jurisdiction.[31]

In order to develop an equation capable of "predicting" sentencing decisions within a jurisdiction, it is essential to identify not only the offense and offender-related characteristics exerting the greatest influences on sentencing decisions, but also the relative importance assigned to each characteristic by the trial judge. This identification is facilitated by the fact that "[w]hile judges believe they are sentencing on the basis of innumerable intangible subjective factors, most . . . sentences can be explained and predicted on the basis of [a limited number of] factors."[32]

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28. Zalman, *The Rise and Fall of the Indeterminate Sentence*, (Pt. 3) 24 WAYNE L. REV. 857, 866 (1978).

29. L. WILKINS, *supra* note 25, at 5. "Since the third dimension [institutional behavior] appeared to carry much less weight in the Commission's decisions when compared to the other two dimensions, it was later deleted from consideration in the construction of the parole guidelines." *Id.*

30. L. WILKINS, *supra* note 25, at 10.

31. In order to determine the feasibility of developing sentencing guidelines within the state, the Committee undertook an extensive survey of 20 counties representing each of the state's 20 judicial circuits. The purpose of the data collection effort was to identify the amount and variety of sentencing data available throughout the state. The necessary data variables are believed to be generally available given sufficient time to plan for the data collection. For a detailed report of the findings of the data collection effort, see Staff Report, *supra* note 21.

32. Singer, *In Favor of "Presumptive Sentences" Set by a Sentencing Commisson*, 24 CRIME & DELINQUENCY 401, 418 (1978). As many as 205 variables have been identified that may affect a sentencing decision. Examples of these variables are: the perceived severity of the offense; the number and type of the defendant's prior convictions; whether or not a weapon is used in the commission of the offense; the criminal status of the offender at the time of the offense; the extent of physical injury suffered by the victim; and the defendant's prior correctional history. Other variables affecting either the initial sentence or the time actually served include the availability of sentencing alternatives other than incarceration, whether a recommended sentence was offered pursuant to a negotiated plea, and the offender's institutional behavior. L. WILKINS, *supra* note 25, at 10-14.

Statistical analysis of these factors and the resulting sentencing equations represent the initial step in guideline development. The equations are merely a mathematical description of the current sentencing process and, as such, are not intended to be used as a prescription for future judicial sentencing. Current sentencing practices may not be desirable or philosophically justifiable but their identification must precede their amendment or refinement.[33]

The format of the guidelines is contingent upon the structural model of the penal code, and of the offense and offender characteristics of greatest importance in the sentencing decision.[34] A popular format adopted by guidelines researchers is a two-dimensional grid relating offense severity and offender characteristic scores to specific, narrowly defined, recommended sentences within legislative parameters.[35]

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33. Hoffman & DeGostin, *supra* note 12, at 203.

34. At least four ways exist of modeling the state's criminal code and the legislatively prescribed criminal sanctions:

[1] *unitary models* that develop one grid for all of the specific types of criminal offenses;

[2] *statutory models* that develop specific grids to conform with various statutory classifictions of crime; this could be as simple as a misdemeanor/felony dichotomy or as detailed as the statutory classifications of a criminal code (e.g., Felony One, Felony Two, etc.);

[3] *generic models* that develop specific grids to conform with various offense types (e.g., property, violent, and drugs); and

[4] *crime-specific models* that develop grids for each crime (e.g., burglary, robbery, etc.).

NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, LAW ENFORCEMENT & ASSISTANCE ADMINISTRATION, U.S. DEP'T OF JUSTICE, MULTIJURISDICTIONAL SENTENCING GUIDELINES PROGRAM TEST DESIGN 23 (1978) (emphasis in original) [hereinafter cited as PROGRAM TEST DESIGN].

The feasibility of developing each model and its subsequent ability to predict current sentencing patterns is largely dependent upon the availability and consistency of individual data elements in the jurisdictions for which the guidelines are constructed.

35.

Offense Score	0-1	2-3	4-5	6-7	8-9	10-11
4	4-6 yrs.	5-7 yrs.	6-8 yrs.	7-9 yrs.	8-10 yrs.	8-10 yrs.
3	OUT	OUT*	3-5 yrs.	4-6 yrs.	5- 7 yrs.	6- 8 yrs.
2	OUT	OUT	OUT*	2-4 yrs.	3- 5 yrs.	4- 6 yrs.
1	OUT	OUT	OUT*	OUT*	1- 3 yrs.	2- 4 yrs.

Offender Score

*The offender is a potential candidate for an alternative sentence.

Use of sentencing guidelines by trial judges would be mandatory to the extent that the sentencing norm for a particular type of defendant, convicted of a particular offense, would be consulted to decide the sentence to be imposed. Since the purpose of guidelines, however, is to lend some structure to the sentencing decision while retaining judicial discretion the trial judges may at times impose sentences other than those recommended by the guidelines.[36] The expectation is that approximately eighty to eighty-five percent of sentencing decisions can be accommodated by the guidelines.[37] The remaining fifteen to twenty percent of cases would produce sentences which fall outside of the recommended range. A reformed sentencing procedure would require that all such sentences be accompanied by written explanations for the deviation from the guidelines. These sentences then would be subject to review, upon appeal, by sentence review panels.[38]

By limiting the written explanation requirement to sentences falling outside of the guidelines, attention is focused

> on the exceptions . . . rather than on the run-of-the-mill decisions. If judges were required to give a written explanation of every sentence, the odds are high that the explanations would be routine and *pro forma*. . . . But if only the exceptions are reviewed or explained, there is a reasonable chance that the explanations and reviews will be made with some care and thought.[39]

Written explanations will hopefully provide a basis for meaningful review; they will also facilitate collection of the information required for the periodic re-evaluation of the sentencing guidelines.[40]

The proposed Florida guidelines follow the federal guidelines concept. Within the reformed structure the judge may either impose the recommended sentence or, if warranted by the nature of the offense and the offender characteristics, impose a sentence

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PROGRAM TEST DESIGN, *supra* note 34, at 3. The values within the cells of the decision matrix are unique to each jurisdiction and reflect the relationship between the legislatively prescribed penal sanctions, the structure of the state's criminal code and the historic sentencing practices of the judiciary for which the guidelines were developed. The guidelines therefore are not automatically transferrable from one jurisdiction within the state to another. *See* Zalman, *supra* note 28, at 869-70.

36. Interim Report, *supra* note 3, at 8.

37. L. WILKINS, *supra* note 25, at 24-25.

38. Interim Report, *supra* note 3, at 8.

39. C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 299 (1978) (emphasis in original).

40. Hoffman & DeGostin, *supra* note 12, at 199.

outside of the recommended range. If the latter course is chosen, the decision must be accompanied by a written statement delineating the reasons for the court's decision.[41]

III. The Sentencing Commission

The Committee's proposal relegates responsibility for the implementation of sentencing guidelines to the judiciary rather than the legislature. This relegation is based on the committee's perception that the establishment of guidelines is a matter of procedural rather than substantive law and, as such, is under the purview of the judiciary.[42]

The Florida statutes identify specific categories of criminal behavior and establish sanctions for each category.[43] The interpretation of legislative intent and the evaluation of individual sentences have historically been a function of the judiciary. The promulgation of sentencing guidelines is only a formal articulation of the implicit sentencing policy of the judiciary. Since the sanctions recommended by the guidelines fall within the broad sentence parameters prescribed by the legislature, sentencing guidelines do not encroach upon the traditional function of the legislature to define criminal activity and to establish maximum terms of incarceration.

Under the Committee's recommendations, the Florida Supreme Court would be responsible for the statewide implementation of the guidelines while responsibility for the actual development of the guidelines would rest with a fifteen-member sentencing commission.[44]

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41. Interim Report, *supra* note 3, at 8.

42. *See generally* Interim Report, *supra* note 3, at 8. Fla. Const. art. V, § 2(a) provides:
> The supreme court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review, the administrative supervision of all courts, the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought. These rules may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature.

43. *See* Fla. Stat. chs. 775-899 (1979).

44. The sentencing commission would be appointed in the following manner:
> one member of the Senate to be appointed by the President of the Senate; one member of the House of Representatives to be appointed by the Speaker of the House; one Supreme Court Justice to be appointed by the Chief Justice of the Supreme Court; four circuit court judges and one county court judge to be appointed by the Chief Justice of the Supreme Court; one state attorney, one public defender, one private attorney (preferably with a background as defense counsel), and one representative of the Attorney General's office to be jointly appointed by the President of the Senate and the Speaker of the House upon recommendations

The role of the sentencing commission vis-a-vis the legislature and the judiciary must be clearly defined prior to the development of the guidelines. Although it is recognized that the commission must operate under the auspices of the judiciary, it should be granted sufficient autonomy to insure objective evaluation of the current sentencing patterns in an atmosphere divorced from the daily pressures of the court and the legislative process.[45] This need for autonomy is particularly important in view of the court's review of the guidelines prior to their adoption by the judiciary.

The data presented to the sentencing commission by its research staff will identify the offense and offender characteristics which have historically influenced the sentencing decision, as well as the relative weight assigned each variable by the sentencing judge. The sentencing commission will evaluate the data for inconsistencies in the length and type of sentences imposed for particular offenses. The commission will also assess the legitimacy and propriety of the factors appearing to have the greatest influence on the sentencing decision. After the variables that are deemed appropriate for inclusion in the guidelines have been identified, the research staff will re-examine the data and assign weights to these variables.[46] This information will form the basis for a guidelines model which will articulate sound sentencing policy, devoid of the influence of extra-legal considerations or the biases of individual judges.

Following implementation of the guidelines, the commission should meet on a regular basis (*e.g.*, every six months) to review the statements submitted by trial judges in support of their decisions to sentence outside of the recommended range. The purpose of the review is twofold. First, the review will identify regional changes in judicial attitudes toward specific criminal behavior. Second, the review will monitor the cases in which the sentence deviates from the recommended range. The information gained from the review will enable the commission continuously to re-evaluate their sentencing guidelines.[47]

Although the criteria used to develop the guidelines must be continuously scrutinized, the interrelationship among the sentence

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of the presidents of the respective statewide associations, the Florida Bar and the Attorney General; and three lay persons to be appointed by the Governor.

The staff required for all necessary data collection, analysis and research would be provided by the Office of the State Courts Administrator. Interim Report, *supra* note 3, at 8-9.

45. Singer, *supra* note 32, at 419.

46. Interim Report, *supra* note 3, at 9.

47. *Id.*

ranges assigned to each offender characteristic score requires that any changes in the guidelines must focus on the system as a whole. That is, neither the sentence ranges assigned to each offender characteristic score nor the weights assigned to the various offense and offender characteristics can be altered without an overall modification of the guidelines system.

By limiting the commission's duties to the development and maintenance of the guidelines, the commission is denied the authority to question the sentencing policies established by the legislature or to dictate how such policies should be interpreted and applied by the judiciary. These functions are an integral part of the legislative and judicial processes and therefore, cannot be assumed by an appointed body such as the commission.

IV. The Sentence Review Panel

Although sentencing guidelines show considerable promise for reducing unwarranted sentence variation, their impact on the sentencing process would be substantially reduced unless a mechanism is provided to review sentences imposed outside the guidelines. Therefore, the Committee recommends that the supreme court establish a sentence review panel for the purpose of evaluating the propriety of the sentences which fall outside the suggested range.[48]

The review process requires that a panel of three circuit judges and one supernumerary judge be appointed for staggered terms of six months each.[49] The panel would have jurisdiction to review those sentences which are not within the range prescribed by the sentencing guidelines and to adjust the deviant sentences when appropriate. Panel opinions which adjust sentences will be published

48. *Id.* The review panel would have appellate jurisdiction for sentence adjustment in all felony cases in which the sentence falls outside of the range prescribed by the guidelines, except for cases in which (a) the sentence was imposed pursuant to an agreement as to that sentence, or (b) the right to sentence review has been waived. *Id.* at 21.

The review panel would consist of three circuit court judges, each representing a different geographic section of the state (the areas to be determined by the boundaries of the district courts of appeal), to be appointed on a rotating basis by the chief judges of the circuit courts comprising the district. A fourth judge will also be appointed to serve as a supernumerary in the event of the inability of one of the panel members to serve. Judges so appointed will serve staggered terms of six months and would continue to serve until their successors are appointed. No judge appointed to the panel would participate in the review of a sentence imposed within his circuit. At the conclusion of each term, the supernumerary judge would become a member of the acting panel. *Id.*

49. *Id.* at 9.

as written decisions to form the basis for a "common law of sentencing."[50]

The procedures governing sentence review would be promulgated by supreme court rule. The review panel would have the authority to reduce or increase the sentence to the same extent as was originally permissible for the trial court at the time the sentence was imposed.[51]

Application for review by the panel would have to be made within sixty days after imposition of sentence, or within sixty days after receipt by the trial court of a mandate issued by an appellate court affirming the judgment and sentence. Both the state and the defendant would be eligible to apply for sentence review, but sentence review would be delayed pending completion of all other appellate review.[52]

All proceedings before the review panel should be in writing. The trial court, the prosecutor, and the defendant would all be eligible to submit written argument. The personal appearance of any party would occur only if the panel decides to increase a sentence. If the sentence is to be increased, the defendant would be required to appear for imposition of sentence. At that time, the defendant would also be advised of his right to be heard. In every instance in which a sentence is changed, the panel would enter a written opinion, which should be published to establish a "common law of sentencing." The Committee believes that there must be a certainty and an end to all litigation, and therefore the decision of the review panel should be final. No further review is to be available.[53]

The Committee deliberately established a sentence review panel in lieu of placing the responsibility for sentence review with the appellate courts. Given the large case load of the appellate courts, the utilization of existing circuit court judges to form an independent sentence review panel offers the best solution for a speedy and effective review process.[54] Inherent in the review panel proposal is the concept of peer review. Trial judges actually sitting on the criminal bench, and therefore directly involved in the felony sentencing process, would review the sentencing decisions of their colleagues. These judges would gain a broad perspective on sentencing practices across the state. The discussion among the panel

50. *Id.*
51. *Id.* at 22.
52. *Id.* at 21.
53. *Id.* at 22.
54. *Id.* at 9.

members during the review process would not only encourage a critical evaluation of the case at hand, but also would encourage the panel member to evaluate his own practices. The publication of the arguments sustained, as well as those rejected, would be an additional aid in the sentencing process. The arguments would represent a persuasive form of precedent established for trial court judges by trial court judges.

Since it is argued that a considerable number of cases currently appealed are "by necessity couched in terms of objections to the process by which the conviction was obtained, [when] in fact [relief is] sought because of dissatisfaction with length of sentence," the new provision of a mechanism for direct sentence review may be expected to decrease the appellate case load.[55] If this occurs, both the supreme court and the legislature may deem it appropriate to reconsider the review panel structure and to transfer the review process to the appellate courts.

Sentence review panels are currently operating on a statewide basis in a number of jurisdictions.[56] The uniqueness of the approach recommended by the Committee lies in establishing such a review process in combination with structured sentencing guidelines. Within this coalition lies the strength of the Committee's recommendations. Under most current review procedures the decision of one judge, or a panel of three judges, is substituted for the decision of the original trial court. The ultimate goal of the Committee is to present a series of recommendations to the supreme court which will assure consistency and equity in the sentencing process. Limiting sentence reform to sentence review will fall short of this objective. Without some form of "sentencing standards, it is virtually impossible for consistent scales of punishment to emerge."[57]

The sentencing guidelines proposed by the Committee will not only provide the trial judge with a standard of comparison for similar offenders; it will also provide the review panel with an overall standard by which to evaluate sentencing decisions. It should be

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55. Richey, *Appellate Review of Sentencing: Recommendation for a Hybrid Approach*, 7 HOFSTRA L. REV. 71, 77 (1978).

56. *See* CONN. GEN. STAT. §§ 51-194 to 196 (1978); GA. CODE § 27-2511.1 (1978); ME. REV. STAT. tit. 15, §§ 2141-44 (Supp. 1979); MD. ANN. CODE ART. 27, §§ 645JA-JG (SUPP. 1979); MASS. GEN. LAWS ANN. ch. 278, §§ 28A-28C (West 1972); MONT. REV. CODES ANN. § 95-2501 to 2530 (Supp. 1977). *See also* State v. Streeter, 308 A.2d 535 (N.H. 1973).

57. Tyler, *Sentencing Guidelines: Control of Discretion in Federal Sentencing*, 7 HOFSTRA L. REV. 11, 19 (1978) (citing Newman, *A Better Way to Sentence Criminals*, 63 A.B.A.J. 1562, 1564 (1977)).

noted that the implementation of sentencing guidelines *without* provisions for sentence review would all but negate the purpose of guidelines development. Sentencing guidelines are not intended to address all cases brought before the bench. It is virtually impossible to develop a system of guidelines that would take into account the myriad aggravating or mitigating factors that could appropriately be considered. Judicial discretion is indispensable for cases where the need exists to sentence outside of the recommended range. Although the trial judge would be required to articulate his reasons for sentencing outside the guidelines, this requirement alone will not suffice to meet the Committee's goals. Without some mechanism for review, articulation of the judge's reasons would become a mere formality and the efficacy of the guidelines would be considerably diminished.

The Committee's decision to recommend access to appeal for both the prosecution and the defense was not made without considerable debate. The controversy surrounding this issue has not been completely resolved. Therefore, the Committee intends to review the access to appeal issue prior to filing its final report with the supreme court.[58]

The decision to extend the privilege of an appeal to both the State and the defendant is based upon the assumption that leniency in the imposition of sentences contributes as much to sentence disparity as do excessively harsh sentences. Appeals brought by the defense will almost certainly be limited to sentences which exceed the guideline recommendations. Limiting the review process to these cases would restrict the precedential value of the panel's decisions to one end of the sentencing spectrum.[59]

Although serious questions of due process and double jeopardy are raised by permitting the review panel to increase a sentence, a number of state schemes allowing for the increase of sentences have been upheld as constitutional by federal courts.[60] The ability

58. Interim Report, *supra* note 3, at 22.

59. *Id.* at 9.

60. *See, e.g.*, Robinson v. Warden, 455 F.2d 1172 (4th Cir. 1972); Walsh v. Picard, 328 F. Supp. 427 (D. Mass.), *aff'd*, 446 F.2d 1209 (1st Cir. 1971). On the other hand, in the government's first attempt to use 18 U.S.C. § 3576 (1970), which allows the government to appeal a sentence under 18 U.S.C. § 3575 (1970) (the Dangerous Special Offender Statute), the United States Court of Appeals for the Second Circuit held that the statute violates the double jeopardy clause of the fifth amendment by permitting the government to review a sentence that the defendant has not appealed. United States v. Di Francesco, 604 F.2d 769 (2d Cir. 1979). In his majority opinion, Judge Smith stated: " 'When a defendant has once been convicted and punished for a particular crime, principles of fairness and finality re-

of the review panel to increase as well as to reduce the sentence imposed is viewed as an important element in insuring a uniform interpretation of the sentencing guidelines.

V. The Multijurisdictional Sentencing Guidelines Project

In September of 1979, Florida was awarded a grant from the Law Enforcement Assistance Administration to develop sentencing guidelines in four of the state's twenty judicial circuits. The primary objective of the project "is to evaluate the effectiveness of sentencing guidelines as a mechanism for enhancing sentencing consistency across different jurisdictions within a state."[61]

Based on the results of the data collection effort undertaken in conjunction with the formulation of the Committee's recommendations, four circuits were selected for participation in the study.[62] The selection was based on the desire to have a mixture of urban, suburban and rural felony cases, and to have a geographic distribution reflective of the varying social and political attitudes within the state.

The multijurisdictional guidelines grant will involve three distinct phases over a two-year period. The first seven months will be entirely devoted to the collection and analysis of historic case data. During the subsequent five months, a sentencing advisory board, in conjunction with the research staff, will evaluate the data and develop sentencing guidelines. In January of 1981, the guidelines will be implemented in each of the four circuits for a twelve-month period.[63]

During the implementation phase, trial judges will be required to consult the guidelines in making sentencing decisions, and to accompany sentences which are imposed outside of the guidelines with a written explanation. These written explanations will be used by a sentencing advisory board (comparable to the sentencing commission recommended by the Committee) to determine the suitability of the sentence ranges provided by the guidelines. In this respect, the multijurisdictional project does not differ from the rec-

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quire that he not be subjected to the possibility of . . . being . . . tried or sentenced for the same offense.'" *Id.* at 784 (quoting United States v. Wilson, 420 U.S. 332, 343 (1975)).

61. Program Test Design, *supra* note 34, at 6.

62. *Id.* at 51-53. The four circuits selected are: the fourth (Duval, Clay and Nassau Counties); the tenth (Polk, Hardee and Highlands counties); the fourteenth (Holmes, Jackson, Washington, Bay, Calhoun and Gulf counties); and the fifteenth (Palm Beach County).

63. *Id.* at 10.

ommendations of the Committee.[64]

The multijurisdictional sentencing guidelines project does differ from the recommendations of the Committee in two respects. First, membership on the Sentencing Advisory Board is limited to circuit judges from the four participating jurisdictions. This limitation is necessary to conform with the program test design developed by the National Institute of Law Enforcement and Criminal Justice.[65] Second, sentence review will not be included in the study. Because of the experimental nature of the project, initiation of a sentence review process in four circuits of the state is inappropriate.[66] The project will be in operation for only a twelve-month period. At the end of that time, the entire project will be evaluated to determine the feasibility of statewide implementation.[67]

The multijurisdictional sentencing guidelines project offers Florida an excellent opportunity to evaluate the guidelines concept without requiring a statewide commitment. The project will enable the supreme court to: (1) explore the possible interrelationship between sentencing guidelines and parole criteria; (2) examine the impact of guidelines on the plea bargaining process; (3) explore the possibility of including recommended ranges in probation decisions; and (4) collect data in the four jurisdictions to provide a basis for recommending improvements in presentence investigation reports, the primary source of information provided the trial judge.

VI. Summary

In formulating recommendations, the Committee considered a variety of sentence reform alternatives. In addition to reviewing the state's sentencing structure, the Committee examined: (1) determinate sentencing and its variations; (2) sentencing councils; (3) sentencing guidelines; (4) formal review of sentences via the appellate review process; and (5) sentence review panels.

Each of these proposals "approaches the problem of sentence disparity from a different direction and each deals more or less successfully with a different aspect of the problem. [No] one proposal [however] is itself capable of adequately dealing with the problem . . . ."[68]

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64. *Id.* at 2.
65. *Id.* at 13.
66. *See generally* Program Test Design, *supra* note 34.
67. *Id.* at 10.
68. R. Dawson, *supra* note 4, at 218.

The combination of sentencing guidelines and a sentence review panel proposed by the Committee narrows the range of permissible discretion by focusing the trial judge's attention on a limited number of offense and offender characteristics. The strength of the guideline system lies in the sentencing norms incorporated into the guidelines which are based on the actual experience of trial judges, rather than on any a priori notions. Barring the presence of extraordinary circumstances, the guidelines provide the trial judge with a reference point to measure the offense at hand.

Sentencing guidelines must not be interpreted as an attempt to reduce the sentencing decision to a mathematical formula devoid of the human considerations so necessary to the sentencing process. The sentencing guidelines are designed to give structure to the *judicial* sentencing process and are not a panacea for the *entire* sentencing process. Therefore, any evaluation of the sentencing guidlines must take into account their limited scope.

In developing a sound sentencing policy, it must be recognized that "[d]isparity among decisions [will remain] a problem whenever [and wherever] discretion is exercised in the administration of criminal justice,"[69] and that "discretion is indispensable in any system where some individualization is deemed necessary."[70] The most promising means of reducing disparity and ensuring a greater degree of equity in the sentencing process is not the elimination of judicial discretion, but rather, the development of methods to structure the exercise of discretion throughout the entire criminal justice system.

69. *Id.* at 215.
70. Tyler, *supra* note 57, at 19.

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New sentencing laws follow old patterns: A Florida case study

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Abstract

This article traces the origins and potential impacts of two sentencing laws passed in 1997 by the Florida Legislature. The Criminal Punishment Code abandoned statewide structured sentencing and increased opportunities for racial and geographic disparity. The Prisoner Release Reoffender Punishment Act mandated long statutory maximum sentences for repeat offenders in reaction to appellate court rulings that more punitive gain time provisions could not be retroactively applied. Both laws continued a long-standing pattern of unsystematic, yet continual, tinkering with sentencing and correctional policy. The article places the Florida case in the context of the national movement for determinate sentencing and discusses areas for further research.

Introduction

Sentencing policy in our nation's history has oscillated between the indeterminate paradigm, reflecting the values of substantive–political theory (Dixon, 1995), and the determinate paradigm, rooted in the tradition of rational–legal theory. Currently, neither model dominates sentencing policy in the U.S. The majority of states cling to the indeterminate structure, although more than a dozen states have joined the national movement for determinate sentencing by abolishing discretionary parole release—the linchpin of indeterminacy. Hybrid determinate and indeterminate systems exist in many states that have adopted "truth-in-sentencing" laws.

The movement for determinate sentencing traveled a torturous route in Florida, the subject of this article. Researchers have chronicled many of the missteps of Florida's sentencing and correctional policy since the mid-1970s (Handberg & Holton, 1993; Hogenmuller, 1998; Kaufman, 1999). This article builds on a previous article by this author (Griset, 1996) that focused on the political and economic forces that drove Florida policymakers during the 1980s and early 1990s to transfer significant sentencing power to postconviction administrators. The present article traces the origins and potential impacts of two 1997 alterations to Florida's sentencing policy—the Criminal Punishment Code (CPC) and the Prisoner Release Reoffender Punishment Act (PRR). These new sentencing laws continue the pattern of reactive, politically driven decision-making that has long characterized sentencing policy in Florida.

Data for this article came, in large part, from structured and semistructured in-depth interviews with more than thirty individuals knowledgeable about sentencing in Florida.[1] Interviewees included state legislators and their staff, gubernatorial representatives, criminal justice agency officials, Sentencing Guidelines Commission members and staff,

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prosecutors, public defenders, judges, and lobbyists. Participants at important meetings, officials involved in drafting or enacting important policy measures, and representatives of interest groups for and against the policy measure were interviewed. To include a variety of ideological and political perspectives, interviewees included Democrats and Republicans, as well as officials from the more liberal south Florida and the more conservative north Florida. Data also came from a variety of published and unpublished documents, including internal legislative memoranda, sentencing commission documents, and other agency reports and memoranda.

This article begins by placing the Florida story in the larger perspective of the national movement for determinate sentencing.

Background

Substantive–political theory provides the theoretical justification for the indeterminate sentencing paradigm. Since substantive–political theory views sentencing policy as part of the oppression apparatus of the ruling class (Quinney, 1970), or as another undesirable outcome of the social welfare state (Savelsberg, 1992), it follows that, to avoid abuse of power, decision-makers should consider offenders' personal situations when imposing punishment.

Until the 1970s, sentencing systems across the U.S. were remarkably uniform. Based on a century-old paradigm, the first application of which in the U.S. is traced to an experiment in 1877 at Elmira Reformatory in New York, indeterminate sentencing and the medical, or rehabilitative, model of punishment dominated state and federal sentencing policy (Allen, 1981; Lindsey, 1925; Rothman, 1980).

During the nearly one-hundred-year reign of the indeterminate sentencing model, discretion and subjective decision-making were recognized as desirable as well as inevitable (Friedman, 1993). Although the sentences imposed and the time actually served in individual states differed, all states shared a common sentencing structure: legislators set broad sentencing parameters; judges imposed maximum, and sometimes also minimum, prison terms within those parameters; and parole boards decided when inmates would be released from prison.

The indeterminate model began to lose its hold on national sentencing policies in the late 1960s, and the attacks against the old order escalated during the 1970s and early 1980s (e.g., Allen, 1964; Blumstein, Cohen, & Tonry, 1983; Frankel, 1972; Mitford, 1973; Morris, 1974; Von Hirsch, 1976; Wilson, 1975). As criticism of the indeterminate structure mounted, the determinate idea captured the imagination of a generation of jurists, social activists, policymakers, and academics.

The assault on the hegemony of the indeterminate paradigm was often strident, and it was not isolated. Liberals and conservatives argued that the medical model was defective and that forced treatment never worked. They contended that it was immoral to base social policy on the illusory goal of rehabilitation, and that individualization of justice and the discretion that flows from case-by-case decision-making were at odds with such concepts as equality, objectivity, and consistency under the law. The consequences of individualization of justice were clear to them: It was but a short leap from discretion to disparity to discrimination (American Friends Service Committee, 1971; Frankel, 1972; Rothman, 1980).

Rational–legal theory, which is built around the Weber (1968) principle of rational organizations, provides the theoretical justification for the determinate paradigm. Rational–legal theory requires that formal rules control the sentencing decision. Offenders should be punished for what they do, not who they are. Thus, the rhetoric of the determinate model focuses on controlling discretion and enhancing accountability through limiting officials' abilities to consider offenders' personal situations.

The modern movement for determinate sentencing owes its origins, in part, to Judge Marvin Frankel. His advocacy for holding decision-makers accountable for their decisions has "dominated the orientation of sentencing researchers, practitioners, and criminal justice policymakers during the last quarter of the twentieth century" (Shane-DuBow, 1998, p. 384).

Much has been written on how conservatives overpowered liberals and redefined the goals of the determinate sentencing movement (e.g., Casper, Brereton, & Neal, 1982; Messinger & Johnson, 1977). Much has also been learned about the gap between the rhetoric and the reality of determinism. Shifts of sentencing discretion from one organization to another have been uncovered in a number of determinate sentencing jurisdictions (e.g., Alschuler, 1978; Clear, Hewitt, & Regoli, 1978; Rothman, 1994; Stolzenberg & D'Alessio, 1994; Von Hirsch & Hanrahan, 1981).

Determinacy's three-legged stool

The rhetoric surrounding determinate sentencing has changed in the past twenty-five years from "just desserts" to "truth-in sentencing," but like a three-legged stool, three interlocking principles still form the basis of the determinate sentencing model:

1. Discretion and its by-products, disparity and discrimination, should be controlled by struc-

turing sentencing through presumptive sentencing guidelines that allow departure in deserving cases.
2. Defendants and prosecutors should have the right of appellate review of departure sentences.
3. Parole release should be abolished and good time should be limited because the actual duration of punishment should be as close as possible to the sentence announced in court.

In Florida, all of the legs of the stool have wobbled at one time or another during the past twenty years. This article examines how two of the newer iterations in Florida's determinate sentencing structure—the CPC and the PRR—topple the stool by removing two of its three legs. By violating the bedrock principles of the determinate ideal, these two laws continue into the future policy mistakes of the past.

The CPC

An essential goal of the determinate sentencing movement was to hold government officials accountable for their sentencing decisions (Allen, 1981; Alschuler, 1978). Presumptive sentencing guidelines, with their focus on articulated standards and bilateral appellate review, were meant to put boundaries on discretion, enhance fairness, promote certainty and systematic planning, and end racial discrimination and other unethical practices (Frankel, 1972). Yet, in Florida, which adopted presumptive sentencing guidelines in 1983, the values of the determinate ideal have been repeatedly debased, and with the 1997 passage of the CPC, the violation appears complete.

The CPC is the product of the Florida Legislature's long-standing opportunistic and reactive approach to sentencing and correctional policy. Legislators have repeatedly shifted the direction of sentencing policy, with no apparent concern for how ad hoc, and often contradictory, edicts would be received by the courtroom workgroup and postconviction administrators. The judiciary has responded with making downward departures from the guidelines more the rule than the exception, and prison and parole officials have often taken the blame for administering unpopular early-release programs.

The CPC, called "a dramatic change in sentencing policy" (Florida Department of Corrections, 1998), was passed in 1997, but the effective date was delayed until October 1, 1998 because of the widespread recognition that the legislation was hastily written and needed extensive revisions to conform with other penal law provisions. Indeed, the CPC was the product of an all-night drafting session, but the drafters were not legislative aides—they were state prosecutors. It was thus no surprise that the CPC enlarged the already large sphere of prosecutorial sentencing power in Florida. Before discussing the drafting of the CPC, however, the law's provisions and origins were examined.

Provisions of the CPC

The CPC kept the form, but not the substance, of the sentencing guidelines scoring system. Guideline scores were still computed, but judges were free to ignore them and impose any sentence up to the long statutory maximums of the old indeterminate sentencing system. Further, defendants had lost the right of appellate review of these long sentences.

Florida divides its felonies into five levels: capital, life, and first through third degrees. Each felony level has a statutory maximum sentence, but until the CPC, these were unused relics of the old indeterminate structure.

Third degree	five years
Second degree	fifteen years
First degree	thirty years
Life	natural life
Capital	death penalty

Under the CPC, any sentence up to the statutory maximum was presumptively correct despite a much lower sentence computed by the sentencing guidelines. An example: The guideline score for a first offender convicted of burglary of a dwelling might be a prison sentence between twenty and thirty-five months. Judges could reduce the lower number (twenty months) by 25 percent (five months). Burglary of a dwelling was a second degree felony with a statutory maximum of fifteen years. Thus, in this example, any sentence between fifteen months and fifteen years was presumptively correct.

Judge Frankel would no doubt be disappointed to learn that the CPC discarded one of the lynchpins of the presumptive sentencing guidelines system that he sketched out in the 1970s: bilateral appellate review. Under the CPC, a sentence at the statutory maximum was presumptively correct; it was thus not a departure and therefore could not be appealed by the defendant. Under the CPC, the term "aggravated departure sentence" had been exorcised from the sentencing lexicon in Florida. Defendants had lost their right to appellate review of aggravated departures, but prosecutors had not sacrificed their right to appellate review of mitigated sentences. Using the burglary of a dwelling example, any sentence of less than fifteen months was a downward departure, subject to written justification and prosecutorial appeal.

The CPC also prohibited judges from considering defendants' substance abuses or other addictions as mitigating factors in sentencing. Added to the provision that all sentences within the statutory maximums were presumptively correct, this restriction on mitigation further strengthened prosecutors' plea bargaining positions.

Potential impact of CPC

The CPC thus grafted onto Florida's determinate sentencing system two features of the indeterminate model: extremely wide sentencing ranges and lack of appellate review for defendants. The possibilities for increasing severity of punishment were many. Fewer opportunities for meaningful review of sentences would exist. Discretionary parole release by the parole board was abolished in 1983. The release powers of the Control Release Authority, which replaced the old parole board, were suspended in 1996, and offenders whose crimes were committed after 1995 must serve 85 percent of their prison sentence. Thus, neither appellate judges nor postconviction administrators now had the power to ameliorate long statutory maximum sentences.

Florida's new sentencing system expressly invited disparity and could well produce sentencing chaos. By rejecting two of the fundamental principles of the determinate ideal—controlling discretion, and holding decision-makers accountable for their decisions—lawmakers created a punishment policy with an unpredictable impact on correctional resources.

When the CPC was passed, the state's Criminal Justice Estimating Conference (1997) forecast that it would result in an additional 3,225 inmates by June 30, 2003, but the estimators noted that "major portions of this legislation were deemed to have an indeterminate impact" (p. 1). The impact of the CPC would depend on the frequency of the imposition of sentences above the guideline scores. In 1999, the Criminal Justice Estimating Conference reduced its estimates to 1,175 additional inmates by fiscal year 2003–2004. Further, the Criminal Justice Estimating Conference (1999) predicted that an additional 590 prisoners would be imprisoned by 2003–2004 because of the provision to deny judges the ability to use substance abuse and addiction as valid mitigating factors.

The Florida Department of Corrections (1999) issued a progress report in October 1999 to satisfy its statutory mandate to analyze sentencing data. The DOC report was based on 36,818 CPC sentences imposed between October 1, 1998, the effective date of the CPC, and August 30, 1999. The study was inconclusive because of methodological problems associated with the lag time, or delay, between the commission of the offense and the date of sentencing. More serious crimes, especially violent crimes, had a longer lag time than less serious property or drug crimes. Thus, at the time of the most recent study, the CPC was only one year old, and many serious offenders had yet to be sentenced. The study's findings were thus skewed towards the less serious crimes, the ones least likely to receive sentences at the statutory maximum. To illustrate this problem: The average lag time for the CPC cases in the study was 3.3 months; the lag time for a comparison of non-CPC cases was 9.6 months. Less than 14 percent of the CPC cases in the study were serious crime; nearly 19 percent of the comparison cases was serious.

Despite the study's limitations, it might indicate that the courtroom work group was following its customary practices of circumventing the dictates of the legislature. CPC sentences were mitigated (an offender scored for mandatory imprisonment but received a nonprison sentence or a prison sentence below the permissible range) in 57.4 percent of all cases. Along with high mitigation rates, geographic disparity might also be thriving under the CPC: Urban Miami had a mitigation rate of 78 percent compared to an 18 percent rate in rural Sanford.

Speculation among interviewees as to the ramifications of the new law varied, but many said that they thought judges would rarely impose the statutory maximum sentence. One interviewee expressed a frequently repeated view: "On paper, it's more drastic than in practice." Or, as another ventured, "It won't be a humongous change. Technically, there is potential for a huge impact, but it is not going to happen." Thus, several policymakers endorsed the CPC because, in essence, they thought it would be ignored by the courtroom workgroup in most cases. It is the antithesis of rational policymaking that a major change in sentencing policy would be supported because people thought it would largely be disregarded.

By rejecting the substance, but keeping the form of the guidelines scoring system, Florida policymakers had abdicated responsibility for structuring sentencing outcomes. In the process, prosecutors had further increased their already-powerful positions. One prosecutor said that, prior to the CPC, "we've got to plea bargain from a few years down under the guidelines. Now we can plea bargain down from fifteen years, or whatever the statutory maximum is." Another predicted that, "Now, if we can threaten everybody with prison, there will be more offenders going to prison," and another observed that they had "stacked the deck. Now, there's a much bigger hammer... a better position to strong arm pleas."

The prospects for unfairness were many. Even if most sentences remained within the guideline ranges, some long sentences would be imposed arbitrarily or

discriminatorily. One interviewee speculated that "some judges will just impose monstrous sentences." Another agreed that "a few judges will go hog wild."

Whether the overall scale of punishment will rise, and if so, to what extent, is unknown, but the impact of the CPC on racial minorities deserves careful study. There is evidence that minorities fared poorly under the old indeterminate structure, with its wide sentencing ranges, which were not unlike those in the new CPC. A study of 1,000 Florida felony cases in 1979 found that non-Whites were significantly more likely to receive a jail or prison sentence than Whites (Florida Department of Corrections, 1997, Part II, Section 2, p. 2). There was also evidence that racial inequality might have been reduced under the 1994 and 1995 guidelines. A study of 221,351 felons sentenced from July 1994 to December 1996 found "that the race of the convicted felon had no meaningful impact on the judge's decision" (Florida Department of Corrections, 1997, Part II, Section 2, p. 1). The potential adverse impacts of the CPC merit further study.

The seeds of the Criminal Punishment Act are rooted in a long-standing history of lawmakers' opportunistic and unsystematic approach to sentencing policy. Following is a brief review of the tortuous course of determinate sentencing in Florida. This history could be conceived in four stages, as shown in Table 1.

Stage 1: a schizophrenic policy

As was true elsewhere around the country, indeterminate sentencing was heavily criticized in Florida in the 1970s (Griswold, 1985; Plante, Abernathy, Salokar, & Kern, 1981). In 1981, the judiciary experimented with voluntary sentencing guidelines in four of the state's twenty judicial circuits (Sundberg, Plante, & Brazier, 1983), and the following year, the legislature assembled a Sentencing Guidelines Commission, and statewide guidelines took effect on October 1, 1983. Discretionary parole release, the cornerstone of the indeterminate sentencing model, was eliminated, but lawmakers succumbed to pressure from correctional officials, and the new sentencing scheme included three types of gain-time provisions (basic gain time, set at one third of the definite sentence, and incentive and meritorious gain time, both to be dispensed at the discretion of prison officials) (Handberg & Holton, 1993).

These three early-release programs were not enough to keep the state within the boundaries established by federal courts, which had first intervened in the running of the state's prisons in 1972 after inmates sued, alleging, among other things, intolerable overcrowding (*Costello v. Digger*, 353 F. Supp. 1324, 1972). Two additional forms of early release—administrative gain time in 1987 and provisional gain time in 1988—"consisted of nothing more than awarding additional days of gain time to all but a relatively small number of excluded inmates until enough prisoners were immediately released to keep the population within the court-imposed limits" (Joint Legislative Management Committee, 1992, p. 10).

Criticism of early release mounted after one early release killed two Miami police officers. This notorious incident resulted in the passage in 1989 of a control release law, described by its supporters as introducing a "human touch" into the release decision. In truth, Florida's Parole Commission was resurrected under a new name, the Control Release Authority, and its release decision-making was guided by a discretionary point system very similar to the one its members used under the former parole guidelines (Griset, 1996). More than 70,000 inmates were released by the Control Release Authority between 1990 and 1994 (Criminal Justice Estimating Conference, 1994, p. 42).

Sentencing policy in Florida was characterized during Stage 1 by lack of coordination between the three branches of government: The legislature continually enacted tougher sanctions, the judiciary frequently circumvented or ignored those sanctions, and the postconviction administrators satisfied federal court orders by releasing inmates early. In large measure, early-release programs were necessitated by the legislature's constant opportunistic tinkering with sentencing policy, largely in the form of a glut of mandatory sentencing laws passed in the late 1980s, often at the request of prosecutors (Bales & Dees, 1992). As one interviewee noted, "in essence, you had two systems running: those who were sentenced inside the guidelines and those who were sentenced outside the guidelines," a situation the interviewee described as "schizophrenic." On the one hand, the legislature enacted tough mandatory sentences; on the other hand, it tolerated a system that allowed many offenders to be released early.

Most inmates serving mandatory sentences were ineligible for gain time or control release. Consequently, to keep the population within federally imposed population caps, nonmandatorily sentenced inmates were frequently released long before the expiration of their supposedly determinate terms. For example, in June 1992, 68 percent of the under-custody population was statutorily ineligible for control release because of mandatory sentences. The impact was most obvious on nonmandatorily sentenced offenders: Over 18,000 inmates were released in 1992 after serving six months or less in prison; more than 13,000 of them had been sentenced to two years or more (House Committee on Criminal Justice,

Table 1
Determinate sentencing stages in Florida

	Stage 1, 1983–1993	Stage 2, 1993–1995	Stage 3, 1995–1997	Stage 4, 1997–2001
Basic components of the new sentencing structure	Matrix-style sentencing guidelines Discretionary parole release abolished Gain time expanded	Minnesota-style structured sentencing Net zero sum impact on prisons Mandatory sentences abolished Prison reserved primarily for violent offenders	Minnesota-style guidelines gutted Sentencing points raised for forty crimes Nonviolent offenders targeted for imprisonment Gain time limited to 15 percent ("truth-in-sentencing") Control Release Authority phased out	CPC enacted with wide sentencing ranges Long statutory maximum sentences of old indeterminate structure presumptively correct for any felony Appeal of aggravated departures abolished Explicitly rejected concept of reserving prison space for serious offenders
Pressures that eventually destabilized the new system	Federal Appellate Court limited prison overcrowding Prison admissions rose rapidly Prison space insufficient Funding for prison construction limited Media criticized "revolving door" of prisons	Fear-of-crime wave sparked by tourist killings State fiscal revenues threatened by drop in tourism STOP demanded end to early release Prosecutors demanded incarceration of property offenders	Republicans gained control of legislature for the first time since Reconstruction Construction boom created extra prison capacity Opposition to high mitigation rate grew Momentum for returning to pre-1983 structure, without parole release, mounted	Potential for widespread racial disparity Potential for widespread geographic disparity Potential for fiscal impact of increased time served in prison to be enormous
Policymakers' attempts to cope with destabilizing pressures on new system	Legislature enacted multiple mandatory sentences Administrative and provisional gain time (computer release) accelerated for nonmandatory sentenced inmates Control release (old Parole Board) resurrected Nonmandatory sentenced inmates released rapidly Judicial mitigation rates high	Legislature funded massive prison construction Legislature convened special "get-tough on crime" session to end early release Judicial mitigation rates high	Legislature deferred to Dade County (Miami) prosecutor's warning that, without guidelines, judges would be too lenient Judicial mitigation rates high	Potential that cycle of mandatory sentences coupled with extensive early release will reappear Potential for judicial mitigation rates to remain high

1995, p. 4). Overall time served declined from an average in January 1987 of 53 percent of the court-imposed sentence to a low of 31 percent in August 1992 (Criminal Justice Estimating Conference, 1994, p. 40).

Stage 2: structured sentencing makes a brief appearance

By the early 1990s, dire warnings were issued to lawmakers by the Sentencing Guidelines Commission and the Department of Corrections (DOC)—soon the prisons would be full of nonreleasable, mandatorily sentenced inmates. There would be no room left for new court commitments. The politically unpopular specter of emergency release loomed large. As the head of DOC said: "We have a crisis, and the crisis has been coming to a head for a long time" (House Committee on Criminal Justice, 1995, p. 4).

Lawmakers could not easily forestall the impending prison gridlock by simply allowing postconviction administrators to apply the traditional remedy of early release. A law-and-order lobbying group, called STOP (Stop Turning Out Prisoners), caught lawmakers' attention with their call for a constitutional amendment to end early release and require inmates to serve at least 85 percent of their sentences. The truth-in-sentencing forces were thus marshalling in Florida as they were elsewhere around the country (Ditton & Wilson, 1999).

The Florida Sentencing Guidelines Commission recommended revising the guidelines "to emphasize incarceration for violent offenders and alternatives to incarceration for nonviolent offenders" (Handberg & Holton, 1993, p. 68). The commission modeled its revised system on sentencing laws that had recently been enacted in Washington and Oregon, which had copied Minnesota, considered by many commentators to have the most enlightened sentencing policy in the nation (Tonry, 1996).

Prosecutors, who had previously lobbied against the sentencing guidelines as not tough enough, now lobbied against the Sentencing Commission's recommendations for changing the guidelines. Prosecutors objected to relinquishing their plea-bargaining advantages inherent in the panoply of mandatory sentencing laws that coexisted with the guidelines. They were not eager to support revisions that required alternatives to incarceration for lower-level felons. Prosecutorial resistance was sufficiently influential in the legislature to delay any action to the point that a prison logjam was only a few months away. Finally, with the releasable pool of inmates projected to be zero by October 1993, lawmakers were told that their only choice was to enact the Minnesota-style guidelines or authorize unpopular emergency release of mandatorily sentenced offenders (Florida Department of Corrections, 1992).

Thus, its back to the door, and again without a clear vision of a strategy for handling this important area of public policy, the legislature met in a special session in May 1993 and enacted a Minnesota-style punishment policy explicitly linked to correctional resources.[2]

Prison was to be reserved for violent and repeat offenders, and future tinkering with the guidelines was to result in a "net zero sum impact" in the overall prison population or be accompanied by sufficient funds to accommodate any projected increase in inmates. Basic good time was abolished, as were most mandatory sentences. To avoid future early release, a prison construction program was launched. For fiscal year 1993–1994 and fiscal year 1994–1995, the legislature appropriated funds for 23,984 additional prison beds at a cost of roughly US$367 million (House Committee on Criminal Justice, 1995, p. 5). With space finally available, the Control Release Authority's early-release power was suspended in December 1994.

Stage 3: notorious crimes upend sentencing policy

The legislature passed the new guidelines, but they evinced no true commitment to the principles of structured sentencing, as became evident one year later. Shortly after the passage of the Minnesota-style sentencing system, and before its effective date, the crime control climate in Florida was rocked by a few notorious crimes. The September 14, 1993 slaying of British tourist Gary Colley during a botched robbery attempt at a rest stop in rural north Florida sparked a "fear-of-crime" wave, especially after four juveniles, including a thirteen-year-old, were arrested for the murder. The following month, passions were further inflamed when an off-duty Miami police officer, Evelyn Gort, was killed by Wilber Mitchell, who had recently been released from prison after serving only two months and seventeen days of his one-year sentence. These tragedies were followed by more tourist murders in 1994 and early 1995, and the negative national and international media coverage continued. The state's juvenile and adult sentencing systems absorbed much of the blame for the subsequent threats to Florida's multibillion-dollar tourist industry, and lawmakers responded by revamping both systems.

Meeting again in special session in May 1995, lawmakers passed several sentencing bills, including the "Officer Evelyn Gort and All Fallen Officers Career Criminal Act," a mandatory sentencing law for offenders with three prior violent felony convictions. (Mandatory sentencing laws already existed for

offenders with one or two prior violent felony convictions.) Also enacted was the Crime Control Act of 1995, which in large measure gutted the previous year's guidelines.

Prosecutors had complained that the Minnesota-style guidelines were too lenient on property offenders, many of whom scored so low that imprisonment was precluded without an aggravated departure. The relatively low sentences for auto theft were particularly irksome to prosecutors and were frequently used to illustrate the laxity of the guidelines. The Attorney General, Robert Butterworth, called for the outright repeal of the guidelines, claiming they were "riddled with loopholes allowing criminals to escape justice" (Orlando Sentinel, 1995, C-5).

In the 1995 special session on crime, the legislature reversed its position of the previous year that prison space was a scarce resource to be reserved for violent and repeat offenders. Nonviolent, first offenders were the target of much of the legislative burst of punitiveness. Points were raised for forty crimes, including burglary and other nonviolent offenses. Many crimes that fell in the nonprison or discretionary categories were moved to the "must-go-to-prison" category. Points were also increased for violations of probation and other community sanctions, as were points for murder and sex offenses.

Lenient judges were blamed for the perceived failure of the guidelines. Data on the first two months of sentencing under the new guidelines were the only empirical information available when lawmakers met in special session in 1995, and the data showed that nearly 42 percent of the 4,395 offenders who scored in the "must-receive-prison" range had not received a prison sentence. While mitigation was frequent, aggravation was rare: Only 3 percent of the 18,764 offenders who scored in the "not-a-state-prison sentence" range was imprisoned (House Committee on Criminal Justice, 1995, p. 14).

The severity/softening/severity cycle was evident to several interviewees, one of whom observed that "if we look at judges' sentencing behavior from a policy standpoint, you would think the Legislature would realize judges don't like the policy for some reason, and they would amend guidelines downward accordingly. But instead they ratcheted up the sentences." Courtroom decision-makers who found the 1994 guidelines too harsh in so many cases would now find them harsher. The dysfunctional cycle thus continued, making it easy to foresee that legislative severity would again be softened by courtroom decision-makers.

Antiguidelines sentiment grows

Despite the increased severity of the 1995 guidelines, complaints about lenient sentencing continued. The Florida Sheriffs Association, the Florida State Attorneys Association, and the State Attorney General urged lawmakers to repeal guidelines in their entirety and revert to the pre-1983 structure, where long statutory maximums were the only restraint on severity. If guidelines were repealed, discretionary parole release by the parole board, which historically reduced the severity of statutory maximum sentencing systems, would not be reintroduced. Accordingly, abolishing guidelines would, as one legislative staff person said, "let judges do whatever they want," and prosecutors, too, he might have added.

Although bills to abolish guidelines had been filed in the past, the repeal momentum took on renewed vigor during the 1997 legislative session, propelled by the combination of two events that again stimulated the legislature's opportunistic sentencing behavior. First, after an unprecedented building boom, Florida had more prison beds than prisoners. Not only was there extra capacity, but prison population forecasts were substantially lowered, and lawmakers were told that there would be 32,106 fewer inmates than predicted by the end of June 2002. The population estimates reflected a reduction in incarceration rates and sentence length. Slightly more than half (51.9 percent) of the offenders who scored for prison were incarcerated under the 1995 guidelines, compared to 60.3 percent under the 1994 guidelines. Further, 15.7 percent of offenders scoring in the discretionary prison range were incarcerated under the 1995 guidelines, compared to 21.3 percent under the 1994 laws. Sentence length under the more punitive guidelines had also dropped, with 76.6 percent of prisoners having sentences of fifty-six months or less, compared to 73.1 percent under the 1994 guidelines (Legislative Management Committee, 1997). Thus, again, as the severity of the guidelines rose, the willingness of Florida's judges to follow them fell.

The second reason that the time was ripe for opportunistic policy changes was that the 1996 elections had produced a legislature dominated, for the first time since Reconstruction, by Republicans, many of whom supported a more punitive approach to punishment policy. One interviewee explained that, with hundreds of beds vacant, the legislative "consensus is that the previous stiffening of penalties didn't produce the results anticipated, and now many lawmakers see the estimates as voodoo science." Another recalled that "for so many years we heard nothing but overcrowding, we felt we would lose control of the population if we didn't have guidelines, but now with empty beds, that concern is unfounded."

Further, many lawmakers saw the high mitigation rate as undercutting the rationale for guidelines. A DOC study of 221,351 felons sentenced from July

1994 to December 1996 found an overall mitigation rate of 56.5 percent for offenders scoring for state prison (41.4 percent received a nonprison sentence and 15.1 percent received a shorter prison sentence than authorized) (Florida Department of Corrections, 1997). Again, instead of asking why courtroom decision-makers so frequently thought the laws were too tough, lawmakers responded to the mitigation rates by trying to make punishments even tougher.

One interviewee said: "statewide guidelines are for the purpose of uniformity—that's the purpose of sentencing guidelines. But real sentencing patterns show something different." Another thought that the frequency of downward departures demonstrated that "people deviated all over the place because you can't impose an artificial system on the criminal justice system. Guidelines tried to treat different cases the same—that's artificial." According to a view expressed by several officials, "people who like guidelines favor leniency for criminals."

Stage 4: the CPC moves sentencing policy to the backroom

As the 1997 legislative session progressed, abolition of guidelines seemed assured until the State Attorney from Dade County (Miami), Katherine Rundle, intervened. What subsequently became the CPC was the product of a hurried, all-night drafting session by prosecutors from her office.

The CPC was a reaction against Dade County judges, whose mitigation rate was considerably higher than their counterparts in many other parts of the state. Fifty-three percent of Dade County offenders who scored for mandatory incarceration escaped imprisonment in fiscal year 1994–1995. If offenders who received a reduced prison sentence were included, Miami's mitigation rate was 73.6 percent. By contrast, the comparable figures from Panama City, in Florida's Panhandle, were 30.4 and 45.9 percent (Florida Department of Corrections, 1997).

In an interview for this article, Dade County State Attorney Rundell explained her motivation for drafting the CPC. She was uncomfortable with abolishing the guidelines scoring system entirely, she said, because without the punishment floor provided by the guidelines, Miami judges would imprison only a few offenders. She feared that her office would be perceived by the public as soft on crime if too many serious offenders escaped imprisonment. Her belief was that retaining the guidelines scoring system would restrain liberal judges and prevent Dade County from being such a statistical sore thumb.

As another prosecutor familiar with the origins of the CPC said: "After we explained our plan to the Sheriff's Association, it started to roll. The Senate and House sponsors of the original abolition bills both bought the plan and substituted the CPC for abolition. It happened overnight. We're real proud of the CPC. It has a bottom but no top. It's the best of both worlds for us."

While several interviewees described the CPC as an attempt to restore sentencing discretion to judges, it was more accurate to view it as an attempt to thwart judges from using their discretion to mitigate sentences. No similar controls were thought necessary for judges who used their discretion to impose severe penalties.

The CPC faced no powerful opposition. One interviewee said that "lots of people were concerned about disparity, but they don't have as loud a voice as law enforcement and sheriffs." The Florida Public Defender Association sent a memo to then-Governor Lawton Chiles, claiming that the CPC "guts the safeguards and framework provided by the sentencing guidelines. The bill will unnecessarily fill prisons with nonviolent offenders, shift judicial power and discretion to the prosecution, undercut drug court programs, and have a greater fiscal impact than currently estimated" (Florida Public Defender Association, 1997).

In an interview, the representative of the Florida Public Defender Association said: "There are many terrible things about the CPC. It's full of inequities. It sets a suggested sentence, but if the judge goes above the sentence, the defendant can't appeal. If the judge goes below, the prosecutor can appeal. This is a total, blatant inequity. The pitch we [Public Defenders Association] made to the Legislature in opposition was that there was a good reason why guidelines were first enacted. There were studies that showed disparity, racial and geographic. We needed uniformity in the state. The only response we got from the Legislature is 'this is a different world now. If Miami wants different sentences than north Florida, that's OK.' I stood up and told them [the Legislature] about these problems, but the State Attorney said 'it's a good bill,' so that was that."

The CPC abandoned any hope of using the sentencing structure to control the use of discretion. It rejected the concept of reserving scarce prison space for more serious offenders and checking abuse of power through bilateral appellate review. Not surprisingly, given the institutional perspective of its drafters, Florida's new punishment policy vastly increased the potential prosecutorial control over sentencing.

Further research is needed to determine the actual impact of the CPC. Many interviewees predicted that the CPC would not produce a dramatic change in sentencing practices. While their assessment might be accurate in the aggregate, future research will focus on disparity and discrimination in individual cases.

The PRR

The legislature delivered a one–two punch to sentencing policy in 1997 with the passage of the CPC and the PRR. While the CPC stemmed from the legislature's reactive and unsystematic alterations in the guidelines structure, the PRR stemmed from lawmakers' reactive and unsystematic alterations in good time (called gain time in Florida) policy.

The PRR, a type of a "two-strikes-and-you're-out" law, elevated prior record over conviction offense in determining punishment. The PRR thus represented a retreat from the concepts of just desserts. Some determinate sentencing theorists rejected any role for prior record in sentencing (Fletcher, 1982; Singer, 1979), while others argued that modest enhancements for prior record were compatible with just desserts because offenders with prior convictions were more blameworthy than first offenders (Von Hirsch & Hanrahan, 1981). Yet, proponents of both arguments agreed that prior record should be subordinate to conviction offense in determining the scale of punishment. The PRR took the opposite approach.

Background and provisions

Gain-time laws were introduced in Florida in 1889 (Florida Laws, 1889, Chapter 3883) to reward and encourage inmates' good behavior and punish their bad behavior. Florida lawmakers had a long tradition of manipulating gain time depending on the political and fiscal dictates of the moment (Kaufman, 1999).

Over the past twenty-five years, many different types of gain time had been enacted, extended, limited, and repealed, with each alteration affecting the duration of punishment for thousands of inmates. The Florida Legislature had added extra gain time to match prison populations to available prison beds; they had likewise taken away gain time to satisfy other political priorities, including looking tough on crime. At times, the changes had been applied retroactively, resulting in numerous ex-post facto legal challenges by prisoners adversely impacted by the rulings.

Like the history of sentencing guidelines, the history of gain-time manipulations involved multiple decision-makers operating at different times and places from different ideological and organizational perspectives. The provisions of the PRR are presented below, followed by an overview of its legal and political antecedents.

Under the PRR, convictions for any of a list of enumerated offenses[3] committed within three years of release from prison mandated imposition of the statutory maximum sentence (life, thirty, fifteen, or five years, depending on the felony degree). PRR offenders were not eligible for sentencing under the CPC, nor could they earn gain time or other early release credits; instead, they must serve 100 percent of the statutory maximum sentence.

The PRR was a mandatory sentencing law that clearly designated the prosecutor as the most powerful person in sentencing. Prosecutors were not required under the law to file PRR status for qualifying offenders, but when they did, judges could not intervene. Judges could not impose a lesser sentence by departure because the PRR bypassed the sentencing guidelines. Nor were any other avenues for mercy left to judicial discretion. The legislature sought to encourage prosecutors to file PRR status, however, by requiring them to write reasons, to be made public, for not filing against qualifying offenders.

Appellate courts and the origins of the PRR

The following summary of three of the more important appellate decisions leading up to the PRR illustrates some of the complexities, and opportunities for uneven and unfair distribution of punishment, wrought by frequent gain-time manipulations.[4]

Weaver v. Graham

Hoyt Weaver pled guilty to second-degree murder in 1976 and was sentenced to fifteen years in prison. At the time he committed his offense, gain time was calculated by a formula that accumulated at an increasing rate the longer the prisoner had served.[5] In 1978, the legislature changed the formula to reduce gain-time awards and applied the change retroactively. Weaver claimed that the change would extend his sentence by over two years in violation of the ex-post facto clause. The Florida Supreme Court denied Weaver's petition, relying on its previous decisions that gain time was an act of grace that could be withdrawn or modified (*Harris v. Wainwright*, 376 So.2d 855, 1979).

Weaver's appeal was heard by the U.S. Supreme Court, which in *Weaver v. Graham* (450 U.S. 24, 1981) reversed, ruling that any retroactive application of a more restrictive gain-time statute was unconstitutional. By a six–two vote, the High Court articulated its litmus test for ex-post facto violations: laws that apply to events occurring before their enactment that disadvantage the offender. Further, the U.S. Supreme Court recognized that "a prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed" (*Weaver v. Graham*, 31–32).[6]

Gwong v. Singletary

The Florida Supreme Court's ruling in *Gwong v. Singletary* (683 So.2nd 109, 1996) led directly, along

with the case of *Lynce v. Mathis* (117 U.S. 891, 1997), to the PRR. In 1995, the legislature had passed a "truth-in-sentencing" bill named after the lobbying group STOP (Florida Laws, 1995, Chapters 95–294, at 2717). The Stop Turning Out Prisoners Act required all prisoners to serve at least 85 percent of their court-imposed sentences.

The law was written to apply prospectively only, but the Attorney General issued an advisory opinion stating the DOC, "in the exercise of its statutory grant of discretion," might deny inmates the ability to earn different types of gain time, regardless of when they committed their offense, provided that previously earned gain time was not cancelled (Butterworth, 1996). Based on the Attorney General's opinion, the corrections department issued a ruling applying the 85 percent formula retroactively. This time, the Florida Supreme Court, citing previous rulings of the US Supreme Court, ruled against the state on ex-post facto grounds and an estimated 500 inmates were released (Kaufman, 1999, p. 419, n. 330).

Lynce v. Mathias

Kenneth Lynce was convicted of attempted murder in 1986 and sentenced to twenty-two years in prison. In 1989, the legislature cancelled provisional gain-time credits for offenders convicted of murder or attempted murder, but this change was applied prospectively only (Florida Laws, 1989, Chapters 89–100, at 254). On October 1, 1992, Lynce, as the result of all his early-release credits, including provisional gain time, was released from prison.

Thereafter, the media attention surrounding the pending release of a notorious sex offender and murderer, Donald Glenn McDougall, led to another change in sentencing policy. The State Attorney General issued an opinion that McDougall could be retained in prison based on his analysis that the legislature intended to make the 1989 restrictions on murderers and attempted murderers retroactive (Butterworth, 1992; *Lynce v. Mathias*, n. 15). On the basis of this Attorney General's opinion, corrections cancelled the provisional release credits of 2,789 inmates in custody, and rearrest warrants were issued for the 164 offenders who had already been released, including Kenneth Lynce, who was reincarcerated and given a new release date of May 19, 1998 (*Lynce v. Mathias*, 436).[7]

Lynce appealed and the U.S. Supreme Court ruled that his continued incarceration was unconstitutional. Incarcerating inmates longer than would have been allowed under the laws in effect when they committed their crimes violated the ex-post facto prohibition, the High Court ruled.

The *Lynce* decision prompted other inmates to appeal, and ex-post facto violations were cited by the Florida Supreme Court in *State v. Lancaster* (24 Fla. L. Weekly S30, 1998) (refusing to credit previously earned administrative and provisional gain time upon probation revocation) and *Gomez v. Singletary* (24 Fla. L. Weekly S33, 1998) (retroactively denying emergency, administrative, and provisional gain time after the implementation of control release). Again, the appellate court remedy was recalculation of sentences and release for hundreds of inmates.

Lawmakers react in anger

The preamble to the PRR begins with a thinly veiled reference to two of the unpopular appellate court cases: "Whereas, recent court decisions have mandated the early release of violent felony offenders . . ."(House Bill 1371, 1997). The two cases were *Gwong v. Singletary* and *Lynce v. Mathias*, discussed above, whereby first the Florida Supreme Court and then the U.S. Supreme Court found that Florida officials had committed ex-post facto violations in the application of gain-time laws.

The legislature, unable to intervene and prevent early release of even the most ostensibly dangerous inmates, sought to seize the initiative and retaliate against the appellate courts through the PRR. Several interviewees expressed concern that voters would not distinguish between the actions of the courts and the legislature, and that the voters would retaliate against lawmakers in the voting booths for early release.

Several interviewees discussed the legislature's anger over the *Gwong* and *Lynce* decisions. One interviewee called the PRR "the remnants of the aftermath of early release." As another explained: "The PRR evolved from the late 1980s. There were so many variations of sentencing because every year the Legislature changed its sentencing policy, so the DOC had different rules for everyone, depending on the date of their crime. The Legislature said 'no more gain time,' but the courts said 'no, you can't arbitrarily take it away.' Hundreds of offenders were released early, and many might commit crimes, so the Legislature said 'whenever they're released, if they commit another crime, then they get a long, long sentence.'"

Another interviewee noted, "giving them the statutory maximum, no gain time... was overkill. What was really needed was supervising them closely once they were released. But it [the PRR] got caught up in politics, and the Speaker put his entire weight behind passing it. He said 'we're not going home without this bill.' He held hostage everything else."

A press release from the National Rifle Association (1997) summarized the legislative mood: "Frustrated by a U.S. Supreme Court decision in February that denied the state's right to rescind early-release credits accrued by thousands of Florida prison inmates under

old programs intended to relieve prison overcrowding. Florida has added a new weapon to cope with the ongoing early releases of thousands of prison inmates... Hailed as a new weapon against career criminals, the legislation won unanimous approval from a crime-weary legislature despite claims that it will add substantially to Florida's prison costs in the decade ahead ..."

Other interviewees, including some candid prosecutors, said that the PRR was unnecessary, as prosecutors had sufficient habitual offender laws to cover every potential situation. (The state already had a violent career criminal law, a habitual violent felony offender law, a habitual felony offender law, and a natural life habitual felony offender law.) Interviewees noted that in one respect, the PRR was different than the other habitual offender laws in the extent of power allocated to prosecutors and removed from judges. The other existing laws allowed judges to reject sentencing under the habitual felony provisions, despite prosecutorial filings of habitual status. Under the PRR, if the prosecutor filed charges against the offender as a PRR, judges, as one interviewee said, "have no wiggle room."

Impact of the PRR

The Criminal Justice Estimating Conference (1997, p. 5) calculated that the PRR would add 7,108 inmates to the prison population by June 30, 2003, of whom 5,054 previously would have received a nonprison sentence. In 1998, the estimate was reduced, this time to reflect actual admissions under the PRR, which were only 58 percent of the original estimate (Criminal Justice Estimating Conference, 1998, p. 1). Again in 1999, the Criminal Justice Estimating Conference (1999, p. 1) lowered its projections to 4,108 offenders, of whom 2,286 would previously not have received a prison sentence. Thus, like the CPC, the PRR appeared to be more bark than bite.

Research is currently underway to determine why the PRR is being used only sporadically. Are there any indications that PRR status is more likely to be filed against racial minorities than against Whites? What is the geographic distribution of this severe sanction? How are prosecutors using the PRR in plea negotiations? Future research will examine these and other questions concerning the implementation of the PRR.

Other new sentencing laws that were not mentioned in this article might also influence prison population growth in the years to come, including a "three strikes you're out" bill, a mandatory gun bill named ten–twenty–life, and a civil commitment for sex offenders bill named after a child victim, the Jimmy Rice Bill.

Conclusion

The contemporary neoclassical return to rational–legal theory and determinate sentencing, and the concomitant rejection of substantive political theory and indeterminate sentencing, have been widely referred to as one of the most significant criminal law transformations of the past quarter century.

Yet, the transformation is far from complete, as only about fourteen states have rejected discretionary release by a parole board, the quintessence of the determinate sentencing model (Bureau of Justice Statistics, 1998). "Truth-in-sentencing" laws, which limit good time awards, exist, in one guise or another, in roughly three quarters of the states (Bureau of Justice Statistics, 1999), suggesting that perhaps the labels of "determinate" and "indeterminate" might mean much less today than they did when the national movement for determinate sentencing began in the mid-1970s.

The relatively uniform "American system of sentencing" that prevailed for nearly one hundred years is no more, and sentencing in the U.S. today is characterized by a jumble of punishment systems (Tonry, 1999). With neither the indeterminate nor the determinate sentencing models dominate, punishment policy is perhaps more vulnerable to ad hoc, unsystematic, and potentially destructive policy initiatives.

The theory of the complexity of joint interaction suggests that the more people involved in a task, and the more removed in time and space they are from one another, the less likely it is that the product of their efforts will be satisfactory (Pressman & Wildavsky, 1984). Sentencing policy, conceived in its fullest terms, is formed by the combined activities of legislators, trial and appellate court judges, prosecutors, defense attorneys, probation and parole officers, post-conviction administrators in charge of early-release programs and revocation of community supervision, and often, private treatment providers.

In addition to the theory of complexity of joint interaction, social science research on the control of discretion in the criminal justice system supports Davis' (1969) view that administrative rulemaking is preferable to rulemaking by legislators or appellate judges because of agency administrators' proximity to the source of discretion. Yet, a state's punishment policy is often imposed from afar. Mandatory sentencing laws, early-release programs, presumptive sentencing guidelines, truth-in-sentencing laws, two and three strike laws, and other punishment policies, are rarely developed through administrative rulemaking. This perspective makes it easier to understand why judges and prosecutors might nullify the edicts of legislators, why legislators might retaliate by imposing more and harsher edicts, and why parole or prison early-release programs are often used as the

state's primary mechanism for controlling the growth of the prison population.

Like a dysfunctional family, the three branches of government, in different places at different times, have employed a variety of pathological adaptations in exercising their punishment powers, often resulting in muddled or destructive punishment policy. This phenomenon is illustrated in the examples presented from Florida, where sentencing policy has repeatedly changed directions, often rapidly and reactively as politically driven responses to high-profile crimes.

Tonry (1999) discusses the best and the worst features of the indeterminate and the determinate sentencing paradigms. Florida has adopted many of the worst features of both paradigms and retained few of the best. All felons, regardless of their prior record, can be sentenced to long statutory maximums without the opportunity to appeal the severity of the punishment. Yet, with parole release, control release, and gain time limited by truth-in-sentencing laws to no more than 15 percent, no safety value exists to control sentencing bias and disparity. By abolishing the Sentencing Guidelines Commission, which, at least theoretically, ameliorated the pathological adaptations of those who shared sentencing power (Wright, 1998), Florida has no mechanism in place for developing sentencing expertise and nonpartisan planning.

Further, by constantly tinkering with gain-time statutes, Florida lawmakers forced the prison system to operate many confusing and overlapping early-release programs. When gain-time formulations were retroactively applied to the under-custody population, regardless of the offense date, offenders' constitutional rights were violated. When appellate courts corrected this abuse, lawmakers retaliated by further rejecting the concept underlying just desserts and modified just desserts: that the severity of punishment should be proportionate to the seriousness of the crime and prior record should assume only a secondary role.

The power to deprive citizens of their liberty is one of the most awesome responsibilities delegated to government officials. It is difficult to reconcile the proper use of this power with a punishment system that invites geographic disparity, racial discrimination, unconstitutional violations of ex-post facto protections, and unpredictable and unaccountable sentencing. Further research will seek to determine the existence and extent of geographic, class, racial, and gender disproportionality in the laws discussed in this article.

Notes

1. A snowball interview technique was used whereby respondents were asked, at the conclusion of the interview, to identify others involved in the issues under discussion. Most of the interviews were face-to-face; the others were by telephone, often with repeated follow-up calls. Interviews lasted from thirty minutes to four hours, and the face-to-face interviews were tape-recorded.

2. The complex matrix system of 1983 was replaced with a slightly less complex point system based on ten levels of severity. Pointss were assigned to the primary conviction offense, additional conviction offenses, prior record, victim injury, offenses committed on probation, and use of a firearm; multipliers of 1.5 and 2.0 were assigned to crimes against law enforcement officers and drug trafficking. The number resulting from this calculation was decreased by a mathematically derived factor of 28, yielding the presumptive sentence in months, which the court could then raise or lower by 25 percent. Unless the court departed, offenders scoring forty or less would not be imprisoned; those scoring between forty-one and fifty-two could be imprisoned at the discretion of the court; and those scoring fifty-three and higher were required to be imprisoned. Defendants and prosecutors could appeal departures, although the extent of departure was not reviewable.

3. The offenses are treason; murder; manslaughter; sexual battery, or other sexual crimes; carjacking; home-invasion robbery; robbery; arson; kidnapping; throwing, placing, or discharging a destructive device or bomb; any felony involving the use or threat of physical force against another; armed burglary; burglary of an occupied struc ture; committing a felony with a firearm; and child abuse or neglect.

4. Among the other major cases are *Blankenship v. Dugger* (521 So.2nd 1097, 1988) (administrative gain time); *Dugger v. Rodrick* (584 So.2nd 2, 1991) (provisional release); *Dugger v. Grant* (610 So.2d 428, 1992) (provisional release); and *Griffin v. Singletary* (638 So.2d 500, 1994) (provisional release). For a comprehensive examination of the legal history of gain time in Florida, see Kaufman (1999).

5. During the first and second year, five days were granted per month; during the third and fourth year, ten days per month; thereafter, inmates could earn fifteen days a month.

6. Despite the U.S. Supreme Court ruling, the legislature continued to disregard the ex-post facto rules in areas other than gain time. When, for example, the legislature increased sentencing ranges and applied them retroactively, the Florida Supreme Court upheld the laws (*State v. Miller*, 488 So.2d 820, 1986), and again the U.S. Supreme Court reversed (*Miller v. Florida*, 482 U.S. 423, 1987).

7. When the warrant for his rearrest was issued, Kenneth Lynce was incarcerated on another charge, but this was not mentioned in the U.S. Supreme Court's decision (Kaufman, 1999, p. 422, n. 345).

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The Florida Senate

Interim Project Report 2006-112 *November 2005*

Committee on Criminal Justice Senator Stephen R. Wise, Chair

REVIEW THE CRIMINAL PUNISHMENT CODE AND SENTENCING JUDGES' ASSESSMENT

SUMMARY

The Criminal Punishment Code ("Code") is Florida's primary sentencing policy. While the Code contains some features of the sentencing guidelines it replaced, it also differs substantially from the former guidelines. The most important difference is that the Code does not restrict judges in imposing a sentence greater than the minimum scored sentence as was the case under the former guidelines.

The Office of Economic and Demographic Research compared sentencing under the Code (FY 2003-04) to sentencing under the sentencing guidelines (FY 1997-98). Their research indicates that a larger percentage of those sentenced received a prison sanction under the Code (21.6%) than under the guidelines (17.1%), a larger percentage of those sentenced received mitigation under the Code (11.2%) than under the guidelines (9.0%), and the mean sentence length for those sentenced to prison was shorter under the Code (3.9 years) than under the guidelines (4.7 years).

Truth in sentencing has largely been achieved by reason of prison bed building and operation of the Code. According to the Florida Department of Corrections, "[t]he average prison sentence today will result in 4.0 years of imprisonment, a 150% increase from the 1.64 average in 1988-89. The percent of prison sentence served is more than 87% for offenders sentenced in FY 2003-2004, a 150% increase from the 34.9% of average sentence served 15 years ago."

A recent study of sentencing has concluded that unwarranted sentencing disparity, the impetus for creating the sentencing guidelines in 1983, exists under the Code, and to a lesser degree, under the previous and more determinate sentencing guidelines.

Forty-six circuit court judges who have sentenced under the Code responded to a survey prepared by staff in which they were asked for their views about the Code and related matters. Findings regarding this survey are that the majority of the responding judges indicated they were either satisfied or generally satisfied with the Code. None of the judges advocated returning to the former guidelines, although one judge indicated she prefers a more determinate sentencing structure and another judge proposed a 'suggested' range for sentencing. Four judges appeared to indicate they prefer indeterminate sentencing to the Code.

The main benefit of the Code noted by the judges is the discretion to impose sentences above the lowest permissible sentence. The main concern about the Code expressed by the judges is that it provides limited discretion to impose sentences below the lowest permissible sentence. Concern about unwarranted sentencing disparity was only raised by four judges. Other concerns raised about the Code and related matters are summarized in this report.

Only five judges indicated support for re-establishing a sentencing commission. (The Code abolished a previously established sentencing commission.)

While it does not appear that any of the concerns noted by the judges identify legal or implementation problems involving the Code that require legislative action, staff recommends that this report be used as an informational resource by legislators in any assessment of changes to sentencing policy or the Code.

BACKGROUND

In 1997, the Legislature enacted the Criminal Punishment Code[1] ("Code") as Florida's "primary sentencing policy."[2] The Code has been described as

[1] ss. 921.002 - 921.0027, F.S. See chs. 97-194 and 98-204, L.O.F.

[2] *Florida's Criminal Punishment Code*: *A Comparative Assessment*, Florida Department of Corrections (Sept. 2004).

"unique in that it has features of both structured and unstructured sentencing policies."[3]

> From a structured sentencing perspective, the Code provides for a uniform evaluation of relevant factors present at sentencing, such as the offense before the court for sentencing, prior criminal record, victim injury, and others. It also provides for a lowest permissible sentence that the court must impose in any given sentencing event, absent a valid reason for departure.
>
> The Code also contains some characteristics of unstructured sentencing, such as broad judicial discretion and the allowance for the imposition of lengthy terms of incarceration.
>
> The Code is effective for offenses committed on or after October 1, 1998 and is unlike the state's preceding sentencing guidelines, which provided for narrow ranges of permissible sentences in all non-capital sentencing events.[4]

The Code replaced more determinate sentencing guidelines. Sentencing guidelines were first adopted in 1983 after significant review and input by judges and others and a pilot project to implement sentencing guidelines in four judicial circuits. In contrast, the Code was not subject to the same deliberative review before its enactment in 1997.[5] Judges' views of the Code, which have never been publicly reported, are reported here for the purpose of providing legislators with information that they may use in any assessment of changes to sentencing policy or the Code.

Staff surveyed circuit court judges who have sentenced under the Code regarding their views of the Code and related matters. Forty-six judges responded to the survey. The number of judges who responded to the survey constitutes approximately 35 percent of judges assigned to the judicial circuits' felony divisions.[6] Therefore, a view shared by the majority of the responding judges may or may not be a view shared by the majority of judges assigned to the judicial circuits' felony divisions. Even given this limitation, the views of the responding judges provide useful information to legislators on sentencing under the Code.

Understanding Florida's various sentencing policies and structures over more than two decades may provide legislators with a better understanding of the judges' survey responses, so staff begins this report with a summary of that history.

Sentencing in Florida*: *1980s to the present

In 1983 the Florida Legislature adopted "sentencing guidelines" or what has been referred to as "determinate sentencing" or "structured sentencing."[7] These are really descriptive labels for a sentencing policy and structure that, broadly speaking, "guides" judges in sentencing. Guidelines may be "voluntary," meaning they have no "enforcement mechanism" if judges don't follow them, or they may be "presumptive," meaning they are "prescriptive rather than descriptive and are also enforceable, although they have provisions to allow judges to depart from them."[8]

Until the adoption of sentencing guidelines in 1983, Florida judges' discretion in sentencing was limited only by the statutory maximum penalties for felonies[9] and constitutional requirements. This type of sentencing, which provides judges with virtually unfettered discretion, has been referred to as "indeterminate sentencing" or "unstructured sentencing."

The "principal concern" raised about indeterminate sentencing in Florida by its critics was "unwarranted" sentencing disparity, which they asserted was occurring

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[3] *Id.*

[4] *Id.*

[5] However, there was input from some judges, prosecutors, public defenders and others regarding changes to the Code after its enactment and prior to its implementation in 1998. *A 1997-1998 Interim Monitor*: *The Florida Criminal Punishment Code*, Senate Committee on Criminal Justice (Sept. 1997).

[6] The Office of the State Courts Administrator reported to staff that in 2004 there were approximately 161 judges assigned to the judicial circuits' felony divisions.

[7] In 1982 the Legislature created a Sentencing Commission. The Commission's responsibilities immediately prior to its termination in 1997 were the "initial development of a statewide system of sentencing guidelines, evaluating these guidelines periodically, and recommending on a continuous basis changes necessary to ensure incarceration of . . . violent criminal offenders . . . and non-violent criminal offenders who commit repeated acts of criminal behavior and who have demonstrated an inability to comply with less restrictive penalties previously imposed for nonviolent criminal acts." s. 921.001(1), F.S. (1997).

[8] Parent, Dunworth, McDonald and Rhodes, *Key Legislative Issues in Criminal Justice*: *The Impact of Sentencing Guidelines*, NCJ 161837, Nat. Inst. of Justice, U.S. Dept. of Justice (Nov. 1996), p. 1.

[9] s. 775.082, F.S.

under indeterminate sentencing.[10] Guidelines proponents were concerned that similarly situated offenders were being sentenced differently in each judicial circuit and by judges within the same circuit. They were also concerned that extra-legal factors, such as gender, race, and ethnicity, were playing a part in sentencing outcomes. While everyone was opposed to sentencing based on those factors, there was disagreement on whether this was actually occurring and, if it was, whether it was the result of indeterminate sentencing or other factors. Guidelines proponents, while acknowledging that some sentencing variation was necessary, believed that fundamental fairness required uniformity in sentencing. Guidelines opponents argued that offenders only had a right to a "legal" sentence (a sentence within statutorily-imposed parameters), that guidelines could never capture the myriad of factors judges had to take into account in sentencing (many unquantifiable), and that variations in the sentencing of similarly situated offenders appropriately reflected the practices of different courtroom work groups and different community standards and values.

The 1983 guidelines structure was "comprised of nine separate worksheets for specified offense categories." "Within each worksheet points were assessed for offenses to be sentenced and prior record offenses based on the number of offenses and each offense's felony degree. Assessments were made for legal status, and victim injury. Total scores fell into sentencing ranges or cells, for each worksheet. The least severe cell provided for a non-prison sanction and the most severe cell provided for 27 years to life in prison. Departure sentences were permissible as long as written reasons were provided."[11] Departure sentences could be appealed.

While the Legislature may have been concerned about truth in sentencing -the principle that the sentence served should be roughly equivalent to the sentence imposed- when it approved of sentencing guidelines, the concern about unwarranted sentencing disparity appears to have been the impetus for adopting the guidelines. Certainly, truth in sentencing was not a reality in 1983. While parole consideration was abolished for non-capital offenders sentenced under the guidelines,[12] gain-time remained available. However, truth in sentencing eventually came to the forefront of concerns regarding sentencing.

When the guidelines were adopted, Florida was under federal judicial oversight[13] to ensure that unconstitutional conditions of overcrowding would not exist in Florida's prisons. Actions taken by the Legislature and other factors exacerbated and alleviated prison crowding. The majority of changes to the guidelines in the 1980s evinced the Legislature's intent to "toughen" the guidelines by enhancing punishments, increasing judges' discretion to impose prison sentences, and narrowing the grounds for appeal of departure sentences.[14]

Prison admissions increased significantly in the 1980s as a result of changes to the guidelines, changes to the habitual offender law,[15] mandatory minimum penalties, significant growth in the overall population of Florida, a precipitous and apparently unanticipated increase in drug offense admissions[16] (reflecting in large part the effects of "crack" cocaine), and other factors.

Although the Legislature appropriated monies for tens of thousands of prison beds during this period, there were frequent indications that Florida's prisons were on the brink of exceeding lawful capacity. To address this prison crowding, the Legislature created several early release mechanisms or programs (in addition to pre-existing basic gain-time), including administrative gain-time and provisional credits, which were administered by the Florida Department of Corrections,

[10] Griswold, *Florida's Sentencing Guidelines*: *Six Years Later*, Federal Probation (Dec. 1989), p. 46.

[11] *Florida's Criminal Punishment Code*: *A Descriptive Assessment*, Florida Department of Corrections (Oct. 1999), p. 3.

[12] The elimination of parole may have been the result of concerns that it was contrary to truth in sentencing and was subjective and arbitrary. Although the Legislature did enact uniform guidelines to assist the parole decision maker, this action apparently did not assuage parole's critics.

[13] The lawsuit was *Costello v. Wainwright*, 397 F. Supp 20 (M.D. Fla. 1975), aff'd as modified, 525 F.2d 1239 (5th Cir. 1976), aff'd in relevant part on reh'g en banc, 539 F.2d 547 (5th Cir. 1976).

[14] For an extensive discussion of changes to the guidelines, see Hogenmuller, *Structured Sentencing in Florida: Is the Experiment Over?*, 20 Law and Policy 281 (July 1998).

[15] Additionally, the Legislature decided to sentence habitual offenders outside the guidelines.

[16] In FY 1989-90, the apex for drug admissions, there were 16,169 drug admissions. Information provided by the Florida Department of Corrections.

and control release, which was administered by the Florida Parole Commission.[17]

The use of early release programs eventually proved untenable.[18] By March of 1992 the average percentage of sentences served was 31.5 percent.[19] Early release and a widely reported murder by an early releasee in 1992 heightened the public's concerns about crime. In a special session in 1993, the Legislature significantly revised the sentencing guidelines and made other changes to try to address those concerns. Perhaps the most significant change in sentencing policy was that "incarcerative sanctions" were to be "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."[20]

The 1994 sentencing guidelines differed considerably from the previous guidelines. The nine separate worksheets and groupings by category were replaced with a chart that ranked non-capital felonies based on what the Legislature determined to be their seriousness. Each offense was assigned to a ranking level on a scale of one to ten (level ten being the most serious level).[21] Additional offenses and prior offenses were also assigned level rankings. Point values were associated with those rankings. The higher the level, the higher the point values. Also, point values were greater for the primary offense relative to point values for additional and prior offenses. Points were also assigned for several other factors, such as victim injury, legal status, and supervision violations.

By scoring all of these factors and performing a mathematical computation, a recommended guidelines sentence was established. There were "basically three categories of sanction based upon total scores":[22] a mandatory non-state prison sanction when the total score was 40 points or less (though the court could increase total sentencing points by up to 15 percent); a discretionary prison or a non-state prison sanction when the total score was greater than 40 points but less than 52 points; and a mandatory state prison sanction when the total score was greater than 52 points.

Prison length (state prison months) was determined by subtracting 28 points from the total sentence points. However, the court had the discretion to increase or decrease by 25 percent the recommended guidelines state prison sentence (unless the sentence had already been increased by up to 15 percent). If the recommended guidelines sentence exceeded the statutory maximum in s. 775.082, F.S., the guidelines sentence was imposed. A departure sentence, which could be appealed, was a state prison sentence varying upward or downward from the recommended guidelines prison sentence by more than 25 percent. Reasons for a departure had to be provided. A non-exclusive list of aggravating and mitigating circumstances were provided in statute.

Florida's prison bed "crisis" was brought under control and truth in sentencing was largely achieved because of a long-term commitment to building prison beds. Other factors that alleviated prison crowding included the enactment of sentence guidelines in 1993, the repeal of basic gain-time and the curtailment of provisional credits and control release, the redefining of prison capacity (after federal oversight had ceased) to "150% of what the system was designed to handle,"[23] a requirement that a funding source be provided for new offenses and penalty enhancements, the elimination of some mandatory minimum terms, a statutory requirement that offenders serve at least 85 percent of their sentences,[24] downward departure sentences, and decreases in drug admissions and the total crime rate index.

The 1993 changes to the guidelines were ambitious and some of those changes would later be incorporated in

[17] For an extensive discussion of early release, see Kaufman, *A Folly of Criminal Justice Policy-Making*: *The Rise and Demise of Early Release in Florida, and Its Ex Post Facto Implications,* 26 Fla. St. U. L. Rev. 361 (Winter 1999).

[18] Kaufman described the situation as follows: "At bottom, the state continued to operate two conflicting subsets of Florida's overall criminal justice policy: (1) a sentencing policy implemented through the guidelines, habitual offender laws, and minimum mandatory sentences, all designed to force the judicial branch to make offenders serve more time in prison; and (2) a corrections policy, implemented through early release mechanisms, that forced the executive branch to let people out of prison earlier than ever before. In essence criminal justice policy had turned against itself." Kaufman (1999), *supra*, at p. 396.

[19] Kaufman (1999), *supra*, at p. 400 (citation omitted).

[20] s. 921.001(4)(a)7., F.S. (1993).

[21] The chart did not list all non-capital felonies; offenses not listed in the chart were ranked based on felony degree. A similar "default" section was included in the Code for ranking felonies not listed in the offense severity ranking chart. s. 921.0023, F.S.

[22] See Note 2.

[23] Kaufman (1999), *supra*, at p. 407.

[24] s. 944.275, F.S.

the Code. However, the guidelines had important critics, most notably many prosecutors and sheriffs. Several prosecutors had opposed guidelines from their original adoption in 1983. Likely their efforts to abolish the guidelines were unsuccessful, in part, because they were successful in convincing legislators to pass amendments to the guidelines. The 1994 guidelines were new territory for guidelines critics and were soon subjected to their criticism: they weren't tough enough, especially regarding prior record; they were too complex; they gave judges little real discretion, such as imposing prison sentences on nonviolent offenders where appropriate; and they reduced sentencing to a mathematical computation.

The Legislature was receptive to many of these criticisms of the guidelines. Legislators were sensitive to a growing, though statistically unsupported, perception that crime in Florida was out of control. This perception was attributable in large part to the murder of a Miami-Dade Police detective and the murders of several tourists.[25] In 1995 and 1996 the Legislature significantly amended the guidelines. Some of the changes included prohibiting sentence mitigation based on the defendant's substance abuse or addiction (without mental illness); enhancing sentencing point values for the primary offense (level 7 and above), additional offenses, prior offenses, and victim injury; and creating point multipliers for the attempted murder of law enforcement officers and other officials and grand theft of a motor vehicle.

Although these changes addressed some of the concerns of guidelines critics, what the critics really wanted were not changes to the guidelines but rather to be free of them. Bills to abolish the guidelines had been introduced as early as the 1980s, but guidelines supporters had always prevailed. By 1997, things had changed. Prison admissions and the prison population appeared to be manageable. There also appeared to be few guidelines supporters in the Legislature.

While prosecutors, perhaps the most visible critics of the guidelines, had clamored for more judicial discretion, that discretion was a two-edged sword. They wanted judges to impose more and longer prison sentences. Abolishing the guidelines and returning to indeterminate sentencing would have given judges virtually unfettered discretion to do that but would have also given them the discretion to impose non-prison sentences and shorter prison sentences. This was a concern of the Miami-Dade State Attorney because, historically, the Eleventh Judicial Circuit had the greatest number of downward departure sentences.

Staff of the State Attorney drafted a proposal for a new sentencing structure, named the Criminal Punishment Code, that limited downward departure sentences but gave judges more flexibility to impose prison sentences and increase prison sentence length than was available under the guidelines. The State Attorney brought this proposal to the Legislature and it was ultimately endorsed.[26] However, because the legislation creating the Code was hastily crafted, the Legislature revised the Code in 1998.

The Criminal Punishment Code, in its present form, applies to defendants whose offenses were committed on or after October 1, 1998. It retains some features of the guidelines it replaced: the offense severity ranking chart; point values for primary offenses, additional offenses, and prior offenses; and point multipliers and enhancements. However, the Code also differs considerably from the guidelines in several respects. Downward departures were retained as were statutory mitigating factors, but downward departures can only be appealed by the State. The Code eliminated upward departures. Judges are free to sentence from the lowest permissible sentence scored under the Code (i.e. the minimum sentence calculated from the Code scoresheet) up to the maximum sentence provided in s. 775.082, F.S.,[27] and that sentence cannot be appealed. For example, the maximum penalty for a third degree felony under s. 775.082, F.S., is a 5-year prison sentence. If the minimum sentence scored under the Code is 2-years imprisonment, the judge can impose a prison sentence of 2 years or a longer prison sentence, as long as the sentence imposed does not exceed 5-years imprisonment.

The lowest permissible sentence under the Code is scored differently than the recommended guidelines sentence under the previous guidelines. If total

[25] Noted one columnist: "Until just recently, Florida was called the Sunshine State and was on its way to being the vacation capital of the world. Now it's called the murder capital of America, a place where even visitors from Bosnia should fear to tread." Fumento, *They Shoot Tourists, Don't They*?, Investor's Business Daily (1993).

[26] Griset, *New sentencing laws follow old patterns*: *A Florida case study*, 30 Journal of Criminal Justice 287, 295 (2002).

[27] If the sentence scored exceeds the maximum penalty in s. 775.082, F.S., the scored sentence is both the minimum sentence and the maximum penalty. This feature was also retained from the previous guidelines.

sentencing points equal or are less than 44 points, the minimum sentence is a non-prison sanction, though the sentencing range is the minimum sanction up to the maximum penalty provided in s. 775.082, F.S. If total sentencing points exceed 44 points, a prison sentence is the minimum sentence, though the judge may sentence up to the maximum penalty provided in s. 775.082, F.S.[28] Sentence length (in months) is determined by subtracting 28 points from the total sentencing points and decreasing the remaining total by 25 percent.

METHODOLOGY

Staff prepared a survey consisting of several questions to circuit judges who have sentenced under the Code. The Office of the State Courts Administrator disseminated the survey to the judicial circuits. The survey asked the judges for their views of the Code as a sentencing policy. It asked them to identify problems, if any, with the Code or with actions taken by the Legislature (other than revisions of the Code) that may affect its use or raise legal challenges. It also asked them if potential appellate challenges to upward departure sentences under the former guidelines affected their consideration of such sentences, the advantages and disadvantages of the Code relative to former guidelines and other sentencing structures, their views on establishing a sentencing commission, and for any other comments they wished to make regarding the Code.

FINDINGS

Staff asked the Office of Economic and Demographic Research (EDR) to do a comparison of sentencing under the Code to sentencing under the former guidelines. EDR examined two fiscal years: one right before the change to the Code (FY 1997-98) and the most recent complete year (FY 2003-04). EDR examined the total number sentenced, the number sentenced to prison (and the calculated incarceration rate), the number and the percentage who received a sanction mitigation, and the mean sentence length for those who received a prison sentence.[29] In addition to examining totals for each of the two fiscal years, EDR looked at the ten individual offenses with the greatest number of sentencing events in FY 2003-04. These ten offenses accounted for 54.5 percent of the sentencing events in FY 2003-04.

EDR's major findings were that, overall and for each of the ten individual offenses, a larger percentage of those sentenced received a prison sanction under the Code (21.6%) than under the guidelines (17.1%), a larger percentage of those sentenced received mitigation under the Code (11.2%) than under the guidelines (9.0%), and the mean sentence length for those sentenced to prison was shorter under the Code (3.9 years) than under the guidelines (4.7 years).[30] [31]

Additionally, as one judge responding to this survey opined: "the combination of massive prison construction and the operation of [the] . . . Code has resulted in 'truth in sentencing'." According to the Florida Department of Corrections, "[t]he average prison sentence today will result in 4.0 years of imprisonment, a 150% increase from the 1.64 average in 1988-89. The percent of prison sentence served is more than 87% for offenders sentenced in FY 2003-2004, a 150% increase from the 34.9% of average sentence served 15 years ago."[32]

One recent study has concluded that unwarranted sentencing disparity exists under the Code and to a greater extent than under any of the previous guidelines. However, it's important to note that the

[28] But see Note 27.

[29] EDR used the DOC convention of recoding all sentences greater than 600 months to 600 months (including life sentences).

[30] Mean sentence lengths for burglary of a dwelling or occupied conveyance and for cocaine possession remain the same under the Code as under the guidelines.

[31] Several possible factors may explain, at least in part, the greater mitigation rate and shorter average sentence length under the Code. Under the guidelines 52 or more points meant prison while under the Code more than 44 points means prison. Therefore, if offenders who score between 44 and 52 points under the Code receive a non-prison sanction, it is the result of a mitigation, whereas under the guidelines it was not. This mitigation may also explain to some degree the shorter sentences on average under the Code than under the guidelines. Some offenders who would have received probation under the guidelines are receiving prison sanctions under the Code, and many of those sentences may be relatively short in length, which would lower the average. Additionally, some offenders who score 44 points or less may be receiving short prison sentences instead of jail sentences in order to relieve jail overcrowding. Also, the Criminal Justice Estimating Conference has noted in its February 14, 2005, forecast that "[t]he average sentencing length of admissions continues to decline, associated with the high level of technical violators of supervision sentenced to prison." (http://edr.state.fl.us/conferences/criminaljustice/ES02142005.pdf)

[32] *Time Served by Criminals Sentenced to Florida's Prisons*: *The Impact of Punishment Policies from 1979 to 2004*, Florida Department of Corrections (Aug. 2004).

study also concluded that the previous guidelines, which limited judicial discretion more than the Code, did not eliminate unwarranted sentencing disparity.[33]

Findings from the survey are that twenty-nine judges indicated they were satisfied (9) or generally satisfied (20) with the Code (some expressing concerns with particular features of the Code). Nine judges either noted one benefit of the Code counterbalanced by one concern or did not provide an opinion. Two judges noted more concerns about the Code than benefits, and eight judges noted only concerns about the Code.

None of the judges advocated replacing the Code with the former guidelines, though one judge indicated a preference for a more determinate sentencing structure like the federal sentencing guidelines and another judge proposed a "suggested" range for sentencing. Four judges appeared to indicate they prefer indeterminate sentencing to the Code.

The main concern expressed about the Code was that it does not allow judges enough discretion or "flexibility" to impose sentences below the lowest permissible sentence (17).[34] Two judges suggested that the Legislature consider bringing back the mitigator relating to a defendant's substance abuse (where there is no mental illness).[35]

Concern about sentencing disparity was only noted by four judges. As previously noted, one judge suggested a "more determinate sentencing scheme (operating or advisory)" might provide for more sentencing uniformity, and another judge proposed a "suggested" range. However, four judges expressed the opinion that structured sentencing of the type found in the former guidelines or the federal sentencing guidelines might be susceptible to constitutional challenge because of the U.S. Supreme Court's opinions in *Apprendi v. New Jersey*[36] and *Blakely v. Washington*,[37] which have profoundly impacted the federal sentencing guidelines and several states' guidelines. In *Blakely*, the Court stated: "Our precedents make clear . . . that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of facts reflected in the jury verdict or admitted by the defendant." [38]

While six judges noted the *Apprendi* and *Blakely* decisions, none of them expressed the view that those decisions threatened the Code. As one judge opined: "The *Blakely* opinion will probably have minimum impact in Florida. The . . . Code does not fit the mold of a typical sentencing guidelines structure. It provides a 'floor' or a minimum sentence, absent downward departure, but no 'ceiling.' The . . . Code does not forbid the trial judge from imposing the statutory maximum sentence for the least serious (Level 1) felony offenses."[39]

Some of the other concerns judges expressed about the Code are that it: is confusing (2);[40] does not sufficiently score prior record (2); does not consider other sentencing factors (e.g., prior juvenile record) (2); does not sufficiently score some offenses (e.g., some thefts and burglaries) (2); "actually affects only a small number of cases and often results in unintended

[33] Crow, *Florida's Evolving Sentencing Policy*: *An Analysis of the Impact of Sentencing Guidelines Transformations*, Doctoral dissertation for the School of Criminology and Criminal Justice, Florida State University (Spring Semester 2005). While cautioning there were several important variables missing from his study, Crow concluded that "extra-legal factors play important roles in determining sentencing outcomes under all sentencing policies examined" and that "the policy goal of increasing sentencing severity seems to undermine the goal of reducing unwarranted disparity." *Id.* at p. 155.

[34] One judge noted that "[t]he problem comes with parties who are inflexible in coming up with appropriate sentencing alternatives when a particular case warrants it, particularly when maximum mandatory sentences are a factor."

[35] One of these judges opined: "Drug addiction *is* treatable but many long-term residential programs -particularly Faith Based- will not take individuals with any significant mental illness."

[36] 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

[37] 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

[38] 124 S.Ct. at 2537 (emphasis provided by the Court and citations omitted). An exception to the *Apprendi* rule is an enhancement above the statutory maximum based solely on the offender's prior record.

[39] This judge noted, however, that "[i]f the prosecutor seeks a punishment that is greater than the statutory maximum due to scored points in excess of that maximum, "*Apprendi* . . . requires the basis for that punishment to be charged in the information or indictment and submitted to the jury for determination unless the sole reason for the excess points is prior record." He cites as an example determining the extent of victim injury, which "may become a jury issue to be reflected in the verdict." [O]ther issues, such as whether the victim was a law enforcement officer, are usually charged in the information or indictment and, if the defendant is found guilty "as charged," the verdict reflects the aggravating circumstance…."

[40] In contrast, one judge described the Code as "simple and straightforward."

consequences in the cases it does effect" (1);[41] does not sufficiently indicate that the lowest permissible sentence is only the "starting point" for determining the appropriate sentence (1); has been changed "piece-meal . . . without looking at how previous changes have affected" the criminal justice system (1); "has the effect of discouraging defendants from exercising their right to jury trial by forcing them to accept a plea offer and is often wasteful of human and prison resources" (1); "does not accomplish stated legislative policy" (1); and does not address unnecessary challenges to sentences based on sentencing error that, if corrected, would not change the sentence previously imposed (1).[42] [43]

The most frequently cited benefit of the Code is the discretion afforded in sentencing above the lowest permissible sentence (14). Some other cited benefits are that the Code is more likely to withstand a *Blakely* challenge than the prior guidelines (2), promotes pleas (2), eliminates upward departure sentences and appeals of those sentences (2),[44] and allows for sentencing above the statutory maximum (1).

The legislation creating the Code abolished the previous Sentencing Commission. Staff asked the judges if Florida should have a sentencing commission. Of those judges indicating an opinion, fourteen indicated that Florida should not have a sentencing commission and five said there should be one. Some judges believed a sentencing commission would limit their sentencing discretion (5). Others believed it was unnecessary (4) or that the Legislature should determine what changes the Code needs (2).

One judge supporting a sentencing commission felt that it's "main advantage . . . is to provide the legislature with expertise that the legislature otherwise does not have available. The . . Commission never had any authority to enact sentencing policy or change current policy." None of the five judges specifically indicated that a sentencing commission should set sentencing standards and at least three of the judges appeared to indicate that they viewed a sentencing commission as having a purely advisory role.

RECOMMENDATIONS

While it does not appear that any of the concerns noted by the judges identify legal or implementation problems involving the Code that require legislative action, staff recommends that this report be used as an informational resource by legislators in any assessment of changes to sentencing policy or the Code.

[41] The judge who expressed this concern stated, in part, that "[w]hile the . . . Code provides a starting point in negotiating settlement of cases, it does not require specific results. Other factors, such as the sentencing policies of the trial judge, prosecutorial priorities, and constitutional considerations such as the prohibition against unreasonable search and seizure, have significant impact on the results of a given case. And since less than 4% of the cases are actually tried by jury, the . . . Code has infrequent direct impact on sentencing. This is particularly true since the vast majority of cases do not require a prison sanction to be imposed. Unfortunately, some of the cases that actually are subject to the sentencing restrictions contained in the . . . Code, and other sentencing policies, result in sentences that trial judges perceive as unnecessarily harsh and wasteful of prison resources."

[42] The judge that raised this concern stated that a sentence in which a sentencing error has occurred should be a "legal sentence" unless the defendant "affirmatively demonstrates" that the error caused the judge to sentence the defendant to prison instead of impose a non-prison sanction.

[43] Some other concerns raised in the survey include: effects of mandatory minimum terms (3); limitations on imposing greater punishment on youthful offenders (2); severity of the penalty for failure to comply with sex offender registration requirements when the offender is not an absconder (2); limitations on imposing community control for violent offenses (1); limitations on withholding adjudications (1); confusion over application of various repeat offender sanctions when several apply (1); confusion over differences in punishment for offenses punishable as life felonies, first degree felonies punishable by life, and first degree felonies (1); the 3-year term for aggravated assault under "10-20-Life" (1); appropriateness of license suspension for failure to pay child support (loss of license) (1); and the absence of any community service requirement for all offenders (1).

[44] Twenty-four judges indicated that they had imposed sentences under the former guidelines and had either considered or imposed an upward departure sentence. Twelve of these judges indicated that they had not imposed departure sentences in some cases because of potential appellate challenges to an upward departure sentence.

STORAGE NAME: h0241s1.cp
DATE: March 19, 1997

HOUSE OF REPRESENTATIVES
COMMITTEE ON
CRIME AND PUNISHMENT
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
(3)
(4)
(5)

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 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 will 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 will 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. 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;
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 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; 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; 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 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 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; 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.

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 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.

<u>The Sentencing Reform Commission</u>

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: The bill repeals section 921.001, F.S., except s. 921.001(4)(b) and 921.001(10) are not repealed. Section 1 also provides for the repeal 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: 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. 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 bill amends 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 4: creates 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.

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. The Criminal Justice Estimating Conference considers the impact indeterminate. 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 form 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 994.275, 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 forcast 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 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 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.

VII. SIGNATURES:

COMMITTEE ON CRIME AND PUNISHMENT:
Prepared by: J. Willis Renuart

Legislative Research Director: J. Willis Renuart

Sentencing Guidelines 1995-96
Annual Report

The Impact of the 1994 and 1995 Structured Sentencing Policies in Florida

Prepared For:
The Florida Sentencing Commission

Florida Department of Corrections
Harry K. Singletary, Jr., Secretary

March 1997

Does An Offender's Race Affect Sentencing in Florida?

Introduction:

The question addressed in this section is: Does an offender's race affect the sentencing decisions made by Florida courts when punishing felony offenders under the 1994 and 1995 sentencing guidelines structure. FS 921.001(a)(4) states that sentencing guidelines embody the principles that **sentencing is to be "neutral with respect to race..".** This study will determine whether this racial equity principle is followed when offenders are punished under Florida's sentencing guidelines mechanism.

Two major changes in Florida's sentencing policy have occurred in the past two decades. In 1983, the indeterminate sentencing policy, also known as parole, was eliminated and replaced with sentencing guidelines. In 1994, the 1983 sentencing guidelines structure was replaced with the 1994 sentencing guidelines. Modifications to the 1994 guidelines were made in 1995 for crimes committed on or after October 1, 1995. This study does not examine whether race affected sentencing decisions under the pre-1983 indeterminate sentencing system or during the 1983 guidelines period. It focuses on whether racial disparity exists within the 1994 and 1995 sentencing guidelines system.

Prior Research:

Some evidence suggests that racial disparity in sentencing did exist in Florida prior to the 1983 sentencing guidelines. The Sentencing Study Committee, which was responsible for recommending that Florida implement sentencing guidelines in 1983, conducted an in-depth study of 1,000 felony cases in 1979.[1] The committee examined the decision whether to sentence an offender to jail or prison and, if a prison sentence was imposed, the length of incarceration. The committee found that, after holding legally relevant factors constant, non-white offenders were significantly more likely to receive a jail or prison sentence than white offenders.

Methodology:

For this analysis, all felony offenders sentenced in Florida courts from July 1, 1994 to December 31, 1996 who were sentenced under the 1994 or 1995 sentencing guidelines were examined for racial disparity.[2] Statistical models were constructed based on variables contained in the sentencing guidelines database maintained by the Florida Department of Corrections. This database contains information on 221,351 offenders sentenced under the guidelines over the period specified.

These statistical models examine the effect of all variables simultaneously, to measure the unique effect of each on the sentencing outcome while holding all other variables constant. This method enables one to determine whether an offender's race influences judicial sentencing when other characteristics about the offender are held constant (seriousness of the current offense, prior criminal record, offenses other than the primary offense,[3] and victim injury).

Sentencing is analyzed as a two part decision: first, whether or not the offender is sentenced to prison, and second, if a prison sentence is administered, the length of the prison sentence. Prior sentencing research has conclusively demonstrated that the judiciary utilizes different factors, or the same factors to different degrees, when making the in/out prison decision versus the length of prison sentence decision.

The following factors were included in the models. Details on how these factors were measured are located at the end of this section.

1. Race (black/white)[4]
2. Gender (male/female)
3. Age at Time of Sentencing
4. Most Serious Offense ("Primary Offense")
5. Statutory Felony Class of the Primary Offense
6. Type of Primary Offense (Murder, Sexual/Lewd Assault, Robbery, Other Violent, Burglary, Property, Drugs, Weapons, and Other)
7. Seriousness of Additional Offenses
8. Types of Additional Offenses
9. Seriousness of Offender's Prior Criminal Record
10. Types of Prior Crimes in Offender's Prior Criminal Record

11. Prior Florida Prison Sentences
12. Victim Injury
13. Prior Community Supervision Violations
14. Law Enforcement Enhancement Guidelines Points
15. Case Disposition (Plea/Trial)

Many of these factors are measured in multiple ways to model the sentencing decisions. For example, the types of prior criminal convictions are measured by the number of prior robbery convictions, the number of prior drug convictions, etc. This approach was taken to develop models which explain as much of the sentencing decisions as possible. A total of 32 factors were used to predict the sentencing decisions.[5]

Details on the methodology of the current study can be obtained from the author.[6]

Findings:

This study failed to find evidence that an offender's race has any meaningful effect on decisions made by Florida courts under the 1994 and 1995 sentencing guidelines structure. **This leads to the conclusion that the goal of racial equity explicit in the sentencing guidelines law has been met when examining the 1994 and 1995 sentencing guidelines structure.**

Overall, the empirical evidence presented in detail in this section documents three primary conclusions:

1. Before examining any other factors, black offenders were more likely than white offenders to be sentenced to prison (Table 1). Within many offense groups, black offenders received longer prison sentences than white offenders (Table 2).

2. However, black offenders had higher rates of characteristics generally considered appropriate for higher rates of imprisonment and longer prison sentences (e.g., more serious crimes and more serious prior criminal records) (Table 3).

3. After taking into account relevant sentencing factors, race was not found to be an influential factor in determining either the decision to sentence an offender to prison (Table 4) or the length of prison sentences for those receiving a prison term (Table 5).

It should be noted that this report addresses only disparity at the final stage in the judicial process of sentencing for felony offenders. The question of whether racial disparity exists at earlier stages in the criminal justice process, such as arrest, prosecution, plea bargaining, or conviction is not within the scope of this report.

Is there racial equity is specific sentencing guidelines factors? Below are the answers to this question.

Question: Are black offenders more likely than white offenders to be sentenced to state prison following a felony conviction when one does **not** examine any of the factors which are intended to affect sentencing (e.g., seriousness of the current crime, prior criminal record and victim injury)?

Answer: Yes. Table 1 shows that black offenders were more likely to be sentenced to prison than white offenders: black 20.8% versus white 14.1 %. When examining the likelihood of black and white offenders receiving a prison sentence for general crime types (violent, property, drug, and other), black offenders were more likely to be sentenced to prison than white offenders when the primary offenses was one of the following: Violent (+11.4%), Property (+3.4%), Drug (+9.4%), and Other (+3.7%). Within the nine more specific offense types (murder/manslaughter, sexual/lewd assault, etc.) black offenders were more likely to be sentenced to prison than white offenders. Examining 49 specific offense types in Table 1 reveals that black offenders were more likely to be sentenced to prison than white offenders within 39 offense types, while white offenders were more likely in 10 offense types.

Question: If the judge decided a prison sentence is appropriate for a convicted felon, were black and white offenders given different lengths of prison sentences under the 1994 and 1995 sentencing guidelines when no legally relevant factors are considered?

Answer: Yes, but only for some offense types. Table 2 shows that the average sentence lengths for black and white offenders were identical (4.6 years) when all 38,031 offenders sentenced to prison are considered. However, while the numerical differences are not significant, when examining differences in average sentence lengths within the four broad offense types, black offenders received longer sentences in three of the four groups (Violent: black = +0.3 years, or + 4.7% longer prison sentences; Property: black +0.3 years, + 8.1%; Other: black +0.4 years, +13.6%). White offenders received an average of 0.6 years, or 17.2% longer prison sentences than black offenders for drug convictions.

When examining racial differences within nine specific offense types, black offenders received longer sentences in seven of the groups. Black offenders sentences averaged 20.4% (2.7 years) greater than white offenders for those convicted of murder or manslaughter. Black offenders convicted of robbery received 18.8% (1.2 years) longer sentences, on average, than white offenders convicted of robbery. Overall, white drug offenders received 17.2% (0.6 years) longer sentences than black offenders. However, when examining those convicted of selling drugs, black offenders received 25.5% (0.6 years) longer sentences than white offenders. White drug offenders received longer sentences for possession and trafficking of drugs compared to black offenders convicted of the same crimes.

Question: Are black offenders and white offenders different relative to sentencing factors considered relevant to the in/out prison decision and the length of prison sentence?

Answer: Yes. Table 3 shows that, for most factors, black offenders consistently exhibited higher rates of characteristics generally associated with judicial decisions towards more punitive sanctions. The figures in Table 3 reveal the following differences:

- Black offenders had higher overall sentencing guidelines points, which are a composite of the seriousness of the current primary crime, additional current crimes, prior criminal record, victim injury, supervision violation points, drug trafficking enhancements, and law enforcement protection enhancements. The average for total points was 30.7 for black offenders

compared to 26.3 for white offenders -- a difference of 4.4 points, or 14.3%.

- Black offenders had higher average primary offense points than white offenders. The average for primary offense points was 26.2 for black offenders compared to 24.9 for white offenders -- a difference of 1.3 points or 5.0%. For drug crimes, black offenders had 15.5% higher average primary offense points than white offenders.

- Black offenders had more serious prior criminal records than white offenders using four different measures. First, black offenders were 27.0% more likely to have a prior criminal record than white offenders (black offenders = 66.2%, white offenders = 48.3%). Second, the average prior record guidelines points for black offenders was 8.2 compared to 4.8 for white offenders, a difference of 3.4 points or 41.5%. Third, black offenders had an average of 5.8 prior criminal convictions compared to 4.3 for white offenders. Fourth, black offenders were much more likely to have prior Florida prison commitments. Black offenders were 40.4% more likely to have a prior prison sentence than white offenders (black offenders: 9.2%; white offenders: 5.5%). These differences continued within the four broad offense groups. For example, among drug offenders, black offenders were 31.9% more likely to have prior criminal record, had 51.6% higher average prior record points, had 18.3% higher average number of prior record convictions, and were 58.5% more likely to have prior prison sentences than white offenders.

- Black offenders were slightly more likely (0.3%) to be convicted of multiple crimes (i.e., "additional offenses" beyond the primary crime) than white offenders. For all offense types, white offenders who had additional crimes had higher average guidelines points for these offenses than black offenders (5.4 versus 5.1). Examining additional point differences across the racial groups revealed that black offenders had higher point levels than white offenders for violent offenses (+1.7, 16.5%), drug offenses (+0.8, 25.0%), and other offenses (+0.6, 17.6%). Only within property offenses did white offenders have higher additional points than black offenders (+1.9, 42.2%).

- Black offenders and white offenders did not differ appreciably in terms of the likelihood that their crimes involved victim injury. White offenders had committed crimes involving some level of victim injury 10.0% of the time compared to 9.6% for black offenders.

- Black offenders were more likely to have previously been violated for failure to abide by the conditions of community supervision (22.1%) than white offenders (19.1%). For violent offenses, black offenders were 17.8% more likely than white offenders to have violated conditions of supervision.

Question: Was race a factor used by judges to any meaningful degree when deciding whether to sentence an offender to prison when **all** other measured factors are held constant?

Answer: No. Table 4 shows that when considering the 32 factors measured in the in/out prison decision model, race was of no meaningful importance. Out of the 32 factors in the model, 28 affected the prison decision to a greater degree than whether the offender was white or black. Only three factors out of 32 were less influential in determining the sentence imposed than the race of the offenders. This leads to the conclusion that the race of the convicted felon had no meaningful impact on the judge's decision whether a prison sentence is warranted. Instead, the number of times the offenders had been sentenced to prison in the past, the seriousness of the current crime, the extent and severity of prior criminal record, the number of prior prison sentences, and the injury inflicted upon the victim are the factors that primarily determined the imprisonment decision.

The statistical models utilized in this study are able to explain just over half (52.2%) of the judicial decision of whether to sentence a criminal to prison. There are obviously a significant number of factors taken into consideration by judges to decide whether to administer a prison sentence that are not accounted for in the models constructed for this study. Without the ability to measure all the factors considered in the prison decision, the true effect of race cannot be quantified.

Question: Once a judge decided to sentence an offender to prison, was race a meaningful factor in deciding the length of the prison sentence?

Answer: No. Table 5 clearly demonstrates that, under the sentencing guidelines, race has no meaningful effect on the length of prison sentences. Of the 31 factors in the model, 28 affected the length of the prison sentence to a greater degree than race. There were only 2 other factors less influential than race is determining the length of the prison sentence. The seriousness of the current offense, extent of victim injury, and the severity of the offender's prior criminal record, are factors which judges apparently consider most when determining the length of the prison sentence.

Conclusion:

This study of 221,351 felons sentenced under Florida's sentencing guidelines policy from July 1994 to December 1996 clearly demonstrates that the goal of ensuring equity in sentences across racial groups has been realized. There is no meaningful empirical evidence to suggest that black offenders and white offenders are treated unequally by the judicial system under these sentencing guidelines. The race of the offender does not have any meaningful bearing on the decision by Florida judges to sentence a felon to prison or how long imprisoned offenders will be incarcerated. What were influential in determining these punishment decisions were factors such as the severity of the crime(s) for which the offender is being sentenced, the extent and seriousness of the offender's prior criminal record, the number of prior prison sentences, and the amount of injury inflicted upon the victim.

Future Research:

Although sentencing guidelines have directed how over one million felons have been punished in Florida since 1983, this study is the first attempt to address the important question of whether there is racial equity in criminal sentencing under sentencing guidelines. There is much more research that will be done to further study the sentencing racial equity issue. Specifically, the following types of analyses will be conducted and reported in the future.

1. Analysis within specific offense types will be conducted to determine if there is any evidence of meaningful racial disparity. The analysis reported here utilized statistical controls to account for differences in the types of

crimes. While this method is generally considered valid, studying this issue within specific offense types may educate us further about this issue.

2. Research will be conducted to determine if any meaningful levels of racial disparity occurred during different time periods since the 1994 and 1995 sentencing guidelines have been in place. It is particularly relevant to examine the racial disparity issue examining the 1994 compared to the 1995 sentencing guidelines.

3. The sentencing guidelines structure and resulting data enable periodic reviews of the racial disparity in sentencing issue to be conducted. Such reviews can be completed annually or on a specialized basis when policy changes require them.

4. While judicial circuit was considered in the statistical models developed in this study, further analysis of the racial disparity issue conducted for individual judicial circuits would tell us more about this issue.

5. If possible, comparative analysis with other states with and without sentencing guidelines structures will be made to identify how Florida compares to other states in terms of the issue of sentencing equity.

6. Further enhancements to the sentencing models will be made to increase the extent to which sentencing decisions are predicted with available data. This will involve including additional data when available and more refinements to the data already accessible.

7. Examinations will be made of whether disparity across geographical areas of the state exists. In addition, the issue of gender and socio-economic equity will be addressed since these factors are also included in the guidelines' equity goal.

Details on Measurement of Sentencing Factors:

Age at Time of Sentencing: Measured in years. The age of the offender when the offense occurred was also used in the preliminary analyses. The

influence of age at sentencing and age at offense produced identical results in the statistical models.

Most Serious Offense ("Primary Offense"): This was measured using the guideline point value associated with the primary offense.

Statutory Felony Class of the Primary Offense: There are five felony class levels defined by Florida law which are sentenced under the guidelines: life, first degree punishable by life, first degree, second degree, and third degree. Capital crimes are not sentenced under the sentencing guidelines and are therefore not considered here. Four separate factors were created for the models indicating whether the primary offense was or was not each of the felony class levels. These variables were included in the model to determine their unique effect on the sentencing decisions. One could create one continuous factor from the felony class level. However, that would assume that the seriousness of the crime increases to the same degree with each increase in the felony class. For example, it would assume that a second degree felony is twice as serious as a third degree felony. There is no basis for making this assumption.

Type of Primary Offense: The specific primary offenses were categorized into nine groups (murder/manslaughter, sexual/lewd assault, robbery, other violent, burglary, property, drugs, weapons/escape, and other). Nine dichotomous variables (no=0, yes=1) were created for each of the offense groups. Eight of these variables were part of the model (for statistical models you exclude one category to form a comparison point). These variables were treated as control variables and are not reported in the in/out prison decision or length of prison decision tables.

Seriousness of Additional Offenses: Measured as the number of guidelines points assessed for all additional crimes for which the offender was sentenced. This was used as an overall seriousness measure. A measure of the number of additional offenses was created, however, the guidelines points were found to have more explanatory power than the number of crimes. These two measures were highly correlated. Only the point total was used in the model.

Types of Additional Offenses: A measure of the nature of additional offenses was created by developing indicators of the number of additional

crimes for each of the nine offense groups detailed above. These nine variables were then used in the statistical models.

Seriousness of Prior Offenses: Measured as the number of guidelines points assessed for all prior crime convictions. This was used as an overall seriousness measure of the offender's prior record. A measures of the number of prior felony convictions was created, however, the guidelines points were found to have more explanatory power than the number of crimes. These two measures were highly correlated. Only the point total was used in the model.

Types of Prior Offenses: The same types of measure explained above for additional offenses was developed for prior record crimes.

Prior Florida Prison Sentences: The number of times an offender has been sentenced to Florida's prison system in the past. This variable only includes new sentences to prison and does not include admissions to prison which resulted from a technical violation of supervision. In these latter cases, the offender is returned to prison to complete a prior commitment. This information is not part of the guidelines scoresheet. It was obtained from the Department of Correction's data system.

Victim Injury: This is measured by the total number of victim injury points assessed on the guidelines scoresheet. Several other measures, such as number of victims involved and number of various types of victim injury, were developed. However, the total victim injury points explained more of the sentence decisions and was used in the final models.

Prior Community Supervision Violations: This was measured by the number of release program violation points assessed on the guidelines scoresheet.

Law Enforcement Enhancement Guidelines Points: If the primary offense on the sentencing guidelines scoresheet is a violation of the Law Enforcement Protection Act, the subtotal sentence points are multiplied by either 1.5, 2.0, or 2.5, depending upon which provision of the law was violated. The measure used for this analysis is the number of additional guidelines points assessed if the multiplier was used.

Endnotes

[1] "A Report on the Analysis of Sentencing Procedures in Florida's Circuit Courts," Sentencing Study Committee, February 29, 1979.

[2] Capital felony cases are not sentenced under the sentencing guidelines and are therefore not a part of this study. The 1994 sentencing guidelines took effect for any crimes committed on or after January 1, 1994. Therefore, offenders sentenced between July 1, 1994 and December 31, 1996 who committed crimes prior to January 1, 1994 are not a part of this study. Offenders sentenced between January 1, 1994 and June 30, 1994 under the 1994 sentencing guidelines were excluded from this analysis. The quality of the guidelines data for this time period is questionable. Data quality improvements as a result of additional training, feedback to judicial circuits, and the implementation of data quality auditing procedures resulted in more accurate and complete guidelines scoresheets after the first six months of implementation.

[3] "Primary Offense" is the most serious crime for which the offender is sentenced under the sentencing guidelines. The determination of which offense is primary, if multiple offenses are involved, is based on which crime results in the highest number of total sentencing guidelines points. For almost all sentencing scoresheets, the primary offense will be the one which falls in the highest guidelines level.

[4] The sentencing guidelines scoresheet allows for the entry of three race categories: white, black, and other. There were 1,889 (0.8%) cases with the "other" race category in the database studied for this report. The relatively low number of cases in "other" and the inability to identify the specific racial group led to the decision not to include these cases in this analysis.

[5] The judicial circuit which sentenced the offenders was used as a control variable in models not presented in this report. These models produced virtually identical results to those reported in this report in terms of racial effects and the relative importance of the factors in the models. To examine this issue further, analysis will be conducted in the future within specific judicial circuits to further study the racial disparity issue.

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Table 1

Prison Versus Non-Prison Sentence for Blacks and Whites (N=221,577):
Sentencing Guidelines Cases from July 1, 1994 to December 31, 1996

Offense Type	Total Percent of Cases Sentenced To Prison	Blacks: Percent of Cases Sentenced To Prison	Whites: Percent of Cases Sentenced To Prison	Difference in Cases Sentenced To Prison
TOTAL ALL CASES	**17.2%**	**20.8%**	**14.1%**	**6.7%**
Violent	29.8%	36.0%	24.6%	11.4%
Property	15.0%	17.1%	13.7%	3.4%
Drugs	11.6%	15.7%	6.3%	9.4%
Other	17.3%	19.4%	15.7%	3.7%
Murder/Manslaughter	81.4%	86.2%	77.1%	9.1%
Attempted Capital Murder	85.9%	86.1%	85.7%	0.4%
2nd Degree Murder	89.8%	89.9%	89.8%	0.1%
3rd Degree Murder	88.1%	86.8%	90.5%	-3.6%
Manslaughter	66.5%	80.4%	55.4%	25.0%
DUI Manslaughter	73.0%	74.1%	72.9%	1.2%
Sexual/Lewd Assault	41.2%	47.3%	38.6%	8.7%
Attempted Capital Sexual Battery	70.9%	62.1%	74.4%	-12.3%
Life Sexual Battery	77.7%	77.7%	77.8%	-0.1%
1st Degree Sexual Battery	50.6%	55.2%	47.6%	7.6%
Lewd/Lascivious Behavior	32.0%	36.2%	30.6%	5.6%
Robbery	52.6%	56.6%	46.5%	10.2%
Robbery With Weapon	74.4%	76.8%	69.7%	7.2%
Robbery Without Weapon	35.6%	38.1%	32.4%	5.7%
Home Invasion, Robbery	71.6%	63.2%	80.6%	-17.4%
Violent, Other	19.6%	24.8%	15.5%	9.3%
Aggravated Battery	24.8%	27.6%	21.8%	5.7%
Aggravated Battery on LEO	18.7%	26.7%	12.3%	14.4%
Aggravated Assault	14.6%	17.3%	12.4%	4.9%
Resisting Arrest with Violence	16.8%	23.5%	11.0%	12.5%
Kidnapping	41.7%	49.8%	36.2%	13.6%
Arson	28.7%	36.4%	25.0%	11.4%
Violent, Other	12.6%	15.1%	11.5%	3.6%
Abuse of Children	17.8%	18.4%	17.3%	1.1%
Assault/Battery, Other	9.3%	12.8%	7.4%	5.4%
Aggravated Stalking	8.3%	11.5%	7.2%	4.3%
Carjacking	73.3%	75.7%	69.9%	5.8%

Table 1 (cont.)

Prison Versus Non-Prison Sentence for Blacks and Whites (N=221,577):
Sentencing Guidelines Cases from July 1, 1994 to December 31, 1996

Offense Type	Total Percent of Cases Sentenced To Prison	Blacks: Percent of Cases Sentenced To Prison	Whites: Percent of Cases Sentenced To Prison	Difference in Cases Sentenced To Prison
Burglary	27.3%	33.4%	23.9%	9.5%
Burglary, Dwelling	39.3%	45.4%	36.1%	9.3%
Burglary, Structure	17.3%	23.8%	13.5%	10.3%
Burglary, Armed	60.2%	62.7%	59.0%	3.7%
Burglary with Assault	47.6%	55.1%	40.6%	14.5%
Burglary, Trespass, Other	4.9%	6.2%	4.5%	1.7%
Property Theft/Fraud/Damage	8.8%	9.6%	8.4%	1.2%
Grand Theft, Other	6.1%	7.0%	5.6%	1.4%
Stolen Property	18.0%	20.5%	17.2%	3.2%
Grand Theft Automobile	14.5%	16.0%	13.4%	2.6%
Forgery/Counterfeiting	6.4%	5.9%	6.7%	-0.8%
Fraudulent Practices	5.6%	8.2%	3.2%	5.0%
Other Theft, Property Damage	7.2%	7.4%	6.7%	0.7%
Worthless Checks	2.3%	1.5%	2.5%	-1.0%
Drugs	11.6%	15.7%	6.3%	9.4%
Drugs, Manuf./Sale/Purchase	15.2%	20.6%	6.0%	14.7%
Drugs, Possession/Other	6.2%	8.6%	3.7%	4.9%
Drugs, Trafficking	60.6%	64.8%	56.7%	8.1%
Weapons	16.5%	19.5%	13.0%	6.5%
Weapons, Possession	16.1%	18.7%	12.9%	5.8%
Weapons, Discharging	18.8%	25.2%	13.3%	11.9%
Other	18.3%	20.4%	17.2%	3.2%
Escape	32.1%	35.4%	29.6%	5.8%
DUI, With Injury	30.5%	29.4%	30.5%	-1.1%
DUI, No Injury	26.4%	25.3%	26.5%	-1.1%
Other	13.4%	17.3%	10.8%	6.5%
Traffic, Other	2.8%	2.7%	2.8%	-0.1%
Leaving Scene of Accident	9.4%	19.5%	7.0%	12.5%
Pollution/Hazardous Materials	1.8%	2.4%	1.6%	0.9%
Racketeering	21.5%	0.0%	25.3%	-25.3%
Number of Cases	**221,577**	**102,625**	**118,952**	

Table 2

Average Prison Sentence Length in Years by Race (N=38,031)

Sentencing Guidelines Cases from July 1, 1994 to December 31, 1996

Offense Type	Average Sentence Length			Black-White Difference	
	Total	Black	White	Number	Percent
TOTAL ALL CASES	**4.6**	**4.6**	**4.6**	**0.0**	**0.0%**
Violent	6.9	7.0	6.7	0.3	4.7%
Property	3.4	3.6	3.3	0.3	8.1%
Drugs	3.0	2.8	3.4	-0.6	-17.2%
Other	3.1	3.3	2.9	0.4	13.6%
Murder/Manslaughter	14.5	15.8	13.2	2.7	20.4%
Attempted Capital Murder	14.6	16.1	12.8	3.3	25.8%
2nd Degree Murder	18.2	18.8	17.5	1.4	7.8%
3rd Degree Murder	12.6	12.3	13.2	-1.0	-7.2%
Manslaughter	8.8	9.8	7.6	2.3	29.7%
DUI Manslaughter	9.7	9.3	9.8	-0.4	-4.6%
Sexual/Lewd Assault	9.3	10.0	9.0	1.0	10.9%
Attempted Capital Sexual Battery	14.2	13.8	14.3	-0.6	-3.9%
Life Sexual Battery	18.5	18.9	16.2	2.7	16.8%
1st Degree Sexual Battery	10.2	11.1	9.5	1.6	16.3%
Lewd/Lascivious Behavior	6.0	4.9	6.5	-1.6	-25.0%
Robbery	7.2	7.6	6.4	1.2	18.8%
Robbery With Weapon	8.9	9.1	8.4	0.7	7.9%
Robbery Without Weapon	4.4	4.7	3.8	0.9	24.5%
Home Invasion, Robbery	9.1	11.0	7.6	3.4	45.5%
Violent, Other	4.3	4.3	4.3	0.0	0.2%
Aggravated Battery	4.3	4.4	4.1	0.3	8.2%
Aggravated Battery on LEO	3.3	3.3	3.6	-0.3	-8.5%
Aggravated Assault	2.9	3.1	2.8	0.3	12.0%
Resisting Arrest with Violence	2.6	2.6	2.6	0.1	3.6%
Kidnapping	11.8	12.5	11.1	1.3	12.0%
Arson	4.2	4.3	4.1	0.2	5.1%
Violent, Other	2.9	2.9	2.8	0.1	3.8%
Abuse of Children	6.8	6.8	6.9	-0.1	-1.5%
Assault/Battery, Other	3.6	2.7	4.5	-1.8	-39.0%
Aggravated Stalking	3.2	3.7	2.9	0.8	27.6%
Carjacking	8.2	8.6	7.6	1.0	12.6%

Table 2 (cont.)

Average Prison Sentence Length in Years by Race (N=38,031)

Sentencing Guidelines Cases from July 1, 1994 to December 31, 1996

Offense Type	Average Sentence Length			Black-White Difference	
	Total	Black	White	Number	Percent
Burglary	4.3	4.6	4.0	0.6	15.2%
Burglary, Dwelling	4.2	4.8	3.8	1.0	26.3%
Burglary, Structure	2.8	3.0	2.7	0.3	10.2%
Burglary, Armed	7.0	7.7	6.6	1.0	15.6%
Burglary with Assault	8.2	8.5	7.7	0.8	10.0%
Burglary, Trespass, Other	3.5	3.0	3.8	-0.9	-22.7%
Property Theft/Fraud/Damage	2.5	2.5	2.6	-0.1	-2.0%
Grand Theft, Other	2.6	2.4	2.8	-0.4	-14.0%
Stolen Property	2.8	3.0	2.7	0.3	10.8%
Grand Theft Automobile	2.4	2.5	2.2	0.3	12.7%
Forgery/Counterfeiting	2.2	2.1	2.2	-0.1	-3.4%
Fraudulent Practices	2.3	2.1	2.6	-0.6	-21.5%
Other Theft, Property Damage	2.7	2.5	3.1	-0.6	-19.5%
Worthless Checks	2.1	2.1	2.0	0.1	5.8%
Drugs	3.0	2.8	3.4	-0.6	-17.2%
Drugs, Manuf./Sale/Purchase	2.7	2.8	2.2	0.6	25.5%
Drugs, Possession/Other	2.0	1.9	2.0	0.0	-0.9%
Drugs, Trafficking	6.1	5.8	6.5	-0.6	-9.9%
Weapons	3.6	3.8	3.4	0.4	12.6%
Weapons, Possession	3.6	3.8	3.3	0.6	17.9%
Weapons, Discharging	3.6	3.6	3.8	-0.2	-5.3%
Other	2.8	2.8	2.8	-0.1	-2.1%
Escape	3.1	2.9	3.2	-0.2	-7.3%
DUI, With Injury	4.1	5.0	4.0	1.0	24.6%
DUI, No Injury	2.2	2.2	2.2	0.0	0.8%
Other	2.6	2.5	2.7	-0.2	-7.7%
Traffic, Other	1.7	1.6	1.7	-0.1	-8.3%
Leaving Scene of Accident	3.0	2.9	3.2	-0.2	-7.4%

Notes: Sentence lengths greater than 50 years or life are treated as 50 years.

Offense types with less than 10 cases in either racial group are excluded.

Table 3

White and Black Offenders Sentencing Factors (221,351 Cases):
Sentencing Guidelines Cases July 1, 1994 to December 31, 1996

Sentencing Factor	Racial Group	All Cases	Violent Crimes	Property Crimes	Drug Crimes	Other Crimes
Total Guidelines Points (Average)	Blacks	30.7	66.1	21	19.8	25.7
	Whites	26.3	57.4	21.6	9.3	24.4
	Diff.	4.4	8.7	-0.6	10.5	1.3
	% Diff.	**14.3%**	**13.2%**	**-2.9%**	**53.0%**	**5%**
Primary Offense Points	Blacks	26.2	44.7	20.0	21.3	22.8
	Whites	24.9	41.1	21.2	18.0	22.6
	Diff.	1.3	3.6	-1.2	3.3	0.2
	% Diff.	5.0%	8.1%	-6.0%	15.5%	0.9%
Prior Criminal Record Indicators:						
Percent With 1+ Prior Record Crimes	Blacks	66.2%	59.5%	65.0%	70.2%	67.0%
	Whites	48.3%	41.6%	49.5%	47.8%	63.5%
	Diff.	17.9%	17.9%	15.6%	22.4%	3.54%
	% Diff.	**27.0%**	**30.1%**	**23.9%**	**31.9%**	**5.3%**
Prior Record Points Average (1+ only)	Blacks	8.2	7.6	8.5	8.3	8.4
	Whites	4.8	4.3	5.3	4.1	6.7
	Diff.	3.4	3.3	3.2	4.2	1.7
	% Diff.	**41.5%**	**43.4%**	**37.6%**	**50.6%**	**20.2%**
Number of Prior Convictions (1+ Avg.)	Blacks	7.4	6.5	8.4	7.1	7.5
	Whites	6.4	5.9	6.8	5.8	8.2
	Diff.	1	0.6	1.6	1.3	-0.7
	% Diff.	**13.5%**	**9.2%**	**19.0%**	**18.3%**	**-9.3%**
Percent With 1+ Prior Prison Sentences	Blacks	9.2%	15.3%	7.6%	7.2%	8.2%
	Whites	5.5%	9.5%	5.0%	3.0%	5.6%
	Diff.	3.7%	5.8%	2.6%	4.2%	2.6%
	% Diff.	**40.4%**	**37.6%**	**34.7%**	**58.5%**	**31.6%**
Additional Crime Indicators:						
Additional Crimes (% With One or More)	Blacks	32.0%	38.2%	34.0%	28.7%	26.0%
	Whites	31.9%	33.4%	41.4%	21.7%	18.5%
	Diff.	0.1%	4.8%	-7.5%	7.0%	7.5%
	% Diff.	**0.3%**	**12.7%**	**-22.0%**	**24.5%**	**28.9%**
Additional Crime Points Avg. (1+ only)	Blacks	5.1	10.3	4.5	3.2	3.4
	Whites	5.4	8.6	6.4	2.4	2.8
	Diff.	-0.3	1.7	-1.9	0.8	0.6
	% Diff.	**-5.9%**	**16.5%**	**-42.2%**	**25.0%**	**17.6%**
Additional Crime Number Avg. (1+ only)	Blacks	2.0	2.1	2.4	1.7	1.9
	Whites	2.3	2.1	2.9	1.8	2.0
	Diff.	-0.3	0.0	-0.5	-0.1	-0.1
	% Diff.	**-15.0%**	**0.0%**	**-20.8%**	**-5.9%**	**-5.3%**

Table 3 (cont.)

White and Black Offenders Sentencing Factors (221,351 Cases):
Sentencing Guidelines Cases July 1, 1994 to December 31, 1996

Sentencing Factor	Racial Group	All Cases	Violent Crimes	Property Crimes	Drug Crimes	Other Crimes
Victim Injury Seriousness						
Victim Injury Points (% With 1+)	Blacks	9.6%	40.5%	1.5%	0.4%	1.8%
	Whites	10.0%	41.3%	1.1%	0.3%	1.7%
	Diff.	-0.4%	-0.8%	0.4%	0.1%	0.1%
	% Diff.	**-4.1%**	**-2.0%**	**29.2%**	**30.7%**	**3.0%**
Victim Injury Points Average (1+ only)	Blacks	21.2	22.0	10.7	9.5	10.5
	Whites	24.2	25.1	10.4	9.4	14.1
	Diff.	-3.0	-3.1	0.3	0.1	-3.6
	% Diff.	**-14.2%**	**-14.1%**	**2.8%**	**1.1%**	**-34.3%**
Release Program Violations:						
Release Program Violators (% Yes)	Blacks	22.1%	18.9%	21.6%	23.8%	22.9%
	Whites	19.1%	15.5%	20.9%	20.0%	16.9%
	Diff.	3.0%	3.4%	0.7%	3.8%	6.1%
	% Diff.	**13.4%**	**17.8%**	**3.2%**	**15.9%**	**26.4%**
Release Program Points Avg. (1+ only)	Blacks	7.4	7.3	7.5	7.5	7.4
	Whites	7.4	7.2	7.5	7.5	7.6
	Diff.	0.0	0.1	0.0	0.0	-0.2
	% Diff.	**0.0%**	**1.4%**	**0.0%**	**0.0%**	**-2.7%**

Table 4

Effect of Factors on In/Out Prison Decision (221,351 Cases): Reported in Order of Most to Least Influential

Sentencing Guidelines Cases from July 1, 1994 to December 31, 1996

Factors Affecting In/Out Prison Decision (1)	Ranking of Effect of Factor on Prison Decision 1= Most Influential	Unique Effect Of Factor on Prison Decision(2)
Prior Florida Prison Sentences	1	1.525
Current Crime Seriousness	2	.334
Prior Record Seriousness	3	.287
Release Program Violator	4	.260
3rd Degree Felony: Current Crime	5	.186
2nd Degree Felony: Current Crime	6	.141
Prior Property Crimes	7	.130
1st Degree P.B.L.: Current Crime(3)	8	.129
Plea or Trial Disposition	9	.126
Prior Drug Crimes	10	.114
Additional Drug Crimes	11	.092
Prior Burglary Crimes	12	.091
Victim Injury Guidelines Points	13	.091
Additional Property Crimes	14	.087
Gender of Offender	15	.084
Prior Robbery Crimes	16	.068
Drug Enhancement Guidelines Points	17	.068
Prior Other Violent Crimes	18	.065
Additional Burglary Crimes	19	.064
Additional Escapes or Weapons	20	.047
Seriousness of Additional Offenses	21	.045
Law Enforcement Guidelines Points	22	.045
Prior Sexual Crimes	23	.043
Additional Other Violent Crimes	24	.041
Additional Robbery Crimes	25	.038
Prior Murder, Manslaughter Crimes	26	035
Age of Offender at Sentencing	27	-.029
Prior Escape or Weapons Crimes	28	.025
Race of Offender	**29**	**.024**
Life Felony: Current Crime	30	.020
Additional Sexual Crimes	31	.012
Additional Murder, Manslaughters	32	.003

Model Explains 51.7% of the In/Out Prison Decision.

(1) See Methodology section for details on how the factors were measured

(2) Standardized parameter estimates from logit model.

(3) P.B.L.=Punishable by life

Table 5

Effect of Factors on Prison Sentence Length (38,031 Cases): Reported in Order of Most to Least Influential Sentencing Guidelines Cases From July 1, 1994 to December 31, 1996

Factors Affecting Length of Prison Sentence(1)	Ranking of Effect of Factor on Sentence Length 1= Most Influential	Unique Effect Of Factor on Sentence Length(2)
Current Crime Seriousness	1	.251
Victim Injury Guidelines Points	2	.229
Plea or Trial Disposition	3	.226
1st Degree P.B.L.: Current Crime(3)	4	.131
Prior Record Seriousness	5	.125
Life Felony: Current Crime	6	.097
Seriousness of Additional Offenses	7	.085
2nd Degree Felony: Current Crime	8	.084
3rd Degree Felony: Current Crime	9	.061
Prior Robbery Crimes	10	.052
Additional Robbery Crimes	11	.052
Prior Property Crimes	12	.045
Law Enforcement Guidelines Points	13	.045
Release Program Violator	14	.042
Drug Enhancement Guidelines Points	15	.038
Prior Sexual Crimes	16	.037
Additional Sexual Crimes	17	.030
Age of Offender at Sentencing	18	.028
Prior Other Violent Crimes	19	.025
Prior Escape or Weapons Crimes	20	.025
Prior Drug Crimes	21	.024
Prior Burglary Crimes	22	.021
Additional Burglary Crimes	23	.021
Prior Murder, Manslaughter Crimes	24	.021
Additional Murder, Manslaughters	25	.019
Additional Property Crimes	26	.014
Additional Escapes or Weapons	27	.014
Prior Florida Prison Sentences	28	-.011
Race of Offender(4)	**29**	**.006**
Gender of Offender(4)	30	.006
Additional Drug Crimes(4)	31	.006

Model Explains 42.2% of the Length of Prison Sentence.

(1) See Methodology section for details on how the factors were measured

(2) Standardized Beta coefficient from oridnary least squares regression model.

(3) P.B.L.=Punishable by life

(4) Race of offender=-.0062, gender of offender=.0059, additional drug crimes=.0055

ENHANCEMENTS SUBCOMMITTEE
JANUARY 17, 2020, REPORT TO CRIMINAL PUNISHMENT CODE TASK FORCE

PROPOSED RECOMMENDATION #1

GIVE JUDGES DISCRETION TO DEPART FROM MANDATORY LIFE SENTENCES ON INDIVIDUALS FACING PRISON RELEASEE REOFFENDER (PRR) SANCTIONS AND ALLOW FOR A MANDATORY MINIMUM TERM OF YEARS

- Under section 775.087, Florida Statutes (10-20-Life statute), the Court has discretion to sentence an individual who has committed a felony and during the commission of that felony discharged a firearm, destructive device, semiautomatic firearm and its high-capacity detachable magazine, or a machine gun to a mandatory minimum of 25 years' prison to life. *See* § 775.087(2)(a)3., Fla. Stat. (2019); § 775.087(3)(a)3., Fla. Stat. (2019).

- Currently, section 775.082(9)(a)3.a., Florida Statutes (2019) states:

> 3. If the state attorney determines that a defendant is a prison releasee reoffender as defined in subparagraph 1., the state attorney may seek to have the court sentence the defendant as a prison releasee reoffender. Upon proof from the state attorney that establishes by a preponderance of the evidence that a defendant is a prison releasee reoffender as defined in this section, such defendant is not eligible for sentencing under the sentencing guidelines and must be sentenced as follows:
> a. For a felony punishable by life, by a term of imprisonment for life…

§ 775.082(9)(a)3.a., Fla. Stat. (2019).

Similar to the discretion given judges in section 775.087, section 775.082(9)(a)3.a. could be amended to allow discretion to judges for individuals convicted of first degree felonies punishable by life where the state is seeking to have the court sentence the defendant as a prison releasee reoffender, but the judge believes that a life sentence would not be appropriate given the facts of the case (where no firearm was discharged and there was no death or great bodily harm) as well as other mitigating evidence presented at the sentencing hearing.

Recommendation: Amend section 775.082(9)(a)3.a., Florida Statute to read: For a felony punishable by life, by a term of imprisonment for life**, but where no firearm was discharged and no death or great bodily harm occurred, for a term of not less than 30 years and not more than a term of imprisonment for life.**

PROPOSED RECOMMENDATION #2

GIVE JUDGES DISCRETION REGARDING THE STACKING OF MANDATORY MINIMUMS UNDER THE 10-20-LIFE STATUTE

- Section 775.087(2)(a), Florida Statute holds that a person who commits or attempts to commit a listed felony (including, for example, arson and narcotics trafficking) while possessing a firearm or destructive device must be given a mandatory minimum prison sentence of 10 years for the firearm possession. Currently, section 775.087(2)(d) requires that the prison sentence for each count of firearm possession be served consecutively to any other sentence:

> It is the intent of the Legislature that offenders who actually possess, carry, display, use, threaten to use, or attempt to use firearms or destructive devices be punished to the fullest extent of the law, and the minimum terms of imprisonment imposed pursuant to this subsection shall be imposed for each qualifying felony count for which the person is convicted. The court shall impose any term of imprisonment provided for in this subsection consecutively to any other term of imprisonment imposed for any other felony offense.

§ 775.087(2)(d) Fla. Stat. (2019). Judges have no discretion under this paragraph to impose any sentence concurrently to other sentences.

- The mandatory nature of the stacking provision creates a significant threat to proportionality in sentencing. The mandatory nature of the stacking provision also creates a significant incentive for law enforcement to engage in sentencing manipulation in narcotics cases. Even if Florida law enforcement has not engaged in this practice, the fact that federal law enforcement has done so under the federal analogue (18 U.S.C. § 924(c)) demonstrates that it is not a good idea to sustain a statutory authorization for such practices.

It is important to note that this statute covers mere possession of a firearm during a listed felony. It does not require that the firearm be brandished or discharged, nor even that the firearm be used in furtherance of the felony. It is enough that the defendant possess the firearm during the commission of the felony.

Obviously, it will sometimes be appropriate for a court to impose consecutive sentences for a person convicted of multiple counts of a section 775.087(2) violation. For example, it may will be appropriate to add three consecutive 10-year sentences to the prison term of a person who commits three sexual assaults and who uses a firearm to subdue his victim in each case.

But as worded, the statute covers a broad range of additional conduct for which stacking creates obviously and significantly disproportionate sentences. For example, a person who habitually and lawfully carries a holstered firearm might try to commit insurance fraud by burning down three unoccupied buildings owned by himself, on three separate occasions. If a prosecutor chose to charge the defendant with three counts of arson under section 806.01(2) and three counts

of possessing a firearm during the commission of the arson under section 775.087(2), a court would be required to impose the appropriate sentence for arson plus thirty years for the firearm possession – despite the fact that the firearm possession did nothing to further the crime.

The statute also creates a significant risk of improper sentencing manipulation by law enforcement. One of the listed felonies is narcotics trafficking under section 893.135(1). The narcotics trafficking statute covers defendants who possess as little as 28 grams of a mixture containing cocaine, or 4 grams of a mixture containing morphine. These are street-level dealer quantities, and as such are subject to mandatory minimum sentences of three years. If the dealer carries a gun while dealing (even without brandishing or discharging), section 775.087(2) more than quadruples the sentence, from three years to thirteen. This may be appropriate given the enhanced danger that comes with gun possession during a drug deal. But mandatory stacking creates the risk that law enforcement will send in an undercover agent to do multiple buys in order to threaten the dealer with a sentence of 50 years or more unless the dealer pleads guilty.

This sort of thing happens already in the federal system under 18 U.S.C. § 924(c), which is the federal analogue to the Florida stacking provision. I call your attention to the following opinion by then-judge Paul Cassell decrying the extreme injustice of such stacking provisions: *United States v. Angelos*, 345 F. Supp. 2d 1227 (D. Utah 2004). Paul Cassell is very much a law-and-order conservative, but his opinion speaks eloquently about the injustice of such mandatory stacking provisions.

Recommendation: Amend the language in section 775.087(2)(d) to give judges discretion to make the firearms sentences consecutive or concurrent. Amend section 775.087(2)(d), Florida Statute to read: … The court shall impose any term of imprisonment provided for in this subsection **concurrently or** consecutively to any other term of imprisonment imposed for any other felony offense.

PROPOSED RECOMMENDATION #3

LEGISLATIVE FIX OF TRAFFICKING IN CANNABIS STATUTE

- Currently, section 893.135(1)(a), Florida Statutes (2019) states:

> (a) Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possess of, in excess of 25 pounds of cannabis, or 300 or more cannabis plants, commits a felony of the first degree, which felony shall be known as "trafficking in cannabis," punishable as provided in s. 775.082, 775.083, or s. 775.084. If the quantity of cannabis involved:
>
> 1. Is in excess of 25 pounds, but less than 2,000 pounds, or is 300 or more cannabis plants, but not more than 2,000 cannabis plants, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 years, and the defendant shall be ordered to pay a fine of $25,000.

> 2. Is 2,000 pounds or more, but less than 10,000 pounds, or is 2,000 or more cannabis plants, but not more that 10,000 cannabis plants, such person shall be sentenced to a mandatory minimum term of imprisonment of 7 years, and the defendant shall be ordered to pay a fine of $50,000.
>
> 3. Is 10,000 pounds or more, or is 10,000 or more cannabis plants, such person shall be sentenced to a mandatory minimum term of imprisonment of l5 calendar years and pay a fine of $200,000.

§ 893.135(1)(a), Fla. Stat. (2019).

As currently written, both the 3 year and 7 year mandatory minimum terms would apply to an individual convicted of trafficking in 2,000 cannabis plants. As currently written, both the 7 year and 15 year mandatory minimum terms would apply to an individual convicted of trafficking in 10,000 cannabis plants. Because only one mandatory minimum term should apply to an individual convicted of trafficking in 2,000 cannabis plants and an individual convicted of trafficking in 10,000 cannabis plants, the statute must be amended to reflect one mandatory minimum term for an individual convicted of trafficking in 2,000 cannabis plants and one mandatory minimum term for an individual convicted of trafficking in 10,000 cannabis plants.

Recommendation: Amend section 893.135(1)(a)1., Florida Statute to read: If the quantity of cannabis involved: 1. Is in excess of 25 pounds, but less than 2,000 pounds, or is 300 or more cannabis plants, but ~~not more than~~ **less than** 2,000 cannabis plants, such person shall be sentenced to a mandatory minimum term if imprisonment of 3 years, and the defendant shall be ordered to pay a fine of $25,000.

Amend section 893.135(1)(a)2., Florida Statute to read: If the quantity of cannabis involved: 2. Is 2,000 pounds or more, but less than 10,000 pounds, or is 2,000 or more cannabis plants, but ~~not more than~~ **less than** 10,000 cannabis plants, such person shall be sentenced to a mandatory minimum term of imprisonment of 7 years, and the defendant shall be ordered to pay a fine of $50,000.

PROPOSED DISCUSSION ITEM #1

JUDICIAL REVIEW FOR INMATES AFTER A CERTAIN PERIOD OF TIME IN PRISON

- Currently, there is no opportunity for release of individuals who have been sentenced to an extensive period of incarceration or life. This is not an attempt to reinstate parole, but a proposal to explore the benefits of having a judicial review process after a certain period of time, maybe 30 years, for individuals serving sentences of 40 years to life and who are no longer a threat to society. This judicial review would not be limited to inmates with significant illnesses, but could take into account one factor of whether an inmate over the age of 55, with or without a significant illness, who has been in prison for 25 years, is still a threat to society.

- The case review would be similar to the juvenile offender case review under section 921.1402. Again, not advocating for re-instituting parole, but once the task force receives the data from the Department of Corrections on the number of inmates over the age of 55 and how long they have been in prison for, would like explore the possibility of judicial review for offenders who have served over 30 years in prison for certain offenses (not murders, sex offense, child pornography, etc.) while maintaining the emphasis on protection of the community at large.

Information on Inmates 50+ by offense

Inmates on Nov 30, 2019 with Life Sentence, Not Parole Eligible

(Note that there are approximately 3600 life sentence inmates who are parole eligible, not represented in the table)

	Age Category								
Primary Offense Category	Under50	50-54	55-59	60-64	65-69	70-74	75-79	80-95	Total
01-CAPITAL MURDER	2647	335	274	172	86	55	26	11	3606
02-2ND DEGREE MURDER	757	142	96	83	53	27	13	10	1181
03-3RD DEGREE MURDER	3	0	1	0	0	1	0	0	5
04-HOMICIDE, OTHER	2	2	1	1	0	0	0	0	6
05-MANSLAUGHTER	15	2	4	0	0	1	0	0	22
06-DUI MANSLAUGHTER	6	4	3	0	0	0	0	0	13
07-CAPITAL SEXUAL BATTERY	560	152	157	107	66	40	25	10	1117
08-LIFE SEXUAL BATTERY	232	98	88	52	31	9	3	1	514
09-1ST DEGREE SEXUAL BATTERY	46	25	27	13	6	0	0	0	117
10-2ND DEGREE SEXUAL BATTERY	5	3	2	4	0	0	0	0	14
11-SEXUAL ASSAULT, OTHER	1	0	1	0	0	0	0	0	2
12-LEWD/LASCIVIOUS BEHAVIOR	79	16	13	26	12	7	6	2	161
13-ROBBERY WITH WEAPON	898	202	165	93	44	12	3	1	1418
14-ROBBERY WITHOUT WEAPON	10	2	3	3	1	1	0	0	20
15-HOME INVASION, ROBBERY	76	6	3	3	0	0	0	0	88
17-CARJACKING	89	20	9	2	1	0	0	0	121
18-AGGRAVATED ASSAULT	2	0	0	1	0	0	0	0	3
19-AGGRAVATED BATTERY	17	3	1	3	0	0	0	0	24
20-ASSAULT/BATTERY ON L.E.O.	10	2	1	0	1	1	0	0	15
22-AGGRAVATED STALKING	1	0	0	0	0	0	0	0	1
24-KIDNAPPING	220	82	74	43	25	10	2	2	458
25-ARSON	1	2	2	1	0	0	0	0	6
26-ABUSE OF CHILDREN	2	0	0	0	0	0	0	0	2
27-VIOLENT, OTHER	58	5	3	2	1	0	0	0	69
28-BURGLARY, STRUCTURE	2	1	1	0	0	0	0	0	4
29-BURGLARY, DWELLING	11	3	2	1	0	1	0	0	18
30-BURGLARY, ARMED	221	41	55	35	12	2	0	0	366
31-BURGLARY WITH ASSAULT	263	99	79	44	17	5	2	0	509
32-BURGLARY/TRESPASS, OTHER	7	2	1	2	0	0	0	0	12

33-GRAND THEFT, OTHER	1	0	0	0	0	0	0	0	1
34-GRAND THEFT, AUTOMOBILE	0	0	0	1	0	0	0	0	1
35-STOLEN PROPERTY	1	1	1	0	0	0	0	0	3
38-FRAUDULENT PRACTICES	0	0	1	0	0	0	0	0	1
40-DRUGS, MANUFACTURE/SALE/PURCHASE	9	4	5	2	0	2	0	0	22
41-DRUGS, TRAFFICKING	12	8	8	3	2	1	0	0	34
43-WEAPONS, DISCHARGING	5	0	0	0	0	0	0	0	5
44-WEAPONS, POSSESSION	14	5	0	1	1	0	0	0	21
46-ESCAPE	4	0	0	0	0	0	0	0	4
50-TRAFFIC, OTHER	1	0	0	0	0	0	0	0	1
51-RACKETEERING	0	0	2	0	0	0	0	0	2
53-CRIMINAL JUSTICE SYSTEM	4	0	0	2	0	0	1	0	7
54-OTHER	1	0	0	0	0	0	0	0	1
Total	6293	1267	1083	700	359	175	81	37	9995

[i]

[i] This table, prepared by DOC, includes everyone serving a life sentence (excluding parole eligible inmates) by offense category. Department of Corrections highlighted the murder/manslaughter/sex offender groupings. Note that the Drug Possession category is not included on the table because none of those inmates have life sentences.

921.1402 Review of sentences for persons convicted of specified offenses committed while under the age of 18 years.—

(1) For purposes of this section, the term "juvenile offender" means a person sentenced to imprisonment in the custody of the Department of Corrections for an offense committed on or after July 1, 2014, and committed before he or she attained 18 years of age.

(2)(a) A juvenile offender sentenced under s. 775.082(1)(b)1. is entitled to a review of his or her sentence after 25 years. However, a juvenile offender is not entitled to review if he or she has previously been convicted of one of the following offenses, or conspiracy to commit one of the following offenses, if the offense for which the person was previously convicted was part of a separate criminal transaction or episode than that which resulted in the sentence under s. 775.082(1)(b)1.:

1. Murder;
2. Manslaughter;
3. Sexual battery;
4. Armed burglary;
5. Armed robbery;
6. Armed carjacking;
7. Home-invasion robbery;
8. Human trafficking for commercial sexual activity with a child under 18 years of age;
9. False imprisonment under s. 787.02(3)(a); or
10. Kidnapping.

(b) A juvenile offender sentenced to a term of more than 25 years under s. 775.082(3)(a)5.a. or s. 775.082(3)(b)2.a. is entitled to a review of his or her sentence after 25 years.

(c) A juvenile offender sentenced to a term of more than 15 years under s. 775.082(1)(b)2., s. 775.082(3)(a)5.b., or s. 775.082(3)(b)2.b. is entitled to a review of his or her sentence after 15 years.

(d) A juvenile offender sentenced to a term of 20 years or more under s. 775.082(3)(c) is entitled to a review of his or her sentence after 20 years. If the juvenile offender is not resentenced at the initial review hearing, he or she is eligible for one subsequent review hearing 10 years after the initial review hearing.

(3) The Department of Corrections shall notify a juvenile offender of his or her eligibility to request a sentence review hearing 18 months before the juvenile offender is entitled to a sentence review hearing under this section.

(4) A juvenile offender seeking sentence review pursuant to subsection (2) must submit an application to the court of original jurisdiction requesting that a sentence review hearing be held. The juvenile offender must submit a new application to the court of original jurisdiction to request subsequent sentence review hearings pursuant to paragraph (2)(d). The sentencing court shall retain original jurisdiction for the duration of the sentence for this purpose.

(5) A juvenile offender who is eligible for a sentence review hearing under this section is entitled to be represented by counsel, and the court shall appoint a public defender to represent the juvenile offender if the juvenile offender cannot afford an attorney.

(6) Upon receiving an application from an eligible juvenile offender, the court of original sentencing jurisdiction shall hold a sentence review hearing to determine whether the juvenile offender's sentence should be modified. When determining if it is appropriate to modify the juvenile offender's sentence, the court shall consider any factor it deems appropriate, including all of the following:

(a) Whether the juvenile offender demonstrates maturity and rehabilitation.

(b) Whether the juvenile offender remains at the same level of risk to society as he or she did at the time of the initial sentencing.

(c) The opinion of the victim or the victim's next of kin. The absence of the victim or the victim's next of kin from the sentence review hearing may not be a factor in the determination of the court under this section. The court shall permit the victim or victim's next of kin to be heard, in person, in writing, or by electronic means. If the victim or the victim's next of kin chooses not to participate in the hearing, the court may consider previous statements made by the victim or the victim's next of kin during the trial, initial sentencing phase, or subsequent sentencing review hearings.

(d) Whether the juvenile offender was a relatively minor participant in the criminal offense or acted under extreme duress or the domination of another person.

(e) Whether the juvenile offender has shown sincere and sustained remorse for the criminal offense.

(f) Whether the juvenile offender's age, maturity, and psychological development at the time of the offense affected his or her behavior.

(g) Whether the juvenile offender has successfully obtained a high school equivalency diploma or completed another educational, technical, work, vocational, or self-rehabilitation program, if such a program is available.

(h) Whether the juvenile offender was a victim of sexual, physical, or emotional abuse before he or she committed the offense.

(i) The results of any mental health assessment, risk assessment, or evaluation of the juvenile offender as to rehabilitation.

(7) If the court determines at a sentence review hearing that the juvenile offender has been rehabilitated and is reasonably believed to be fit to reenter society, the court shall modify the sentence and impose a term of probation of at least 5 years. If the court determines that the juvenile offender has not demonstrated rehabilitation or is not fit to reenter society, the court shall issue a written order stating the reasons why the sentence is not being modified.

History.—s. 3, ch. 2014-220; s. 97, ch. 2015-2.

MEMORANDUM

TO: Justine Hicks, Criminal Punishment Code Coordinator

FROM: Melissa Nelson, State Attorney, Fourth Judicial Circuit

RE: Criminal Punishment Code Task Force

DATE: 12/3/19

I. MATERIALS

Please find attached a PDF binder with materials I promised to share. As you will note, the Fourth Circuit Girls Court, the LEAD program from Seattle, and Pennington County's initiative are all programs which have potential impacts on local county jail populations. Because there was discussion about providing citation authority to law enforcement (also a form of pre-arrest diversion), I included an R Street Policy Study as well.

The below items are included in the binder:

1. **Fourth Circuit Girls Court**
   Program outline of Duval County's Girls Courts program.

2. **LEAD Fact Sheet**
   Information about Law Enforcement Assisted Diversion (LEAD) out of King County, Seattle, WA. LEAD is a pre-booking diversion pilot program developed with the community to address low-level offenses. Its success depends on police discretion and the redirection of low-level offenders to community-based services, instead of jail and prosecution. The program utilizes case managers, who partner with law enforcement and prosecutors. More information about LEAD can be found here: https://www.leadbureau.org/resources.

3. **R Street Policy Study "Statewide Policies Relating to Pre-arrest Diversion and Crisis Response" by Lars Trautman & Jonathan Haggerty**
   This paper outlines policies and characteristics of both pre-arrest diversion and different types of crisis situations. It also discusses citation authority, especially with respect to

emergency situations. Page 11 of the paper discusses examples of successful legislative action expanding types of low-level offenses eligible for citations.

4. Pennington County Safety & Justice Fact Sheet and Timeline
   The Pennington County, SD sheriff's office and circuit court received a MacArthur Foundation "Safety and Justice Challenge" grant and are working to address the main drivers of the local jail population through lowering jail admissions, increasing community engagement, and creating alternatives to incarceration through this initiative. More information can also be found here: http://www.safetyandjusticechallenge.org/challenge-site/pennington-county/.

I understand our subcommittee's charge is to make recommendations that would offer alternatives to Florida DOC. To this end, I've also included materials regarding two potential alternative initiatives for the subcommittee's consideration. During our meeting, I shared that our office has been researching the efficacy of a Young Adult Court. Such a court would function like a Problem-Solving Court and seek to utilize our county jail, as opposed to DOC, for a population of young offenders who, in fact, would be eligible for state prison. Included in the attached binder is a draft of our concept paper as well as materials related to the YAC in San Francisco, CA. Secondly, I also include information regarding the Alternative Sanctions Program, which provides an alternative administrative method of reporting and resolving certain technical violations in lieu of submitting VOPs to the courts.

5. DRAFT Young Adult Court Proposal & Related Materials regarding YAC in other jurisdictions
   The Fourth Circuit Proposal is a preliminary draft outline for a Young Adult Court pilot program in Duval County.

6. Alternative Sanctions Program (DOC)
   The SAO4 is currently partnering with probation officers and the courts on the creation of an alternative sanctioning program for technical violations-of-probation (VOPs) in accordance with § 948.06(1)(h). This program would provide the courts and Dept. of Corrections an alternative, administrative method of reporting and resolving certain technical violations in lieu of submitting VOPs to the courts. The process would be modeled after the Alternative Sanctioning Program (ASP) (established in attached Administrative Order for Duval County). The ASP is a program being utilized throughout the state for offenders on felony probation for non-violent offenses. When a technical violation occurs, the DOC sends a violation report to the Judge. If the Judge accepts the new sanction, the probation term resumes with the new special condition. If the Judge disagrees (or the offender disagrees), then a formal VOP occurs. For FPTI, we hope to follow a similar procedure; however, the violation report will come to the SAO. The SAO

then decides whether to accept the recommendation, re-refer with other conditions, or reject the offender from FPTI.

II. QUESTIONS AND REQUESTS

I have a few follow-up questions from our last two calls and suggestions for further discussion.

1. Minutes from the first Non-Prison Sanctions subcommittee conference call on 9/19/19. Can you please re-circulate these? I do not have them.

2. During the subcommittee conference call on 9/19, Judge Andrews mentioned the success of the Pinellas County Boys and Girls courts programs. Sheriff Nocco requested that program information be submitted to the group. I have not seen that information circulated yet and am interested in seeing it. Will you please forward it to me when it is available?

3. I would like to see a list of Florida counties where problem-solving courts currently exist, and where they do not. Is this information committee staff can provide?

4. It will be important for us to project the potential impact that each of our considered recommendations would actually have on the current prison population. How can we achieve this? Do we have the ability to coordinate with a research partner to study the effect our recommended changes would have on prison population?

III. ADDITIONAL IDEAS FOR DISCUSSION

Some of the suggestions below are beyond the scope of our subcommittee's charge, but I include them so that they can be shared with the relevant subcommittees. I solicited feedback from our most senior prosecutors, who work with the CPC on a daily basis, and I also reached out to Len Engel, Director of Policy and Campaigns, the Crime and Justice Institute (who presented to the CPC Task Force on October 4th). Mr. Engel graciously provided input on these topics and added a suggestion too. I've included his recommendations and suggestions here.

1. **Reclassification of offenses.**
   Drug possession reclassified as a level 2 (instead of 3). Rationale – Substance abuse is generally perceived as a "victimless" crime. Until there are more meaningful opportunities for substance abuse and mental health treatment available, this charge, standing alone, should not result in a prison sentence. It is not cost effective for tax payers and only increases the risk of recidivism. See 2018 CJI report to the Florida Legislature.

Commented [NM1]: From Len Engel:

Prison data show that the overwhelming majority of prison admissions for drug possession are people with behavioral health needs. More and more states across the country are recognizing and responding to substance use disorder with public health solutions rather than criminal justice sanctions.

Also, should this policy idea be linked to a particular CPC score? For instance a possession offense(s) may not be eligible for a prison sentence if the CPC score is less than (54, 44, ?) points.

2. **Expansion of statutory downward departure factors.** See § 921.0026.
   Examples: Veteran status; Former foster care participant; The defendant is amenable to the services of a post-adjudicatory, court-approved reentry program and is otherwise qualified to participate in the program. (Similar to §921.0026(m), which allows for downward departure for drug court.) Rationale: Reentry courts and reentry programs are being used with increasing frequency, especially in the federal system. Florida will likely have more programs like this moving forward. For example, programs such as Operation New Hope, Prisoners of Christ, JREC, etc.

3. **Expand gain time opportunities for offenders who make meaningful use of their time in prison through education, trade training, peer group leadership roles, absence of disciplinary reports, etc.**
   Recently a Florida DOC inmate wrote to the Florida Bar's Criminal Rules Committee and proposed an amendment to Rule 3.800 (c). The proposal is included in the materials. It was not adopted by the committee. In summary, the proposal suggests that any defendant who has completed at least one-third of his or her sentence, and any minimum mandatory sentence, should be able to apply for a reduction in sentence. He argues that the current rule is not effective because the 90-day period in which to file the motion does not give an inmate an opportunity to demonstrate rehabilitation sufficient to justify a sentence reduction. There would need to exist much more restrictive criteria than those he proposes for such a rule change to work. For example, the rule could be limited to property and non-violent crimes, or to second- and third-degree felonies. With the right restrictions as to who can apply for a reduced sentence, plus criteria in place that a court must use in reviewing the rule (such as those in place with the new juvenile sentencing law) and the factors a court must consider, the rule could work to decrease prison population and allow inmates who have reformed to be released early. Obviously, if the rule specifically outlines the factors that a trial court must consider when reviewing the request for reduction of sentence, one factor must be victim input so that the victim has the right to object to the reduction in sentence.

4. **Authorize a discretionary release mechanism to reduce lengthy prison sentences and incentivize good behavior and program completion** (Recommendation and data from Len Engel)
   The period of time a person serves in a Florida prison has increased 18% and sentence lengths for newly-sentenced individuals have increased 22% over the past decade.

   Additionally, the population of people in prison over age 50 increased 65% from 2007 to 2016, and this population is serving sentences far longer than younger inmates. The over-50 population are serving, on average, 313-month sentences, while those in the under-50 age group are serving sentences of 184 months. While their propensity to crime declines compared to their younger peers, older inmates have higher incidences

Commented [NM2]: From Len Engel:
Sen. Brandes proposal last year to reduce the 85% to 65% for nonviolent offenses was based on an expansion of gain time.

of serious health conditions, leading to much greater medical costs. Due to these increased needs, prisons across the nation spend roughly two to three times more to incarcerate geriatric individuals than their younger counterparts.

This increase in length of stay and sentence lengths is driven by a number of factors, including the 85% requirement, the absence of parole, and the CPC formula, which enables sentence enhancements for various factors.

Policy option – Allow a person to petition the sentencing court to consider reducing the sentence based on behavior since incarceration and other factors not considered at sentencing (such as unaddressed behavioral health needs). A person is eligible to petition the court after serving 5 years or 50% of a sentence for a nonviolent offense or 10 years or 60% of a sentence for a violent offense.

5. Data

The taskforce should consider recommending that whichever policies are adopted from our recommendations 1) be quantitatively tracked to determine their impact on the prison system, and 2) analyses of individuals impacted by the policies be conducted to determine recidivism, access to treatment, supervision compliance, and discharge.

Thank you for reviewing and circulating this memo and materials. Please let me know if I can be of further assistance. I look forward to seeing you in January.