A Primer On Florida Sentencing Law:

Basic Sentencing Issues in Florida State Criminal Courts

by

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§ 1. Generally

Persons who violate social norms are often subject to sanctions imposed by the application of the law through the criminal justice system. “Person” in this sense includes individuals, children, firms, associations, joint adventurers, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations. This means that, with the exception of imprisonment, criminal sanctions are equally applicable to living persons and artificial entities for violations of criminal law.

A corporation may, for example, be held criminally responsible for illegal acts of its employees if the acts are (1) related to and committed within the course of employment, (2) committed in furtherance of the business of the corporation, or (3) authorized or acquiesced in by the corporation. A corporation may be held criminally liable for acts of misfeasance, malfeasance or nonfeasance, even though the act constituting the offense may be ultra vires, or one as to which a specific intent is essential. The fact that the punishment for an offense is either fine or imprisonment, or both, will not ordinarily render the offense inapplicable to a corporation. Although a corporation is generally immune from prosecution for offenses involving personal violence, a corporation may be indictable for involuntary manslaughter and therefore subject to criminal sanctions.

Criminal sanctions imposed on a corporation can include restrictions on the relevant activities of a corporate officer where the crime involves guilty knowledge or criminal intent and the criminal liability of the officer is established by showing that that officer actually and personally performed the acts which constitute the offense, or that they were done by that officer’s direction or permission.

Sentencing is, in essence, the allocation of penalties for violations of the law that are worthy of the moral condemnation of the community. Either a finding of responsibility by the sentencing judge or an acceptance of responsibility by the defendant before the sentencing judge is a condition precedent to the imposition of such penalties.

In principle, sentencing law is guided by the following considerations:

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1 § 1.01(3), Fla. Stat.


3 State ex rel. Losey v. Willard, 54 So. 2d 183 (Fla. 1951) and cases cited therein; see also, State v. Shouse, 177 So. 2d 724 (Fla. 2d DCA 1965).

4 Donald and Bales Exterminating, Inc. v. State, 487 So. 2d 78 (Fla. 1st DCA 1986).
**Uniformity:** Similar offenses must be subject to similar sanctions. When significantly different sanctions are imposed for nearly identical offenses, sentencing disparity occurs which, if egregious enough, can be of constitutional dimensions.

**Certainty:** The sentence imposed should be the actual sentence served, or very nearly so.

**Proportionality:** Once a sentence has been imposed for a criminal offense, it cannot be increased, and can be decreased only under extraordinary conditions. The sanction imposed should be proportionate to the wrong committed. Proportionality is, in turn, guided by the following goals:

**Rehabilitation:** Where the defendant is deserving, he or she should be given the opportunity for change and self-improvement through education, therapy and other sanctions designed to permit a willing defendant to turn away from criminal conduct and become a productive member of the community. This is a dominant consideration in juvenile sentencing in Florida.

**Retribution:** Where the defendant has incurred a debt to society and his or her victim or victims, the defendant must be made to pay in time, treasure, or loss of privilege. The twin themes of retribution are enforcement or respect for society and its laws and making the victim whole again. When these themes conflict, the former is normally given ascendency over the latter. Retributive sanctions include mandatory fines, forfeiture, restitution, loss of driving privileges, loss of civil liberties, and the like. This is the dominant consideration in adult sentencing in Florida.

**Deterrence:** The public at large should be discouraged, through fear or acceptance of norms of law-abiding behavior, from engaging in criminal conduct, and those who have engaged in criminal conduct should be discouraged from continuing to do so. Deterrence takes many forms, including but not limited to:

— Public education about the penalties for breaking the law. Education includes but is not limited to school programs, and publicized accounts of punishment inflicted upon specific criminals.

— Swift and successful prosecution of wrongdoers. Theoretically, the longer a criminal case lingers between commission and resolution, the lower the deterrent value of that prosecution.

— Enhanced penalties for recidivist criminals. This form of deterrence is aimed primarily at the repeat offender. Common recidivist crimes subject to increased fines, incarceration and/or reclassification include driving under the influence (DUI), driving while license suspended or revoked (DWLSR), and petit theft. Recidivist considerations are also present in the addition of sentencing points for a defendant’s prior record on the defendant’s sentencing scoresheet in circuit court.
— Lasting stigma. Persons who break the law are publicly identified and sanctioned, and a permanent record of such is maintained. Two varied examples of stigma are the publication by the State of the names and addresses of convicted sex offenders and the requirement, imposed as a special condition of one defendant’s DUI probation, for the defendant to carry a bumper sticker on his car publicizing the fact that he or she has been convicted of DUI and is on probation.

**Incapacitation:** Where the defendant has created a significant danger to society, he or she must be prevented, either temporarily or permanently, from inflicting more harm on society or its members. Incapacitation sanctions include, but are not limited to, the death penalty, minimum mandatory sentencing, chemical castration, permanent revocation of driving privileges, and the like.

There are three basic structures for the imposition of sanctions within the range of considerations described, supra, of which Florida uses a combination.

**Indeterminate sentencing** is where the sentencing judge is permitted to impose virtually any sentence on any defendant, limited only by the common law or statutory maximum sentence for the degree of offense for which the defendant is being sentenced. This was the traditional sentencing model used in Florida before legislatively imposed sentencing schemes. This is still the model used, for the most part, in juvenile court and in misdemeanor sentencing of adults.

Determinate sentencing is where the discretion of the sentencing judge is limited to a fixed range of alternatives set by the legislature and is generally of three varieties: *Mandatory or minimum mandatory* sentencing is that in which the minimum or maximum lengths of a sentence, or the exact length of a sentence, for specific offenses or specific groupings of offenses, is prescribed by the legislature. Sentencing pursuant to the Prison Releasee Reoffender Punishment Act (PRRPA) is a contemporary example of determinate sentencing. *Flat-time* sentencing is where the defendant so sentenced serves the exact sentence imposed, without benefit of gain time, parole, or other measures by which the sentence would otherwise be shortened subsequent to imposition. A flat-time sentence is served “day-for-day.” A single sentence can be both minimum mandatory and flat-time. Where, for example, a defendant is sentenced to not more than the minimum mandatory sentence, as for possession, use or discharge of a firearm in the course of the commission of a felony under the 10–20–Life statute, the sentence is both. *Presumptive* sentencing is where the defendant, upon conviction for a certain offense, is assessed a legislatively specified sentence or sentence range that is normally the product of a mathematical compilation of factors deemed relevant by the legislature. The former 1983, 1994, and 1995 guidelines sentencing schemes used in Florida are examples of presumptive determinate sentencing: Under the former guidelines, a calculus in which points were assessed for the offense or offenses before the court for sentencing, the defendant’s prior record, and other factors deemed relevant by the legislature, was used to compute the minimum and maximum

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5 § 775.082(9), Fla. Stat.
6 § 775.087(2), Fla. Stat.
sentence that could be imposed on a given defendant, with departures above or below that range subject to significant restrictions and scrutiny by appellate courts.

*Presumptive minimum sentencing* is where the discretion of the sentencing judge is limited to alternatives between a minimum sentencing “floor” and the upper statutory maximum that can be imposed for a given offense. The present Criminal Punishment Code is an example of a presumptive minimum sentencing scheme. Under the Criminal Punishment Code, a calculus similar to that used with the former guidelines is used to assess points for the offense or offenses before the court for sentencing, the defendant’s prior record, and other factors deemed relevant by the legislature, in order to compute the minimum sentence that can be imposed on a defendant, with departures below that presumptive minimum subject to significant restrictions and appellate court scrutiny. The Prison Releasee Reoffender Punishment Act (PRRPA) is another example of a presumptive minimum sentencing scheme.

The provision of criminal penalties and of limitations upon the application of such penalties is a matter of predominantly substantive law and, as such, is a matter properly addressed by the legislature.\(^7\) Substantive law has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer.\(^8\) It includes those rules and principles which fix and declare the primary rights of individuals with respect to their persons and property.\(^9\) “Practice and procedure,” on the other hand, may be described as the machinery of the judicial process as opposed to the product thereof,\(^10\) and encompasses the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. In other words, practice and procedure is the method of conducting litigation involving rights and corresponding defenses.\(^11\) The power of the judiciary to prescribe practices and procedures is based in Art. V, sec. 2(a), Fla. Const., which states that the Florida Supreme Court shall adopt rules for the practice and procedure in all courts. Furthermore, the state constitution provides that powers constitutionally bestowed upon the courts may not be exercised by the legislature.\(^12\) This dichotomy means that, when imposing a sentence, a trial court

\(^7\) § 921.002, Fla. Stat.; see, *Hall v. State*, 823 So. 2d 757, 763 (Fla. 2002) (“[A] statutory criminal sentencing scheme, such as the [Criminal Punishment] Code, is substantive in nature because it is a product of legislative policy.”).

\(^8\) *State v. Garcia*, 229 So. 2d 236 (Fla. 1969).

\(^9\) *Adams v. Wright*, 403 So. 2d 391 (Fla. 1981).


\(^12\) See, Art. II, § 3, Fla. Const.
must act within the bounds of the discretion granted by the legislature,\textsuperscript{13} and that a statute which
purports to create or modify a procedural rule of court is constitutionally infirm.\textsuperscript{14}

The provisions of the Florida Criminal Punishment Code and offenses defined by other
statutes must be strictly construed; when the language is susceptible of differing constructions, it
must be construed most favorably to the accused.\textsuperscript{15} This is known as the principle of lenity.
Sentencing schemes are subject to the rule of lenity.\textsuperscript{16}

The legislature has provided that whoever, in the course of one criminal transaction or
episode, commits an act or acts which constitute one or more separate criminal offenses, upon
conviction and adjudication of guilt, must be sentenced separately for each criminal offense; and the
sentencing judge may order the sentences to be served concurrently or consecutively. Offenses are
separate for such purposes if each offense requires proof of an element that the other does not,
without regard to the accusatory pleading or the proof adduced at trial.\textsuperscript{17}

The expressed intent of the Legislature is to convict and sentence for each criminal offense
committed in the course of one criminal episode or transaction and not to allow the principle of
lenity to determine legislative intent. Exceptions to this rule of construction are:

1. Offenses which require identical elements of proof.\textsuperscript{18}

2. Offenses which are degrees of the same offense as provided by statute.\textsuperscript{19}

3. Offenses which are lesser offenses the statutory elements of which are subsumed by the
greater offense.\textsuperscript{20}

\textsuperscript{13}State v. Ayers, 901 So. 2d 942 (Fla. 2d DCA 2005).

\textsuperscript{14}Markert v. Johnston, 367 So. 2d 1003 (Fla. 1978); Military Park Fire Control Tax Dist. No. 4 v. DeMarois, 407 So. 2d 1020 (Fla. 4th DCA 1981); see also, State v. Raymond, 906 So. 2d 1045 (Fla. 2005).

\textsuperscript{15}\$ 775.021(1), Fla. Stat.

\textsuperscript{16}See, Gross v. State, 820 So. 2d 1043 (Fla. 4th DCA 2002); Lewis v. State, 574 So. 2d 245 (Fla. 2d DCA 1991).

\textsuperscript{17}\$ 775.021(4)(a), Fla. Stat.

\textsuperscript{18}\$ 775.021(4)(b) 1, Fla. Stat.

\textsuperscript{19}\$ 775.021(4)(b) 2, Fla. Stat.

\textsuperscript{20}\$ 775.021(4)(b) 3, Fla. Stat.
The primary purpose of sentencing in Florida is to punish the offender. Rehabilitation is a desired goal of the criminal justice system but is subordinate to the goal of punishment. Punishment may be further subdivided into the penological goals of retribution, deterrence, and incapacitation. Additional goals are restoration and reparation. An exception to the policy of punishment is in juvenile sentencing, where the primary goal is rehabilitation.

§ 2. Criminal episode

“Criminal episode” is not defined by statute, but can be taken to mean continuous and uninterrupted conduct that establishes at least one offense and is so joined in time, place and circumstances that such conduct is directed to the accomplishment of a single criminal objective, and is equivalent to “same transaction” or “crime spree.” There is no bright-line test for distinguishing a single criminal episode from separate criminal episodes, and courts must look at the nature of the crimes, time, place, and number of victims involved.

In determining when criminal activity can be denominated single or separate for purposes of consecutive minimum mandatory sentencing, for example, the focus has been on the nature of the offenses, the time sequence in which they were committed, and the place they were committed, as well as by focusing on whether there was a single victim or multiple victims. “ Separate offenses” may be defined in terms of separate victims, separate locations, and temporal breaks between the incidents, and not in terms of separate statutory elements. Therefore, in determining whether a series

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22See, State v. Brewer, 767 So. 2d 1249 (Fla. 5th DCA 2000) (Harris, J., concurring).

23§ 775.089, Fla. Stat.

24See ch. 985, F.S.

25See, O’Connell v. State, 733 So. 2d 556 (Fla. 5th DCA 1999).

26Preston v. State, — So.3d —, 2012 WL 1758985 (Fla.1st DCA 2012); Torbert v. State, 832 So. 2d 203, 204 (Fla. 4th DCA 2002).

27State v. Boatwright, 559 So. 2d 210 (Fla. 1990); Murray v. State, 491 So. 2d 1120 (Fla. 1986); Woods v. State, 615 So. 2d 197 (Fla. 1st DCA 1993).
of criminal events constitutes a single criminal episode or separate criminal episodes for purposes of sentencing,\textsuperscript{28} the focus ought to be directed to the facts of each individual case.\textsuperscript{29}

§ 3. Classes of offenses

In Florida, almost all criminal offenses are divided by severity into the two broad categories of misdemeanors and felonies. A third, very small, category is that of common law crimes, which have attributes of each of the other two categories. County courts have original jurisdiction in all misdemeanor cases not cognizable by the circuit courts.\textsuperscript{30} Circuit courts have jurisdiction, \textit{inter alia}, of all felonies and of all misdemeanors arising out of the same circumstances as a felony which is also charged.\textsuperscript{31} Section 26.012, Fla. Stat., does not, however, grant authority to the circuit court to consider traffic infractions, even where the infraction arose from the same circumstances as the charged felony.\textsuperscript{32} The circuit court also has original jurisdiction in all cases relating to juveniles except traffic offenses as provided in chapters 316 (State Uniform Traffic Control) and 985 (Delinquency), Florida Statutes, and exclusive original jurisdiction of proceedings in which a child is alleged to have committed a delinquent act or violation of law.\textsuperscript{33} Juvenile cases are, however, processed separately from adult cases.\textsuperscript{34} The Florida Rules of Criminal Procedure and Rules of Evidence apply uniformly to both misdemeanors and felonies.

§ 3.1. Misdemeanors

The term “misdemeanor” means any criminal offense that is punishable under the laws of the State of Florida, or that would be punishable if committed in Florida, by a term of imprisonment in a county correctional facility, except an extended term, not in excess of one year. The term

\textsuperscript{28}Woods v. State, 615 So. 2d 197, 199 (Fla. 1st DCA 1993) (consecutive minimum mandatory sentences); Williams v. State, 804 So. 2d 572, 573 (Fla. 5th DCA 2002) (“The fact that the crimes have separate elements of proof is not controlling.”).

\textsuperscript{29}See, Parker v. State, 633 So. 2d 72 (Fla. 1st DCA 1994); see also, State v. White, 92 Haw. 192, 199, 990 P.2d 90, 97 (1999) (examples of crimes arising from the same criminal episode include “the simultaneous robbery of seven individuals, the killing of several people with successive shots from a gun, the successive burning of three pieces of property, or such contemporaneous and related crimes as burglary and larceny, or kidnaping and robbery”).

\textsuperscript{30}§ 34.01(a), Fla. Stat.

\textsuperscript{31}§ 26.012(2)(d), Fla. Stat.

\textsuperscript{32}Davis v. State, 116 So. 3d 612 (Fla. 5th DCA 2013).

\textsuperscript{33}§§ 26.012(2)(c) and 985.0301(1), Fla. Stat.

\textsuperscript{34}See, ch. 985, F.S.
“misdemeanor” does not mean a conviction for any noncriminal traffic violation of any provision of chapter 316, Fla. Stat., or any municipal or county ordinance.35

Misdemeanors are less severe than felonies and are further divided by degree. Misdemeanors of the second-degree may be punished by a statutory maximum of up to 60 days in county jail; first-degree misdemeanors may be punished by up to a year in county jail.

As it can with almost all felonies, a court may also impose probationary sentences for misdemeanors up to the statutory maximum for the offense. Punishment for a second-degree misdemeanor thus can include up to six months probation, while for a first-degree probation it can be up to a year of probation. The court can also combine incarceration with probation. Examples of lawful combinations include a 12-month straight probationary sentence with 364 days incarceration as a condition of probation for a first-degree misdemeanor and six months straight probation with 60 days of incarceration as a condition of probation for a second-degree misdemeanor;36 a true split sentence of incarceration followed by a period of probation totaling up to one year for a first-degree misdemeanor and up to six months for a second-degree misdemeanor; and a reverse split sentence of probation followed by incarceration within the same respective totals as for true split sentences. Formerly, the practice in many jurisdictions (if not the rule) was that, upon revocation of probation, the defendant was eligible for credit for time spent on probation towards time spent incarcerated, so that the combined total of probation and incarceration did not exceed the relevant statutory maximums.37 That is not the case today. Thus, it is now possible for a judge to revoke probation in a first-degree misdemeanor case and impose the full incarcerative penalty (one year for a first-degree misdemeanor and 60 days for a second-degree misdemeanor), with credit for any time served, upon revocation of probation, notwithstanding how long the defendant has been on probation.

There is no statutory authority for incarcerating misdemeanants in state prison, although a defendant charged with both a felony and a misdemeanor can be sentenced to prison for the felony with the misdemeanor sentence to run concurrently. Likewise, neither the sentencing guidelines nor the Criminal Punishment Code apply to misdemeanors.38

Some misdemeanors are subject to reclassification of the offense to a higher degree of misdemeanor or to a felony and/or enhancement of the penalty (sometimes including minimum mandatory provisions) based on recidivism and/or statutory aggravating factors. Common examples

35 § 775.08(2), Fla. Stat.
37 See, Baldwin v. State, 558 So. 2d 173 (Fla. 5th DCA 1990).
38Singleton v. State, 554 So. 2d 1162 (Fla. 1990) at 1164 n.2.
include driving under the influence,\textsuperscript{39} driving while license suspended or revoked,\textsuperscript{40} battery,\textsuperscript{41} culpable negligence,\textsuperscript{42} petit theft,\textsuperscript{43} and possession of marijuana.\textsuperscript{44}

The trend in Florida is toward more structured sentencing and less judicial discretion in misdemeanors, as has been the case with felonies. A longstanding example is in driving under the influence cases where, upon conviction, the trial court cannot withhold adjudication and is legislatively mandated to impose certain additional sanctions.

A more recent example is the creation of section 775.0837, Fla. Stat., the Habitual Misdemeanor Offenders Law. A habitual misdemeanor offender is defined as a person who is before the court for sentencing for any misdemeanor offense described in chapters 741, 784, 790, 796, 800, 806, 810, 812, 817, 831, 832, 843, 856, 893, or 901, Fla. Stat. and who has previously been convicted, as an adult, of four or more misdemeanor offenses described in these chapters that were not part of the same criminal transaction or episode and were committed within one year of the date of the commission of the misdemeanor that is before the court for sentencing. If the court finds that the defendant qualifies as a habitual misdemeanor offender, the court is required, unless it makes a finding that an alternative disposition is in the best interests of the community and the defendant, to sentence the defendant as a habitual misdemeanor offender and impose one of the following sentences:

(1) Incarceration in a county jail operated by the county or a private vendor for a term of not less than six months, but not to exceed one year;

(2) Commitment to a residential treatment program or other community-based treatment program or a combination of residential and community-based program for not less than six months, but not to exceed 364 days; or

(3) Detention for not less than six months, but not to exceed 364 days, to a designated residence.

\textsuperscript{39}§ 316.193, Fla. Stat.
\textsuperscript{40}§ 322.34, Fla. Stat.
\textsuperscript{41}§ 784.03, Fla. Stat.
\textsuperscript{42}§ 784.05, Fla. Stat.
\textsuperscript{43}§ 812.014, Fla. Stat.
\textsuperscript{44}§ 893.13, Fla. Stat.
A court may not sentence a defendant under section 775.0837, however, if the misdemeanor before the court for sentencing has been reclassified as a felony as a result of any prior qualifying misdemeanor.\textsuperscript{45}

Note that the common law offense of criminal contempt and local ordinances punishable by incarceration are the legal equivalent to misdemeanors for purposes of sentencing.\textsuperscript{46}

\section*{§ 3.2. Felonies}

The term “felony” means any criminal offense that is punishable under the laws of Florida, or that would be punishable if committed in Florida, by death or imprisonment in the state penitentiary. “State penitentiary” includes state correctional facilities. A person must be imprisoned in the state penitentiary for each sentence which, except for an extended term, exceeds one year.\textsuperscript{47} All felonies are punishable by incarceration in state prison. The legislature has created five categories of felonies, which are classified, for purposes of sentencing and for any other purpose provided by statute, as follows:

\textit{Capital felony}. A defendant who has been convicted of a capital felony must be punished by death if the proceeding held to determine sentence in accordance with the provisions of section 921.141 results in findings by the court that such person shall be punished by death, otherwise such person must be punished by life imprisonment and will be ineligible for parole. In the event that the death penalty is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a defendant previously sentenced to death for a capital felony is required to cause that defendant to be brought before the court and to sentence that defendant to life imprisonment without possibility of parole. No sentence of death can be reduced as a result of a determination that a method of execution is held unconstitutional under the state constitution or the constitution of the United States.\textsuperscript{48}

\textit{Life felony}. A defendant who has been convicted of a life felony committed prior to October 1, 1983 may be punished by a term of imprisonment for life or for a term of years not less than 30; for a life felony committed on or after October 1, 1983 by a term of imprisonment not exceeding 40 years; for a life felony committed on or after July 1, 1995, except for one which was committed on or after September 1, 2005, which is a violation of section 800.04(5)(b), for a term of imprisonment for life or by imprisonment for a term of years not exceeding life imprisonment; and for a life felony

\textsuperscript{45}§ 775.0837, Fla. Stat.

\textsuperscript{46}See, \textit{Saridakis v. State}, 936 So. 2d 33 (Fla. 4th DCA 2006) (criminal contempt); \textit{City of Fort Lauderdale v. Mattlin}, 566 So. 2d 1330 (Fla. 4th DCA 1990) (municipal ordinance); \textit{Moorman v. Bentley}, 490 So. 2d 186 (Fla. 2d DCA 1986) (criminal contempt).

\textsuperscript{47}§ 775.08(1), Fla. Stat.

\textsuperscript{48}§§ 775.08(1)(a), 775.082(1), 775.082(2), Fla. Stat.
committed on or after September 1, 2005, which is a violation of s. 800.04(5)(b), by a term of imprisonment for life, or a split sentence that is a term of not less than 25 years’ imprisonment and not exceeding life imprisonment, followed by probation or community control for the remainder of the person’s natural life, as provided in section 948.012(4).\footnote{§§ 775.081(b), 775.082(3)(a), Fla. Stat.} Note that the provision for not less than 25 years’ imprisonment is not a minimum mandatory sentence in the ordinary sense.\footnote{Montgomery v. State, 36 So. 3d 188 (Fla. 2d DCA 2010).} A defendant who has committed a life felony on or after July 1, 2008, which is that defendant’s second or subsequent violation of section 800.04(5)(b) may be punished by a term of imprisonment for life.\footnote{§ 775.081(1), Fla. Stat.}

_Felony of the first degree._ A defendant who has been convicted of a felony of the first degree may be punished by a term of imprisonment not exceeding 30 years or, when specifically provided by statute, by imprisonment for a term of years not exceeding life imprisonment.\footnote{§§ 775.081(c), 775.082(3)(b), Fla. Stat.}

_Felony of the second degree._ A defendant who has been convicted of a felony of the second degree may be punished by a term of imprisonment not exceeding 15 years.\footnote{§§ 775.081(1)(d), 775.082(3)(c), Fla. Stat.}

_Felony of the third degree._ A defendant who has been convicted of a felony of the third degree may be punished by a term of imprisonment not exceeding 5 years.\footnote{§§ 775.081(1)(e), 775.082(3)(d), Fla. Stat.}

A capital felony and a life felony must be so designated by statute. Other felonies are of the particular degree designated by statute. Any crime declared by statute to be a felony without specification of degree is a felony of the third degree, except that this provision does not affect felonies punishable by life imprisonment for the first offense.\footnote{See, Jones v. State, 546 So. 2d 1134, 1135 (Fla. 1st DCA 1989) (“It is clear that there is no distinct felony classification of ‘first-degree felony punishable by life,’ but only a first-degree felony which may be punished in one of two ways.”).}

First-degree felony punishable by life. There is no separate classification for first-degree felonies punishable by life imprisonment.\footnote{§ 775.082(3)(a)4.b, Fla. Stat.} Thus, a first-degree felony, regardless of the sentence imposed by the substantive law prohibiting the conduct, is still a first-degree felony under the
statutory classification.\textsuperscript{57} Some confusion in distinguishing a life felony from a first-degree felony punishable by life can arise because of the statutory language that permits each, in certain circumstances, to be punished by a term of years not exceeding life imprisonment, and the lack of a definition of what such a term of years is.\textsuperscript{58} The distinction that the former is a separate classification scheme and the latter is a penalty provision within a different classification scheme remains, however.\textsuperscript{59}

A capital crime may be charged only by indictment, but any other felony may be charged by either information or indictment.\textsuperscript{60} An indictment may be amended only to correct a defect, error, or omission in a caption or to eliminate surplusage.\textsuperscript{61} Otherwise, a trial court has no authority to issue an order amending an indictment.\textsuperscript{62} Further, once an indictment has been returned, a grand jury cannot charge a new or different crime through an amendment to the indictment.\textsuperscript{63} However, the grand jury and state attorney have concurrent authority to charge noncapital crimes.\textsuperscript{64} Even when the grand jury has declined to charge an offense by indictment, the state attorney may charge the same offense by information.\textsuperscript{65}

\section{3.3. Common law crimes}

A third category of crimes in Florida comprises crimes at common law. Common law crimes are the vestiges of the time before the rise of criminal codification, when the inherited common law of England was in force in the state. Generally,

The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the 4th day of July, 1776,

\textsuperscript{57} Burdick v. State, 594 So. 2d 267 (Fla. 1992).

\textsuperscript{58} See, Powlowski v. State, 467 So. 2d 334 (Fla. 5th DCA 1985) (a sentence of 300 years is a term of imprisonment less than life); Greenhalgh v. State, 582 So. 2d 107 (Fla. 2d DCA 1991) (99–year sentence would be lawful for felony punishable by life).

\textsuperscript{59} See, Brown v. State, 412 So. 2d 58 (Fla. 4th DCA 1982); Trent v. State, 403 So. 2d 1131 (Fla. 4th DCA 1981).


\textsuperscript{61} Fla. R. Crim. P. 3.140(c)(1), (i) to (j).

\textsuperscript{62} Snipes v. State, 733 So. 2d 1000, 1004 (Fla. 1999).

\textsuperscript{63} Smith v. State, 424 So. 2d 726, 729 (Fla. 1982).

\textsuperscript{64} State ex rel. Hardy v. Blount, 261 So. 2d 172, 174 (Fla. 1972).

\textsuperscript{65} State ex rel. Hardy v. Blount, 261 So. 2d 172, 174 (Fla. 1972); State ex rel. Latour v. Stone, 135 Fla. 816, 185 So. 729, 730 (1939).
are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the Constitution and laws of the United States and the acts of the Legislature of this state.66

As to crimes, the common law of England in relation to crimes, except so far as the same relates to the modes and degrees of punishment, is of full force in Florida where there is no existing provision by statute on the subject.67 Those crimes which have not been separately reclassified by statute as either a felony or a misdemeanor therefore retain their status as common law crimes.68

There are two types of common law crimes in Florida (1) those for which the elements are defined by statute but which are not classified, and (2) those for which the elements are not defined but which are classified by statute. Punishment at common law has been effectively abolished by Florida statutory law, which now defines the range of punishments for each of the statutory crimes, also provides that “When there exists no such provision by statute, the court shall proceed to punish such offense by fine or imprisonment, but the fine shall not exceed $500, nor the imprisonment 12 months.”69

Contempt is a common law crime in Florida,70 which, although recognized by statute,71 is not specifically classified by statute as either a felony or a misdemeanor.72 Criminal contempt is a common law crime which can carry a maximum term of imprisonment for 12 months and which case law regards as the functional equivalent of a misdemeanor for purposes of the right to court-appointed counsel during contempt proceedings.73 Cheating is another common law crime, the elements of which are not set out by statute, although it has been classified as a felony.74

An unresolved issue is whether or not contempt convictions can be scored as prior record on a scoresheet used at sentencing. Common practice is to list contempt convictions under the

66§ 2.01, Fla. Stat.
67§ 775.01, Fla. Stat.
68Giordano v. State, 32 So. 3d 96 (Fla. 2d DCA 2009).
69§ 775.02, Fla. Stat.
70Kramer v. State, 800 So. 2d 319 (Fla. 2d DCA 2001).
71§ 38.23, Fla. Stat.
72§ 38.22, Fla. Stat.; See, Ducksworth v. Boyer, 125 So. 2d 844 (Fla. 1960) (contempt is neither a felony nor a misdemeanor).
73Giordano v. State, 32 So. 3d 96 (Fla. 2d DCA 2009).
74“Whoever is convicted of any gross fraud or cheat at common law shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.” § 817.29, Fla. Stat.
defendant’s prior record as misdemeanors, but Fla. R. Crim. P. 3.702 to 3.704 and the statutory guidelines and Criminal Punishment Code address only felonies and misdemeanors and do not address common law crimes.

§ 4. Principal

Whoever commits any criminal offense against the State, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether he or she is or is not actually or constructively present at the commission of such offense. To be guilty as a principal for a crime physically committed by another, one must intend that the crime be committed and do some act to assist the other person in actually committing the crime.

While this generally means “in for a penny, in for a pound,” there are limits to the application of principal theory in sentencing. When, for example, a defendant is charged with a felony involving the “use” of a weapon, his or her sentence cannot be enhanced without evidence establishing that defendant had personal possession of the weapon during the commission of the felony. The Eighth Amendment does not, for another example, permit imposition of the death penalty on a defendant who aids and abets a felony in the course of which murder is committed by others but who does not himself or herself kill, attempt to kill or intend that killing take place or that lethal force will be employed.

§ 5. Accessory after the fact

Any person not standing in the relation of husband or wife, parent or grandparent, child or grandchild, brother or sister, by consanguinity or affinity to the offender, who maintains or assists the principal or accessory before the fact, or gives the offender any other aid, knowing that the offender had committed a felony or been accessory thereto before the fact, with intent that the offender avoids or escapes detection, arrest, trial or punishment, is an accessory after the fact. Any person, regardless of the relation to the offender, who maintains or assists the principal or accessory before the fact, or gives the offender any other aid, knowing that the offender had committed the offense of child abuse, neglect of a child, aggravated child abuse, aggravated manslaughter of a child

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76 Banks v. State, 790 So. 2d 1094, 1098 n.2 (Fla. 2001); Staten v. State, 519 So. 2d 622 (Fla. 1988); Ryals v. State, 112 Fla. 4, 150 So. 132 (1933).
77 State v. Rodriguez, 602 So. 2d 1270 (Fla. 1992).
79 § 777.03(1)(a), Fla. Stat.
under 18 years of age, or murder of a child under 18 years of age, or had been accessory thereto before the fact, with the intent that the offender avoids or escapes detection, arrest, trial, or punishment, is an accessory after the fact unless the court finds that the person is a victim of domestic violence.\textsuperscript{80}

§ 6. Attempts, conspiracies and solicitations

\textit{Attempt} is defined as “to make an effort to do,” and requires criminal intent together with an overt act directed toward the commission of the intended offense.\textsuperscript{81} A person who attempts to commit an offense prohibited by law and in such attempt does any act toward the commission of such offense, but fails in the perpetration or is intercepted or prevented in the execution thereof, commits the offense of criminal attempt. Criminal attempt includes the act of an adult who, with intent to commit an offense prohibited by law, allures, seduces, coaxes, or induces a child under the age of 12 to engage in an offense prohibited by law.\textsuperscript{82}

\textit{Solicitation} is defined as “the act or an instance of requesting or seeking to obtain something; a request or petition.”\textsuperscript{83} A person who solicits another to commit an offense prohibited by law and in the course of such solicitation commands, encourages, hires, or requests another person to engage in specific conduct which would constitute such offense or an attempt to commit such offense commits the offense of criminal solicitation.\textsuperscript{84}

\textit{Conspire} is a modern derivative of the Latin \textit{conspirare}, which means “to breathe together,” and in the context of criminal law connotes collective criminality in the form of an agreement, express or implied, between two or more people to commit an unlawful act.\textsuperscript{85} A person who agrees, conspires, combines, or confederates with another person or persons to commit any offense commits the offense of criminal conspiracy.\textsuperscript{86}

Attempts, solicitations, and conspiracies are inchoate (imperfect, partial or unfinished) offenses and, as such are usually punishable to a lesser degree than the completed offense. \textit{E.g.}, if the completed offense would be a third-degree felony, the inchoate offense usually is punishable as

\begin{itemize}
\item \textsuperscript{80}§ 77.03(1)(b), Fla. Stat.
\item \textsuperscript{81}See, \textit{State v. Wilkinson}, 724 So. 2d 614 (Fla. 5th DCA 1998).
\item \textsuperscript{82}§ 777.04(1), Fla. Stat.
\item \textsuperscript{83}BLACK’S L. DICT. 1398 (7th Ed. 1999); see also, \textit{Scarborough v. Liberty Nat. Life Ins. Co.}, 872 So. 2d 283 (Fla. 1st DCA 2004).
\item \textsuperscript{84}§ 777.04(2), Fla. Stat.
\item \textsuperscript{85}See, \textit{Robinson v. State}, 610 So. 2d 1288 (Fla. 1992).
\item \textsuperscript{86}§ 777.04(3), Fla. Stat.
\end{itemize}
a first-degree misdemeanor. An exception is where statutory law provides that the attempt, solicitation, or conspiracy is to be punished in the same manner as the completed offense. In the case of reclassification of offense or enhancement of penalty, the rule is that absent, language in the applicable statutory law referencing attempts, attempts of qualifying crimes are not themselves qualifying crimes.87

§ 7. Nonexistent crime

No one may be convicted of a nonexistent crime, notwithstanding his or her participation in inducing the erroneous conviction.88 A defendant cannot be convicted of a nonexistent lesser included offense, even if defense counsel specifically requests that the court give a jury instruction for the nonexistent offense.89 When a defendant is “convicted” of a nonexistent lesser included offense of an existing crime, the proper remedy is retrial on the principal charge; when the conviction is for a nonexistent offense that is the principal crime charged, the proper remedy is retrial on the other offenses instructed at trial.90 Two common sources of convictions for nonexistent offenses are where a penal statute is applied retroactively in error,91 and where the language of attempts, solicitations, and conspiracies is improperly used in the charging document, jury instructions, and verdict form at trial. Historical examples of nonexistent crimes include solicitation to commit third-degree murder,92 attempted manslaughter by culpable negligence,93 attempted aggravated battery of a law enforcement officer,94 attempted conspiracy to traffic in heroin,95 possession of stolen property,96 and possession of a concealed weapon by a convicted felon.97 Note that an offense

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87See, Tambriz-Ramirez v. State, 112 So. 3d 767 (Fla. 4th DCA 2013).
88Jones v. State, 908 So. 2d 615 (Fla. 4th DCA 2005).
89Achin v. State, 436 So. 2d 30 (Fla. 1982).
90State v. Wilson, 680 So. 2d 411 (Fla. 1996).
91See, State v. Barnum, 921 So. 2d 513 (Fla. 2005), as revised on denial of reh’g, (Feb. 9, 2006).
92Hieke v. State, 605 So. 2d 983 (Fla. 4th DCA 1992).
93Cooper v. State, 905 So. 2d 1063 (Fla. 4th DCA 2005).
94H.E.S. v. State, 773 So. 2d 80 (Fla. 2d DCA 2000).
95Marrero v. State, 864 So. 2d 1131 (Fla. 2d DCA 2003).
96B.B.P. v. State, 841 So. 2d 687 (Fla. 2d DCA 2003).
can be temporarily nonexistent, as was the case with the offense of Driving While License Permanently Revoked during the period on or after July 1, 1998, and before May 21, 2003. 98

§ 8. Mental competency

The procedures for dealing with defendants determined to be incompetent to proceed with sentencing are addressed in Rule 3.214. 99 If a defendant is determined to be incompetent to proceed after being found guilty of an offense or violation of probation or community control or after voluntarily entering a plea to an offense or violation of probation or community control, but prior to sentencing, the court must postpone the pronouncement of sentence and proceed pursuant to Rule 3.210, et seq. and the following rules. 100 A defendant may, however, waive a competency hearing. 101

In general terms, a person accused of an offense or a violation of probation or community control who is mentally incompetent to proceed at any material stage of a criminal proceeding cannot be proceeded against while incompetent. 102 A “material stage of a criminal proceeding” includes, inter alia, the trial of the case, pretrial hearings involving questions of fact on which the defendant might be expected to testify, entry of a plea, violation of probation or violation of community control proceedings, sentencing, hearings on issues regarding a defendant’s failure to comply with court orders or conditions, or other matters where the mental competence of the defendant is necessary for a just resolution of the issues being considered. 103 The terms “competent,” “competence,” “incompetent,” and “incompetence,” as used in Rules 3.210 to 3.219, refer to mental competence or incompetence to proceed at a material stage of a criminal proceeding. 104 The incompetence of the defendant will not, however, preclude such judicial action, hearings on motions of the parties, discovery proceedings, or other procedures that do not require the personal participation of the defendant. 105

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98 See, Florida Dept. of Highway Safety and Motor Vehicles v. Critchfield, 842 So. 2d 782 (Fla. 2003).
99 Fla. R. Crim. P. 3.213(c).
100 Fla. R. Crim. P. 3.214.
101 Hatchell v. State, 328 So. 2d 874 (Fla. 1st DCA 1976); Bolius v. State, 319 So. 2d 85 (Fla. 2d DCA 1975).
103 Fla. R. Crim. P. 3.210(a)(1); Calloway v. State, 651 So. 2d 752 (Fla. 1st DCA 1995) (sentencing is a material stage of a criminal proceeding for purposes of the rule governing the procedure for raising the issue of the defendant’s competence to proceed).
There is a legal presumption of competence in criminal proceedings. A defendant, as any other person, is presumed competent and in the absence of circumstances which require the court to inquire as to his or her competence, the burden is on the defendant to establish his or her incompetence. The burden of proving competency does not shift to the State where the defendant has not previously been declared competent although he or she has been involuntarily committed to a hospital for observation as an allegedly mentally ill patient. The reasonable belief on the part of the court that the defendant is incompetent does not place the burden on the State of proving competence.

If, however, at any material stage of a criminal proceeding, the court of its own motion, or on motion of counsel for the defendant or for the state, has reasonable ground to believe that the defendant is not mentally competent to proceed, the court is required to immediately enter its order setting a time for a hearing to determine the defendant’s mental condition, which has to be held no later than 20 days after the date of the filing of the motion, and must order the defendant to be examined by no more than three, nor fewer than two, experts prior to the date of the hearing. Attorneys for the state and the defendant may be present at the examination. Similarly, in juvenile court cases if, at any time prior to or during a delinquency case, the court has reason to believe that the child named in the petition may be incompetent to proceed with the hearing, the court on its own motion may, or on the motion of the child’s attorney or state attorney must, stay all proceedings and order an evaluation of the child’s mental condition.

A written motion for the examination made by counsel for the defendant must contain a certificate of counsel that the motion is made in good faith and on reasonable grounds to believe that the defendant is incompetent to proceed. To the extent that it does not invade the lawyer-client privilege, the motion must also contain a recital of the specific observations of and conversations with the defendant that have formed the basis for the motion. Similarly, a written motion for the examination made by counsel for the state must contain a certificate of counsel that the motion is made in good faith and on reasonable grounds to believe that the defendant is incompetent to proceed, as well as a recital of the specific facts that have formed the basis for the motion, including a

106 See, DeFriest v. State, 448 So. 2d 1157 (Fla. 1st DCA 1984) (presumption of sanity).

107 See, Chatman v. State, 199 So. 2d 475 (Fla. 1967) (presumption of sanity); Child v. Wainwright, 148 So. 2d 526 (Fla. 1963) (same).

108 King v. State, 387 So. 2d 463 (Fla. 1st DCA 1980); see, Fla. Jur. 2d, Criminal Law § 1562.


111 § 985.19(1), Fla. Stat.; see, M.A. v. State, 964 So. 2d 831 (Fla. 4th DCA 2007).

recitation of the observations of and statements of the defendant that have caused the state to file the motion.\textsuperscript{113}

If the defendant has been released on bail or other release provision, the court may order the defendant to appear at a designated place for evaluation at a specific time as a condition of such release. If the court determines that the defendant will not submit to the evaluation or that the defendant is not likely to appear for the scheduled evaluation, the court may order the defendant taken into custody until the determination of the defendant’s competency to proceed. A motion made for evaluation under Rule 3.210(b) will not otherwise affect the defendant’s right to release.\textsuperscript{114}

The order appointing experts is required to: (1) identify the purpose or purposes of the evaluation, including the nature of the material proceeding, and specify the area or areas of inquiry that should be addressed by the evaluator;\textsuperscript{115} (2) specify the legal criteria to be applied;\textsuperscript{116} and (3) specify the date by which the report should be submitted and to whom the report should be submitted.\textsuperscript{117}

\textbf{§ 8.1. Scope of examination and report}

Upon appointment by the court, the experts are required to examine the defendant with respect to the issue of competence to proceed, as specified by the court in its order appointing the experts to evaluate the defendant, and must evaluate the defendant as ordered.\textsuperscript{118} The experts are required to first consider factors related to the issue of whether the defendant meets the criteria for competence to proceed; that is, whether the defendant has sufficient present ability to consult with counsel with a reasonable degree of rational understanding and whether the defendant has a rational, as well as factual, understanding of the pending proceedings.\textsuperscript{119} In considering the issue of competence to proceed, the examining experts must consider and include in their report the defendant’s capacity to: appreciate the charges or allegations against the defendant; appreciate the range and nature of possible penalties, if applicable, that may be imposed in the proceedings against the defendant; understand the adversary nature of the legal process; disclose to counsel facts

\textsuperscript{113}Fla. R. Crim. P. 3.210(b)(2).

\textsuperscript{114}Fla. R. Crim. P. 3.210(b)(3).


\textsuperscript{116}Fla. R. Crim. P. 3.210(b)(4)(B).

\textsuperscript{117}Fla. R. Crim. P. 3.210(b)(4)(C).

\textsuperscript{118}Fla. R. Crim. P. 3.211(a).

\textsuperscript{119}Fla. R. Crim. P. 3.211(a)(1).
pertinent to the proceedings at issue; manifest appropriate courtroom behavior; testify relevantly; and any other factors deemed relevant by the experts.120

If the experts should find that the defendant is incompetent to proceed, the experts shall report on any recommended treatment for the defendant to attain competence to proceed. In considering the issues relating to treatment, the examining experts shall report on: (1) the mental illness or mental retardation causing the incompetence;121 (2) the treatment or treatments appropriate for the mental illness or mental retardation of the defendant and an explanation of each of the possible treatment alternatives in order of choices;122 (3) the availability of acceptable treatment and, if treatment is available in the community, the expert must so state in the report;123 and (4) the likelihood of the defendant attaining competence under the treatment recommended, an assessment of the probable duration of the treatment required to restore competence, and the probability that the defendant will attain competence to proceed in the foreseeable future.124 If a notice of intent to rely on the defense of insanity has been filed prior to trial or a hearing on a violation of probation or community control, and when so ordered by the court, the experts are required to report on the issue of the defendant’s sanity at the time of the offense.125

Any written report submitted by the experts is required to: (1) identify the specific matters referred for evaluation;126 (2) describe the evaluative procedures, techniques, and tests used in the examination and the purpose or purposes for each;127 (3) state the expert’s clinical observations, findings, and opinions on each issue referred for evaluation by the court, and indicate specifically those issues, if any, on which the expert could not give an opinion;128 and (4) identify the sources of information used by the expert and present the factual basis for the expert’s clinical findings and opinions.129

120 Fla. R. Crim. P. 3.211(a)(2).
121 Fla. R. Crim. P. 3.211(b)(1).
122 Fla. R. Crim. P. 3.211(b)(2).
123 Fla. R. Crim. P. 3.211(b)(3).
125 Fla. R. Crim. P. 3.211(c).
126 Fla. R. Crim. P. 3.211(d)(1).
127 Fla. R. Crim. P. 3.211(d)(2).
The information contained in any motion by the defendant for determination of competency to proceed or in any report of experts filed under Rule 3.211 insofar as the report relates solely to the issues of competency to proceed and commitment, and any information elicited during a hearing on competency to proceed or commitment held pursuant to Rule 3.211, can be used only in determining the mental competency to proceed or the commitment or other treatment of the defendant.\(^{130}\) The defendant waives this provision by using the report, or portions thereof, in any proceeding for any other purpose, in which case disclosure and use of the report, or any portion thereof, is governed by applicable rules of evidence and rules of criminal procedure. If a part of the report is used by the defendant, the State may request the production of any other portion of that report that, in fairness, ought to be considered.\(^{131}\)

§ 8.2. Hearing and disposition

The experts preparing the reports may be called by either party or the court, and additional evidence may be introduced by either party. The experts appointed by the court must be deemed court witnesses whether called by the court or either party and may be examined as such by either party.\(^{132}\)

The court must first consider the issue of the defendant’s competence to proceed. If the court finds the defendant competent to proceed, the court must enter its order so finding and is required to proceed.\(^{133}\) Once a defendant is determined competent to stand trial, a presumption of competence attaches to the defendant in later proceedings, including post-trial proceedings.\(^{134}\) Another competency hearing is required, however, if a bona fide question as to the defendant’s competency has been raised.\(^{135}\)

Once a defendant has been found incompetent to proceed at trial, that defendant is presumed to remain incompetent until a court enters an order finding him or her competent.\(^{136}\) Where a pretrial determination results in a determination that the defendant is competent to stand trial, and defense counsel makes no objection thereto and does not move for a competency examination during trial, and after the trial the defendant is found incompetent for sentencing on the basis of new, post-trial

\(^{130}\)Fla. R. Crim. P. 3.211(e)(1).

\(^{131}\)Fla. R. Crim. P. 3.211(e)(2).

\(^{132}\)Fla. R. Crim. P. 3.212(a).

\(^{133}\)Fla. R. Crim. P. 3.212(b).

\(^{134}\)Durocher v. Singletary, 623 So. 2d 482 (Fla. 1993); see, Fla. Jur. 2d, Criminal Law § 1562.

\(^{135}\)Boyd v. State, 910 So. 2d 167 (Fla. 2005).

\(^{136}\)Delisa v. State, 910 So. 2d 418 (Fla. 4th DCA 2005); Samson v. State, 853 So. 2d 1116 (Fla. 4th DCA 2003); Blue v. State, 837 So. 2d 541 (Fla. 4th DCA 2003).
evaluations by experts, this does not indicate that the defendant was incompetent to stand trial after all.\textsuperscript{137} A judge cannot issue an order declaring the defendant competent \textit{sua sponte}: Once adjudicated incompetent, the legal status of a defendant cannot change from incompetent to competent without a hearing at which the defendant has the opportunity to call witnesses and introduce evidence.\textsuperscript{138} A presumptively incompetent defendant is not \textit{sui juris} until the court declares the defendant such, and when a defendant is not \textit{sui juris}, a defendant cannot waive his or her right to a competency hearing.\textsuperscript{139}

If the court finds the defendant is incompetent to proceed, or that the defendant is competent to proceed but that the defendant’s competence depends on the continuation of appropriate treatment for a mental illness or mental retardation, the court is required to consider issues relating to treatment necessary to restore or maintain the defendant’s competence to proceed.\textsuperscript{140} The court may order the defendant to undergo treatment if the court finds that the defendant is mentally ill or mentally retarded and is in need of treatment and that treatment appropriate for the defendant’s condition is available. If the court finds that the defendant may be treated in the community on bail or other release conditions, the court may make acceptance of reasonable medical treatment a condition of continuing bail or other release conditions.\textsuperscript{141} If the defendant is incarcerated, the court may order treatment to be administered at the custodial facility or may order the defendant transferred to another facility for treatment or may commit the defendant as provided in Fla. R. Crim. P. 3.212(c)(3).\textsuperscript{142}

A defendant may be committed for treatment to restore a defendant’s competence to proceed if the court finds that: (1) the defendant meets the criteria for commitment as set forth by statute;\textsuperscript{143} (2) there is a substantial probability that the mental illness or mental retardation causing the defendant’s incompetence will respond to treatment and that the defendant will regain competency to proceed in the reasonably foreseeable future;\textsuperscript{144} (3) treatment appropriate for restoration of the

\begin{footnotes}
\item[137]\textit{McKnight v. State}, 319 So. 2d 647 (Fla. 3d DCA 1975).
\item[138]\textit{Erickson v. State}, 965 So. 2d 294 (Fla. 5th DCA 2007); \textit{Jackson v. State}, 880 So. 2d 1241 (Fla. 1st DCA 2004); \textit{Sledge v. State}, 871 So. 2d 1020 (Fla. 5th DCA 2004); see also \textit{Molina v. State}, 946 So. 2d 1103 (Fla. 5th DCA 2006); \textit{Samson v. State}, 853 So. 2d 1116 (Fla. 4th DCA 2003); \textit{Blue v. State}, 837 So. 2d 541 (Fla. 4th DCA 2003).
\item[139]\textit{Delisa v. State}, 910 So. 2d 418 (Fla. 4th DCA 2005).
\item[140]Fla. R. Crim. P. 3.212(c).
\item[141]Fla. R. Crim. P. 3.212(c)(1).
\item[142]Fla. R. Crim. P. 3.212(c)(2).
\end{footnotes}
defendant’s competence to proceed is available;\textsuperscript{145} and (4) no appropriate treatment alternative less restrictive than that involving commitment is available.\textsuperscript{146} If the court commits the defendant, the order of commitment must contain: (1) findings of fact relating to the issues of competency and commitment addressing the factors set forth in Rule 3.211 when applicable;\textsuperscript{147} (2) copies of the reports of the experts filed with the court pursuant to the order of examination;\textsuperscript{148} (3) copies of any other psychiatric, psychological, or social work reports submitted to the court relative to the mental state of the defendant;\textsuperscript{149} and (4) copies of the charging instrument and all supporting affidavits or other documents used in the determination of probable cause.\textsuperscript{150}

The treatment facility must admit the defendant for hospitalization and treatment and may retain and treat the defendant. No later than six months from the date of admission, the administrator of the facility is required to file with the court a report that must address the issues and consider the factors set forth in Rule 3.211, with copies to all parties. If, at any time during the 6-month period or during any period of extended commitment that may be ordered pursuant to this rule, the administrator of the facility determines that the defendant no longer meets the criteria for commitment or has become competent to proceed, the administrator is required to notify the court by such a report, with copies to all parties.\textsuperscript{151}

If, during the six-month period of commitment and treatment or during any period of extended commitment that may be ordered pursuant to Rule 3.212, counsel for the defendant has reasonable grounds to believe that the defendant is competent to proceed or no longer meets the criteria for commitment, counsel may move for a hearing on the issue of the defendant’s competence or commitment. The motion is required to contain a certificate of counsel that the motion is made in good faith and on reasonable grounds to believe that the defendant is now competent to proceed or no longer meets the criteria for commitment. To the extent that it does not invade the attorney-client privilege, the motion must contain a recital of the specific observations of and conversations with the defendant that have formed the basis for the motion.\textsuperscript{152} Similarly, if, upon consideration of a motion filed by counsel for the defendant or the prosecuting attorney and any information offered the court in support thereof, the court has reasonable grounds to believe that the

\textsuperscript{145}Fla. R. Crim. P. 3.212(c)(3)(C).
\textsuperscript{146}Fla. R. Crim. P. 3.212(c)(3)(D).
\textsuperscript{147}Fla. R. Crim. P. 3.212(c)(4)(A).
\textsuperscript{148}Fla. R. Crim. P. 3.212(c)(4)(B).
\textsuperscript{149}Fla. R. Crim. P. 3.212(c)(4)(C).
\textsuperscript{150}Fla. R. Crim. P. 3.212(c)(4)(D).
\textsuperscript{151}Fla. R. Crim. P. 3.212(c)(5).
\textsuperscript{152}Fla. R. Crim. P. 3.212(c)(5)(A).
defendant may have regained competence to proceed or no longer meets the criteria for commitment, the court is required to order the administrator of the facility to report to the court on such issues, with copies to all parties, and must order a hearing to be held on those issues. ¹⁵³

The court is required to hold a hearing within 30 days of the receipt of any such report from the administrator of the facility on the issues raised thereby. If, following the hearing, the court determines that the defendant continues to be incompetent to proceed and that the defendant meets the criteria for continued commitment or treatment, the court must order continued commitment or treatment for a period not to exceed one year. When the defendant is retained by the facility, the same procedure must be repeated prior to the expiration of each additional one-year period of extended commitment. ¹⁵⁴ If, at any time after such commitment, the court decides, after hearing, that the defendant is competent to proceed, it must enter its order so finding and must proceed. ¹⁵⁵ A determination by the Department of Children and Families that a criminal defendant has regained competency is insufficient to change the defendant’s status. It is the trial court’s responsibility, after a hearing, to determine whether a defendant has regained competency in order to proceed. ¹⁵⁶ If, after any such hearing, the court determines that the defendant remains incompetent to proceed but no longer meets the criteria for commitment, the court must proceed as provided in Rule 3.212(d). ¹⁵⁷

Where, however, the parties and the judge agree, the Court may decide the issue of competence on the basis of the written reports of the experts. ¹⁵⁸ The parties may not, however, stipulate to the ultimate issue of competency, for that task is left expressly to the trial judge and that authority may not be delegated to the parties or their lawyers. ¹⁵⁹

If the court decides that a defendant is not mentally competent to proceed but does not meet the criteria for commitment, the defendant may be released on appropriate release conditions for a period not to exceed one year. The court may order that the defendant receive outpatient treatment at an appropriate local facility and that the defendant report for further evaluation at specified times during the release period as conditions of release. A report must be filed with the court after each

¹⁵⁴ Fla. R. Crim. P. 3.212(c)(6).
¹⁵⁵ Fla. R. Crim. P. 3.212(c)(7).
¹⁵⁶ Erickson v. State, 965 So. 2d 294 (Fla. 5th DCA 2007); Sledge v. State, 871 So. 2d 1020 (Fla. 5th DCA 2004).
¹⁵⁷ Fla. R. Crim. P. 3.212(c)(8).
¹⁵⁸ Fowler v. State, 255 So. 2d 513 (Fla. 1971).
¹⁵⁹ S.B. v. State, — So. 3d —, 2014 WL 836806 (Fla. 4th 2014).
evaluation by the persons appointed by the court to make such evaluations, with copies to all parties.\textsuperscript{160}

\section*{§ 8.3. Continuing incompetency to proceed, except incompetency to proceed with sentencing}

If at any time after five years following a determination that a person is incompetent to stand trial or proceed with a probation or community control violation hearing when charged with a felony, or one year when charged with a misdemeanor, the court, after hearing, determines that the defendant remains incompetent to stand trial or proceed with a probation or community control violation hearing, that there is no substantial probability that the defendant will become mentally competent to stand trial or proceed with a probation or community control violation hearing in the foreseeable future, and that the defendant does not meet the criteria for commitment, it must dismiss the charges against the defendant without prejudice to the State to refile the charges should the defendant be declared competent to proceed in the future.\textsuperscript{161} If the incompetency to stand trial or to proceed is due to retardation or autism, the court must dismiss the charges within a reasonable time after such determination, not to exceed two years for felony charges and one year for misdemeanor charges, unless the court specifies in its order the reasons for believing that the defendant will become competent within the foreseeable future and specifies the time within which the defendant is expected to become competent. The dismissal must be without prejudice to the State to refile should the defendant be declared competent to proceed in the future.\textsuperscript{162}

If at any time after five years following a determination that a person is incompetent to stand trial or proceed with a probation or community control violation hearing when charged with a felony, or one year when charged with a misdemeanor, the court, after hearing, determines that the defendant remains incompetent to stand trial or proceed with a probation or community control violation hearing, that there is no substantial probability that the defendant will become mentally competent to stand trial or proceed with a probation or community control violation hearing in the foreseeable future, and that the defendant does meet the criteria for commitment, the court must dismiss the charges against the defendant and commit the defendant to the Department of Children and Family Services for involuntary hospitalization or residential services solely under the provisions of law or may order that the defendant receive outpatient treatment at any other facility or service on an outpatient basis subject to the provisions of those statutes. In the order of commitment, the judge must order that the administrator of the facility notify the state attorney of the committing circuit no less than 30 days prior to the anticipated date of release of the defendant. If charges are dismissed pursuant to Rule 3.213(b)(1), the dismissal will be without prejudice to the State to refile the charges should the defendant be declared competent to proceed in the future.\textsuperscript{163} If the continuing

\begin{footnotesize}
\begin{enumerate}[\textsuperscript{160}]
\item Fl. R. Crim. P. 3.212(d).
\item Fl. R. Crim. P. 3.213(a)(1).
\item Fl. R. Crim. P. 3.213(a)(2).
\item Fl. R. Crim. P. 3.213(b)(1).
\end{enumerate}
\end{footnotesize}
incompetency is due to retardation or autism, and the defendant either lacks the ability to provide for his or her well-being or is likely to physically injure himself or herself, or others, the defendant may be involuntarily admitted to residential services as provided by law.\(^\text{164}\)

\section*{§ 8.4. Conditional release}

The committing court may order a conditional release of any defendant who has been committed according to a finding of incompetency to proceed based on an approved plan for providing appropriate outpatient care and treatment. When the administrator is required to determine outpatient treatment of the defendant to be appropriate, the administrator may file with the court, and provide copies to all parties, a written plan for outpatient treatment, including recommendations from qualified professionals. The plan may be submitted by the defendant. The plan must include: (1) special provisions for residential care, adequate supervision of the defendant, or both; (2) provisions for outpatient mental health services; and (3) if appropriate, recommendations for auxiliary services such as vocational training, educational services, or special medical care.

In its order of conditional release, the court must specify the conditions of release based on the release plan and must also direct the appropriate agencies or persons to submit periodic reports to the court regarding the defendant’s compliance with the conditions of the release, and progress in treatment, and provide copies to all parties.\(^\text{165}\)

If it appears at any time that the defendant has failed to comply with the conditions of release, or that the defendant’s condition has deteriorated to the point that inpatient care is required, or that the release conditions should be modified, the court, after hearing, may modify the release conditions or, if the court finds the defendant meets the statutory criteria for commitment, may order that the defendant be recommitted to the Department of Children and Family Services for further treatment.\(^\text{166}\) If at any time it is determined after hearing that the defendant no longer requires court-supervised follow-up care, the court shall terminate its jurisdiction in the cause and discharge the defendant.\(^\text{167}\)

\section*{§ 8.5. Civil commitment}

The basic rule also applies to civil commitment proceedings. A sexually violent predator has a state and federal procedural due process right to be competent in order to consult with counsel, assist counsel in challenging facts offered by the State that have not been previously admitted or tested in a trial, and testify on his own behalf in involuntary civil commitment proceedings under the

\[^\text{164}\] Fla. R. Crim. P. 3.213(b)(2).
\[^\text{165}\] Fla. R. Crim. P. 3.219(a).
\[^\text{166}\] Fla. R. Crim. P. 3.219(b).
\[^\text{167}\] Fla. R. Crim. P. 3.219(c).
Jimmy Ryce Act, sections 394.910 to 931, Fla. Stat., and the court may not proceed if the defendant has been determined to be mentally incompetent under the standards governing competency in criminal cases.\textsuperscript{168}

\section*{§ 9. Pleas\textsuperscript{169}}

Often, a criminal prosecution is terminated short of trial upon the entry of a plea by the defendant. A plea conference is a formal ceremony, under oath, memorializing a crossroads in the case. What is said and done at a plea conference carries consequences.\textsuperscript{170} The form of a plea is governed by Fla. R. Crim. P. 3.170. A defendant may plead (1) not guilty, (2) guilty, or, with the consent of the court, (3) \textit{nolo contendere} (no contest). Except as otherwise provided by the rules (e.g., pleas taken in chambers or in absentia), all pleas to a charge must be in open court and must be entered by the defendant. If the sworn complaint charges the commission of a misdemeanor, the defendant may plead guilty to the charge at the first appearance under Fla. R. Crim. P. 3.130, and the judge may thereupon enter judgment and sentence without the necessity of any further formal charges being filed; because the formal charging of a felony is by information or indictment, defendants may not plead to a felony at first appearance. A plea of not guilty may be entered in writing by counsel. Every plea must be entered of record, but a failure to enter it will not affect the validity of any proceeding in the cause.\textsuperscript{171}

A “guilty in best interest” plea is one in which the defendant does not admit guilt but does admit that there is sufficient evidence on which a conviction could be obtained.\textsuperscript{172} There is no federal constitutional right to have the court accept a guilty plea merely because it is in the “best interests” of the defendant to do so.\textsuperscript{173} A trial judge does not have to accept every constitutionally valid guilty plea merely because a defendant wishes so to plead and a defendant does not have an absolute right under the federal constitution to have his or her guilty plea accepted by the court, although the States may by statute or otherwise confer such a right. Likewise, the States may bar courts from accepting guilty pleas from any defendants who assert their innocence.\textsuperscript{174}

\begin{itemize}
\item \textsuperscript{168}\textit{In re Commitment of Camper}, 933 So. 2d 1271 (Fla. 2d DCA 2006).
\item \textsuperscript{169}A detailed explanation of pleas of guilty and \textit{nolo contendere} can be found at Michael E. Allen, Florida Criminal Procedure, Chapter 11, Vol. 22, West’s Florida Practice Series (2014 ed.).
\item \textsuperscript{170}\textit{Scheele v. State}, 953 So. 2d 782 (Fla. 4th DCA 2007).
\item \textsuperscript{171}Fla. R. Crim. P. 3.170(a).
\end{itemize}
The discretion provided by Fla. R. Crim. P. 3.172, governing the acceptance of guilty or *nolo contendere* pleas, hinges on express elements and, once those elements are satisfied, no residual discretion remains and the judge must accept the guilty plea. When the plea is knowing and voluntary, when there is a factual foundation to support it, when the State has agreed to it, then the discretion is ended and the plea must be accepted. This rule applies only to unconditional and unqualified guilty pleas, not to negotiated pleas where the State has agreed to a particular sentence or to the disposition of particular charges, or where the State opposes the plea.\(^{175}\) This means, for example, that a trial judge cannot refuse a concession to a judgment of guilt merely because the judge does not like “best interest” pleas. There is no residuum of discretion to insist that a defendant make a public acknowledgment of actual guilt before a plea of guilty is legally acceptable.\(^{176}\) Fla. R. App. P. 9.140 provides that “A defendant who pleads guilty or *nolo contendere* may expressly reserve the right to appeal a prior dispositive order of the lower tribunal, identifying with particularity the point of law being reserved.”\(^{177}\) A trial judge has wide discretion to refuse to accept an *Ashby*\(^{178}\) plea depending upon the trial judge’s perception of whether the issue to be reserved is dispositive of the case.\(^{179}\) Fla. R. Crim. P. 3.172 and Fla. R. App. P. 9.140 in combination mean that a trial court lacks discretion to refuse to accept a defendant’s open *nolo contendere* plea where the defendant in his or her plea reserves the right to appeal a question of law that is dispositive of the case, the plea identifies the particular issue the defendant seeks to reserve, the court and both parties agree that the issue is dispositive of the case, and the plea is knowing and voluntary, has an adequate factual foundation, and has been accepted by the State.\(^{180}\)

Jeopardy attaches once a trial court accepts a defendant’s plea.\(^{181}\) The trial court’s acceptance of a guilty or *nolo contendere* plea is a matter wholly within the trial court’s discretion, but when that discretion is exercised by a formal pronouncement that the plea is accepted, it is binding on the State and on the defendant, who is thereby placed in jeopardy. An acceptance of a plea has legal

\(^{175}\) Rigabar v. Broome, 658 So. 2d 1038 (Fla. 4th DCA 1995).

\(^{176}\) Rigabar v. Broome, 658 So. 2d 1038 (Fla. 4th DCA 1995).

\(^{177}\) Fla. R. App. P. 9.140(b)(2)(A)(i); see, State v. Ashby, 245 So. 2d 225 (Fla. 1971) (a defendant in a criminal case might plead no contest conditioned on the right to preserve for appellate review a question of law).

\(^{178}\) State v. Ashby, 245 So. 2d 225 (Fla. 1971).

\(^{179}\) Brown v. State, 376 So. 2d 382 (Fla. 1979).

\(^{180}\) Lamour v. State, 899 So. 2d 1256 (Fla. 4th DCA 2005).

significance, and once jeopardy has attached a court may not set aside a guilty or nolo contendere plea previously accepted without legal cause.\textsuperscript{182}

Having entered a plea in accordance with Fla. R. Crim. P. 3.172, the defendant may, with the court’s permission, enter a plea of guilty or nolo contendere to any and all charges pending against him or her in the State of Florida over which the court would have jurisdiction and, when authorized by law, to charges pending in a court of lesser jurisdiction, if the prosecutor in the other case or cases gives written consent thereto. The court accepting such a plea must make a disposition of all such charges by judgment, sentence, or otherwise. The record of the plea and its disposition must be filed in the court of original jurisdiction of the offense. If a defendant secures permission to plead to other pending charges and does so plead, the entry of such a plea constitutes a waiver by the defendant of venue and all nonjurisdictional defects relating to such charges.\textsuperscript{183}

The defendant, with the consent of the court and of the prosecuting attorney, may plead guilty to any lesser offense than that charged that is included in the offense charged in the indictment or information or to any lesser degree of the offense charged.\textsuperscript{184} When an indictment or information charges an offense that is divided into degrees without specifying the degree, if the defendant pleads guilty, generally the court shall, before accepting the plea, examine witnesses to determine the degree of the offense of which the defendant is guilty.\textsuperscript{185}

No defendant, whether represented by counsel or otherwise, may be called on to plead unless and until he or she has had a reasonable time within which to deliberate thereon.\textsuperscript{186} No plea of guilty or nolo contendere can be accepted by a court without the court first determining, in open court, with means of recording the proceedings stenographically or mechanically, that the circumstances surrounding the plea reflect a full understanding of the significance of the plea and its voluntariness and that there is a factual basis for the plea of guilty. A complete record of the proceedings at which a defendant pleads must be kept by the court.\textsuperscript{187} If a defendant stands mute, or pleads evasively, a

\textsuperscript{182} Sydoriak v. State, 947 So. 2d 1287 (Fla. 5th DCA 2007); Jupin v. State, 664 So. 2d 1031 (Fla. 2d DCA 1995); Johnson v. State, 460 So. 2d 954, at 957 (Fla. 5th DCA 1984); see also, State ex rel. Wilhoit v. Wells, 356 So. 2d 817, 822 (Fla. 1st DCA 1978) (“[T]he court cannot accept such a plea [of guilty or nolo contendere], thus binding the accused, and then reject the plea over the defendant’s objection, either as a matter of discretion or on some ground insufficient for the rejection of a guilty plea that has been accepted.”).

\textsuperscript{183} Fla. R. Crim. P. 3.170(b).

\textsuperscript{184} Fla. R. Crim. P. 3.170(h).

\textsuperscript{185} Fla. R. Crim. P. 3.170(i).

\textsuperscript{186} Fla. R. Crim. P. 3.170(j).

\textsuperscript{187} Fla. R. Crim. P. 3.170(k).
plea of not guilty must be entered by the presiding judge.\textsuperscript{188} If the defendant is a corporation and fails to appear, a plea of not guilty must be entered of record by the presiding judge.\textsuperscript{189}

A plea of not guilty is a denial of every material allegation in the indictment or information on which the defendant is to be tried.\textsuperscript{190} A plea of guilty or \textit{nolo contendere} entered by the defendant, or the alternative finding of guilt by the factfinder at trial, is the condition precedent to jurisdiction for the court to impose sentence for an open charge. The equivalents relative to violations of probation or community control are the defendant’s admission to the violation or the trial court’s finding of violation after evidentiary hearing. There are two recognized pleas in Florida criminal proceedings by which the defendant consents to sentencing by the court, guilty and \textit{nolo contendere} (no contest).

\section*{§ 9.1. Guilty plea}

A guilty plea is a full admission of the offense charged, and can be used as an admission in collateral criminal or civil proceedings. In entering a guilty plea a defendant admits the facts that underlie the offense: A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment.\textsuperscript{191} A plea of guilty thus serves as a stipulation that no proof by the prosecution need by advanced; it supplies both evidence and verdict, ending controversy.\textsuperscript{192} A plea of guilty forecloses direct appeal on any matter which occurred prior to entry of the plea.\textsuperscript{193} A defendant who pleads guilty may appeal only issues which occurred contemporaneously with the plea, and those issues include only subject matter jurisdiction, illegality of the sentence, failure of the government to abide by the plea agreement, and the voluntariness of the plea.\textsuperscript{194} An exception to this is an Alford plea, discussed supra, where a defendant pleads guilty without admitting guilt.

\begin{footnotesize}
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  \item \textsuperscript{188}Fla. R. Crim. P. 3.170(c).
  \item \textsuperscript{189}Fla. R. Crim. P. 3.170(d).
  \item \textsuperscript{190}Fla. R. Crim. P. 3.170(e).
  \item \textsuperscript{193}Robinson \textit{v. State}, 373 So. 2d 898 (Fla. 1979).
  \item \textsuperscript{194}Robinson \textit{v. State}, 373 So. 2d 898 (Fla. 1979).
\end{itemize}
\end{footnotesize}
Generally, the entry of a guilty plea will preclude a later double jeopardy attack on conviction or sentencing grounds.\(^\text{195}\) There is an exception to this general rule when (a) the plea is a general plea as distinguished from a plea bargain; (b) the double jeopardy violation is apparent from the record; and (c) there is nothing in the record to indicate a waiver of the double jeopardy violation.\(^\text{196}\) A general plea is one where no agreement exists as to the sentence the defendant will receive, while an agreement to a specific sentence or a specific sentencing benefit is a key element distinguishing a bargained plea agreement from a general one.\(^\text{197}\)

§ 9.2. *Nolo contendere* plea

A plea of *nolo contendere* or “no contest,” admits the facts for the purpose of the pending prosecution and to that extent is the same as a guilty plea insofar as it gives the court the power to punish.\(^\text{198}\) It cannot be used as an admission in collateral criminal or civil proceedings. The plea has been variously defined as an “implied confession,” a “mild form of pleading guilty,” a “substitute for a guilty plea,” a “query directed to the court to decide the defendant’s guilt,” and a “compromise between the government and the defendant.”\(^\text{199}\) While the generally accepted rule is that the defendant waives all formal defects in the proceedings by his or her *nolo* plea, substantive defects are not cured by entry of the plea.\(^\text{200}\) The classic instances warranting withdrawal of the plea involve force, fear, fraud, and inadvertence or mistake.\(^\text{201}\) If some inherent fatal defect is apparent in the record, the court is authorized to strike the plea on its own motion “in order to protect the defendant against his own ignorance.”\(^\text{202}\)

§ 9.3. Procedures for the acceptance of guilty or *nolo contendere* pleas

Procedures for the entry and acceptance of guilty or *nolo contendere* pleas are governed by Fla. R. Crim. P. 3.172. Before accepting a plea of guilty or *nolo contendere*, the trial judge must be

\(^{195}\) *Labovick v. State*, 958 So. 2d 1065 (Fla. 4th DCA 2007); *Godfrey v. State*, 947 So. 2d 565 (Fla. 1st DCA 2006).

\(^{196}\) *Novaton v. State*, 634 So. 2d 607, 609 (Fla. 1994).

\(^{197}\) *Williamson v. State*, 859 So. 2d 553, 554 (Fla. 1st DCA 2003).


\(^{199}\) See, *Hoover v. State*, 511 So. 2d 629 (Fla. 1st DCA 1987) at n.10.

\(^{200}\) 89 A.L.R.2d at 553, 593.

\(^{201}\) *U.S. v. Shneer*, 194 F.2d 598 (3d Cir. 1952); 89 A.L.R.2d at 576–78.

\(^{202}\) See, e.g., *State v. Page*, 112 Vt. 326, 24 A.2d 346 (1942), in which the appellate court affirmed the trial court’s action in striking a *nolo contendere* plea to a charge of violating an invalid city ordinance, commending the trial court for shielding the accused from the consequences of an illegal prosecution.
satisfied that the plea is voluntarily entered and that there is a factual basis for it.\textsuperscript{203} The Florida Supreme Court has observed that the purpose of this requirement is “to ensure that the facts of the case fit the offense with which the defendant is charged” and “to avoid a defendant’s mistakenly entering a plea of guilty to the wrong offense.”\textsuperscript{204} The court noted that “a plea may meet the test of voluntariness, knowledge and understanding of the consequences, yet still be inaccurate,” and that the normal consequence of a determination that there is not a factual basis for the plea would be for the court to set it aside.\textsuperscript{205} Counsel for the prosecution and the defense are required to assist the trial judge in this function.\textsuperscript{206}

The court may satisfy itself by statements and admissions made by the defendant, his counsel, and the prosecutor; by factual evidence heard or filed in the cause, \textit{i.e.} preliminary hearings, motions to suppress, or depositions taken in the cause. Under appropriate circumstances, the presentence investigation report may be used to present this factual information to the trial court. These are not the exclusive means for a trial court to reach a determination. The trial court is free to utilize whatever procedure is best for the particular case before it to ensure that the defendant is entering a plea to the proper offense under the facts of the case. But whatever method is employed, the court should indicate for the record the source of the factual information supporting the plea.\textsuperscript{207} A stipulation to the factual basis with no factual basis in the record is insufficient.\textsuperscript{208}

All pleas have to be taken in open court, except that when good cause is shown a plea may be taken \textit{in camera}.\textsuperscript{209} Except when a defendant is not present for a plea, pursuant to the provisions of Fla. R. Crim. P. 3.180(d), dealing with misdemeanor trials in absentia, the trial judge is encouraged, when determining voluntariness, to place the defendant under oath and is required, pursuant to Fla. R. Crim. P. 3.172(c), to address the defendant personally and determine that the defendant understands: (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; (2) if the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding against him or her and, if necessary, one will be appointed to represent him or her; (3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made and that the defendant has the right to be tried by a jury and

\begin{enumerate}
\item \textsuperscript{203} Fla. R. Crim. P. 3.172(a).
\item \textsuperscript{204} \textit{Williams v. State}, 316 So. 2d 267, 271–72 (Fla. 1975).
\item \textsuperscript{205} \textit{Williams v. State}, 316 So. 2d 267, 271–72 (Fla. 1975).
\item \textsuperscript{206} Fla. R. Crim. P. 3.172(a).
\item \textsuperscript{207} \textit{State v. Sion}, 942 So. 2d 934 (Fla. 3d DCA 2006).
\item \textsuperscript{208} \textit{Young v. State}, 935 So. 2d 1263 (Fla. 2d DCA 2006); \textit{Jones v. State}, 846 So. 2d 1224, 1225 (Fla. 2d DCA 2003) (citing \textit{Koenig v. State}, 597 So. 2d 256, 258 (Fla. 1992)).
\item \textsuperscript{209} Fla. R. Crim. P. 3.172(b).
\end{enumerate}
at that trial has the right to the assistance of counsel, the right to compel attendance of witnesses on
his or her behalf, the right to confront and cross-examine witnesses against him or her, and the right
not to be compelled to incriminate himself or herself; (4) that if the defendant pleads guilty, or nolo
contendere without express reservation of the right to appeal, he or she gives up the right to appeal
all matters relating to the judgment, including the issue of guilt or innocence, but does not impair
the right to review by appropriate collateral attack; (5) that if the defendant pleads guilty or is
adjudged guilty after a plea of nolo contendere there will not be a further trial of any kind, so that
by pleading guilty or nolo contendere he or she waives the right to a trial; (6) that if the defendant
pleads guilty or nolo contendere, the trial judge may ask the defendant questions about the offense
to which he or she has pleaded, and if the defendant answers these questions under oath, on the
record, and in the presence of counsel, the answers may later be used against him or her in a
prosecution for perjury; (7) the complete terms of any plea agreement, including specifically all
obligations the defendant will incur as a result; (8) that if he or she pleads guilty or nolo contendere
the trial judge must inform him or her that, if he or she is not a United States citizen, the plea may
subject him or her to deportation pursuant to the laws and regulations governing the United States
Immigration and Naturalization Service;\footnote{210} and (9) that if the defendant pleads guilty or nolo contendere, and the offense to which the defendant is pleading is a sexually violent offense or a
sexually motivated offense, or if the defendant has been previously convicted of such an offense, the
plea may subject the defendant to involuntary civil commitment as a sexually violent predator upon
completion of his or her sentence.\footnote{211}

The provisions of Rule 3.172(c) providing for the determination of voluntariness are
mandatory, and must be strictly adhered to ensure a valid plea and sentence. \textit{Ad hoc} colloquies that
fail to mention all of the matters raised in the rule are generally inadequate.\footnote{212} A written plea
agreement also cannot substitute for the on-the-record colloquy called for by the rule.\footnote{213}

The express reservation of the right to appeal of Fla. R. Crim. P. 3.172(c)(4) is not absolute.
The Florida Supreme Court has held that a defendant in a criminal case might plead no contest
conditioned on the right to preserve for appellate review a question of law, with the trial court having
wide discretion in the determination of whether or not a given issue is dispositive.\footnote{214} The court
subsequently narrowed this view, however, holding that “an Ashby nolo plea is permissible only

\footnote{210}It is not necessary for the trial judge to inquire as to whether the defendant is a United States citizen, as
this admonition is required to be given to all defendants in all cases.

\footnote{211}It is not necessary for the trial judge to determine whether the present or prior offenses were sexually
motivated in this respect, as this admonition must be given to all defendants in all cases.


\footnote{214}\textit{State v. Ashby}, 245 So. 2d 225 (Fla. 1971).
when the legal issue to be determined on appeal is dispositive of the case.”

The Court explained its ruling as follows:

The practice of allowing an appeal after a plea of *nolo contendere* is grounded upon the belief that “it expedites resolution of the controversy and narrows the issues to be resolved.” These purposes are poorly served and, indeed, thwarted when a defendant is permitted to appeal nondispositive pretrial rulings. Instead of expediting resolution of the controversy, the procedure prolongs litigation by sanctioning, in effect, an interlocutory appeal. Because of the nondispositive nature of the appeal, the defendant faces the prospect of a trial even if he prevails on appeal. The inevitable is not avoided but merely postponed, thus further burdening the already severely taxed resources of our courts. The more logical and efficient procedure to follow in this situation is to proceed to trial and fully ventilate all of the issues. In this way the matter will reach the appellate court in a familiar posture and with a full record upon which to base an intelligent decision.

Thus, conditional no-contest (*nolo*) pleas may be entered and accepted only when it is clear that, regardless of the outcome of the appeal, there will be no trial. Once the defendant has identified the particular issue he or she seeks to reserve, and the court and the parties agree that it is dispositive of the case, *i.e.*, regardless of the result of the appeal, no trial will be necessary, the trial court cannot insist that the defendant enter a guilty plea and thereby give up his or her right to appeal.

Before the trial judge accepts a guilty or *nolo contendere* plea, the judge must determine that the defendant either (1) acknowledges his or her guilt or (2) acknowledges that he or she feels the plea to be in his or her best interest, while maintaining his or her innocence. Note that Fla. R. Crim. P. 3.172(d) allows for pleas of convenience or best interests where the defendant simply acknowledges that the uncertain risk of trial on additional and more serious charges compels him to accept conviction and punishment even while maintaining innocence. The United States Supreme Court has approved acceptance of such pleas of convenience, also known as *Alford* pleas. A judge

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215 Brown v. State, 376 So. 2d 382, 384 (Fla. 1979).

216 Brown v. State, 376 So. 2d 382 (Fla. 1979) at 384.

217 Vaughn v. State, 711 So. 2d 64 (Fla. 1st DCA 1998) (defendant was not entitled to plead no contest conditioned on right to appeal denial since her motion to suppress was not dispositive).

218 Lamour v. State, 899 So. 2d 1256 (Fla. 4th DCA 2005).

219 Fla. R. Crim. P. 3.172(d).

cannot refuse a concession to a judgment of guilt merely because the trial judge does not like “best interest” *Alford* pleas. There is no residuum of discretion to insist that a defendant make a public acknowledgment of actual guilt before a plea of guilty is legally acceptable. When the plea is knowing and voluntary, when there is a factual foundation to support it, when the State has agreed to it, then the discretion has ended and the plea must be accepted.²²¹

The proceedings at which a defendant pleads guilty or *nolo contendere* are required to be of record.²²² No plea offer or negotiation is binding until it is accepted by the trial judge formally after making all the inquiries, advisements, and determinations required by Rule 3.172. Until that time, it may be withdrawn by either party without any necessary justification.²²³ If the trial judge does not concur in a tendered plea of guilty or *nolo contendere* arising from negotiations, the plea may be withdrawn.²²⁴ Except as otherwise provided in Rule 3.172, evidence of an offer or a plea of guilty or *nolo contendere*, later withdrawn, or of statements made in connection therewith, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.²²⁵ Failure to follow any of the procedures in Rule 3.172 does not render a plea void absent a showing of prejudice.²²⁶

§ 9.4. Pleas and sentencing in absentia

Fla. R. Crim. P. 3.180 governs the presence of defendants in prosecution proceedings. The defendant is required to be present, *inter alia*, at the pronouncement of judgment and the imposition of sentence.²²⁷ An exception contained within this rule is that persons prosecuted for *misdemeanors* may, at their own request, by leave of court, be excused from attendance at any and all proceedings.²²⁸ This means that persons charged with misdemeanors may, at their request and with the court’s permission, be tried and sentenced in absentia.

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²²¹*Rigabar v. Broome*, 658 So. 2d 1038 (Fla. 4th DCA 1995).

²²²Fla. R. Crim. P. 3.172(e).

²²³Fla. R. Crim. P. 3.172(f).

²²⁴Fla. R. Crim. P. 3.172(g).

²²⁵Fla. R. Crim. P. 3.172(h).

²²⁶Fla. R. Crim. P. 3.172(i).


²²⁸Fla. R. Crim. P. 3.180(d).
A defendant cannot be sentenced in absentia under Rule 3.180 for a felony. A felony defendant may, however, be sentenced in absentia if he or she voluntarily absented himself or herself from the sentencing hearing.

A defendant has a broad constitutional right—which he or she can waive by voluntary absence—to be present at the stages of his or her trial where fundamental fairness might be thwarted by his or her absence. Sentencing is a critical stage in a criminal prosecution, and defendant has a right to be present at the pronouncement of judgment and the imposition of sentence, whether the sentence to be imposed is the immediate result of adjudication of guilt after trial or revocation hearing, a successful motion to vacate sentence, the result of a successful Rule 3.850 challenge, or to impose restitution. An exception to the requirement that defendant be present at imposition of sentence is made in resentencing cases where all that is required on remand is a ministerial act of sentence correction. When a convicted defendant voluntarily flees from the sentencing and remains away while the court pronounces sentence in his or her absence, in the absence of any direct

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229 *Leone v. State*, 643 So. 2d 1198 (Fla. 5th DCA 1994) (rule that defendant charged with a misdemeanor may be tried in absentia does not apply to defendant charged with a felony).

230 See, *Singletary v. State*, 870 So. 2d 851 (Fla. 3d DCA 2003) (remand required to determine if defendant voluntarily absented himself from hearing where he was sentenced in absentia); *Zuluaga v. State*, 793 So. 2d 60 (Fla. 4th DCA 2001) (same); *Aguiar v. State*, 633 So. 2d 557 (Fla. 3d DCA 1994) (trial court had authority to sentence defendant in absentia where defendant voluntarily absented himself during progress of trial without leave of court, thereby waiving opportunity of learning the sentencing date that was set once defendant had been found guilty); *Capuzzo v. State*, 596 So. 2d 438 (Fla. 1992) (defendant who voluntarily failed to attend his scheduled sentencing hearing could be sentenced in absentia).

231 *Papageorge v. State*, 710 So. 2d 53 (Fla. 4th DCA 1998).

232 *Aguiar v. State*, 633 So. 2d 557 (Fla. 3d DCA 1994).

233 *Dougherty v. State*, 785 So. 2d 1221 (Fla. 4th DCA 2001); *Barcelo v. State*, 774 So. 2d 895 (Fla. 4th DCA 2001); *State v. Scott*, 439 So. 2d 219, 221 (Fla. 1983); see also, *Jackson v. State*, 767 So. 2d 1156, 1160 (Fla. 2000); *Brice v. State*, 770 So. 2d 740 (Fla. 4th DCA 2000); *Summerall v. State*, 588 So. 2d 31 (Fla. 3d DCA 1991) (pronouncement of verdict and sentence in criminal trial or probation revocation hearing is critical stage of proceedings at which defendant is entitled to be present, absent voluntary waiver of his or her presence).

234 *Miller v. State*, 833 So. 2d 318 (Fla. 2d DCA 2003) (it is error for a trial court to conduct a restitution hearing in the defendant’s absence without a showing that the absence is voluntary); *Papageorge v. State*, 710 So. 2d 53 (Fla. 4th DCA 1998).

235 *Kiely v. State*, 884 So. 2d 95 (Fla. 2d DCA 2004) (Defendant did not have right to be present at hearing at which his sentences were corrected, where trial court merely performed ministerial function of imposing sentences that had already been pronounced); *Davis v. State*, 800 So. 2d 336 (Fla. 4th DCA 2001) (An exception to presentencing rule’s mandate that criminal defendants be present at the pronouncement of judgment and the imposition of sentence is made in re-sentencing cases where all that is required on remand is a ministerial act of sentence correction); *Dougherty v. State*, 785 So. 2d 1221 (Fla. 4th DCA 2001).
appeal from the sentencing or other legal circumstance resulting in a tolling, the time for seeking
relief from the sentence under Rule 3.850 begins to run from the pronouncement. 236

§ 9.5. Withdrawal of plea

When a negotiated plea agreement cannot be honored, the defendant must be afforded an
opportunity to withdraw his or her plea and the trial court has an affirmative duty to so advise the
defendant. 237 When a defendant moves to withdraw his or her plea, the court should be liberal in
exercising its discretion to permit the withdrawal, especially where it is shown that the plea was
based on a failure of communication or a misunderstanding of the facts or law. 238 The underlying
principle is that the defendant should not be penalized for an honest misunderstanding or deliberate
misrepresentation to him or her by defense counsel, and that the ends of justice will best be served
by allowing the defendant to withdraw his or her plea. 239

In particular, when a defendant has entered into an agreement with the State for a specified
sentence in accordance with Rule 3.171(b)(1)(A)(iii), if the State fulfills its promise but the trial
court declines to honor the agreement, the defendant is entitled to withdraw his or her plea.
Where, however, the State fulfills its promise to make a nonbinding recommendation under Rule
3.171(b)(1)(A)(ii), and the trial court declines to sentence the defendant in accordance with that
recommendation, the defendant has no recourse under Rule 3.170(l) because there is no breach of
the agreement. On the other hand, when the State fails to honor a plea agreement, whether it
involves a negotiated plea for a specified sentence or a promise to make a nonbinding
recommendation, the violation of the agreement is akin to a breach of contract for which the
defendant is entitled to seek a remedy. 240

Ordinarily, newly-discovered evidence or a newly-available witness cannot constitute a
ground for withdrawing a plea prior to sentencing since it in no sense relates to whether the plea was
entered freely and voluntarily with full knowledge of its consequences or was induced by some
improper influence. Only upon a showing that the ends of justice would be served can newly
discovered evidence constitute a basis for withdrawing such pleas prior to sentencing. Such a
showing should be reserved to those cases where evidence or a witness has been uncovered

236 Springer v. State, 958 So. 2d 389 (Fla. 4th DCA 2007).

237 Ritchie v. State, 458 So. 2d 877 (Fla. 2d DCA 1984) (fundamental fairness required that defendant be
allowed to withdraw his plea when he was not apprised of the trial court’s inability to ensure compliance with
condition of his plea bargain which was of obvious importance in his decision to plead).

238 See, Jolly v. State, 392 So. 2d 54 (Fla. 5th DCA 1981) (when plea negotiations were based on material
mistake of law, plea was invalid and no legal sentence could be imposed; remedy was not to correct sentence, but,
rather, to set aside plea and reinstitute charges pending against defendant prior to invalid plea).

239 Tobey v. State, 458 So. 2d 90 (Fla. 2d DCA 1984); Brown v. State, 245 So. 2d 41 (Fla. 1971).

240 See, O’Berry v. State, 114 So. 3d 1110 (Fla. 2d DCA 2013).
subsequent to the plea which raises a substantial question as to the guilt or innocence of the defendant. 241

The opportunity to withdraw a plea is an all-or-nothing proposition. The defendant must elect to either entirely withdraw his or her plea or to not withdraw it at all. Where the defendant is facing multiple charges, he or she may not elect to withdraw from only a portion of the plea affecting one or another of the charges against him or her. The rule is that the defendant should not be permitted to renege on one portion of his or her agreement with impunity, and to afford the defendant this opportunity to withdraw from sentences on certain counts while retaining the benefit of the remainder would be to rewrite the agreement between the parties to the defendant’s distinct advantage. 242

When the defendant conceals or fails to disclose information material to the impending sentence, the defendant is not allowed to enforce the agreement, but neither is the court allowed, under such circumstances, to impose a sentence greater than that which the court stated it would impose or which was agreed upon. Instead, in the absence of prejudice to the State, the defendant must be permitted to withdraw his or her plea and proceed to trial. This is true notwithstanding that the defendant made the bargain without disclosing prior convictions or other information material to an impending sentence not yet discovered by the authorities, where the trial court determines to impose a sentence greater than that agreed upon. 243 There is no mistake or misunderstanding sufficient to support withdrawal of a plea if the defendant agrees to a plea bargain knowing, but not disclosing, a prior record additional to that known by the authorities at the entry of the plea, if no sentence has been specified. 244

A defendant does not have a right to withdraw his or her plea when the agreement with the State is for a sentencing recommendation that is not binding on the court and the sanctions imposed by the court at sentencing are not consistent with the defendant’s expectations. 245 Under Goins v.

241 Berry v. State, 106 So. 3d 500 (Fla. 4th DCA 2013).

242 See, Quintana v. State, 917 So. 2d 991 (Fla. 3d DCA 2005); Williams v. State, 650 So. 2d 1054 (Fla. 1st DCA 1995); Boatwright v. State, 637 So. 2d 353 (Fla. 1st DCA 1994).

243 Goldberg v. State, 536 So. 2d 364 (Fla. 2d DCA 1988) (plea agreement entered into upon defendant’s false representation that he had no substantial prior record; after presentence investigation revealed substantial prior record that precluded the agreed-upon sentence, defendant should have been informed that he could withdraw his plea before being subjected to sentence greater than what had been previously negotiated); Williams v. State, 448 So. 2d 1236 (Fla. 1st DCA 1984); Ben v. State, 440 So. 2d 501 (Fla. 2d DCA 1983).

244 Johnson v. State, 547 So. 2d 238 (Fla. 1st DCA 1989); Goff v. State, 498 So. 2d 1035 (Fla. 1st DCA 1986) (denial of motion to withdraw plea was proper where defendant objected to guidelines sentence as being greater than his own informal calculation, as calculation was due to defendant’s failure to tell counsel about his prior record, where the condition of his plea was “a guidelines sentence” with no specific term mentioned).

245 J.A.N. v. State, 947 So. 2d 1258 (Fla. 5th DCA 2007); Lepper v. State, 451 So. 2d 1020 (Fla. 1st DCA 1984).
State,\textsuperscript{246} in cases involving an open plea to the bench, with only a state recommendation, the plea is clearly binding as long as the defendant knows that the judge can impose any legal sentence. In those cases, the defendant cannot withdraw his or her plea based upon dissatisfaction with the ultimate sentence. However, where the State enters into a plea bargain involving an “agreed” sentence, the trial court cannot simply take the plea and impose a greater sentence. If it appears that the trial judge has concluded before accepting the plea that he or she is not comfortable with the agreed sentence in a plea agreement case, the court has several options that would not run afoul of the rule in \textit{Goins}. First, the court could go ahead and take the plea, impose the sentence, then allow the defendant to withdraw the plea if different from the agreed-upon sentence. Alternatively, the judge could inform the parties before accepting the plea that the plea deal is unacceptable, and explain to the defendant that he or she can either go to trial or enter an open plea to the court. If the defendant then decides to enter an open plea to the court, that plea would be binding and could not be withdrawn based upon displeasure with the sentence. Another alternative would be for the trial judge to allow the parties to negotiate a new deal. For example, the trial judge could indicate that he or she will not accept a plea agreement with such a short term of probation, but allow the parties time to negotiate an tender a new plea deal that increased the probationary sentence.\textsuperscript{247}

Fla. R. Crim. P. 3.170(f) governs the withdrawal of pleas \textit{before} sentencing, and provides that “[t]he court may in its discretion, and \textit{shall} upon good cause, at any time \textit{before a sentence}, permit a plea of guilty or no contest to be withdrawn and, if judgment of conviction has been entered thereon, set aside the judgment and allow a plea of not guilty, or, with the consent of the prosecuting attorney, allow a plea of guilty or no contest of a lesser included offense, or of a lesser degree of the offense charged, to be substituted for the plea of guilty or no contest” [emphasis added]. The burden is on the defendant to establish good cause under the rule, and the word “shall” indicates that such a showing entitles the defendant to withdraw a plea as a matter of right.\textsuperscript{248} Good cause is established where, for example, the defendant advises the court of his or her innocence, the existence of defense witnesses, and his or her motivation for entering the plea so to improve his or her chance of being sentenced as a youthful offender before the defendant learns of the court’s sentence, as opposed to the situation in which the defendant has learned of the court’s sentence and is displeased with the outcome.\textsuperscript{249} Another example of good cause would be a change in the law that increases the burdens on a defendant after a plea has been entered but before sentencing.\textsuperscript{250} The rule, however, should be liberally construed in favor of the defendant because the law inclines toward a trial on the merits and, where it appears that the interests of justice would be best served, a defendant should be permitted

\textsuperscript{246}Goins \textit{v. State}, 672 So. 2d 30 (Fla. 1996).

\textsuperscript{247}T.H. \textit{v. State}, 965 So. 2d 237 (Fla. 5th DCA 2007).

\textsuperscript{248}Yesnes \textit{v. State}, 440 So. 2d 628 (Fla. 1st DCA 1983).

\textsuperscript{249}See, \textit{Wright v. State}, 961 So. 2d 1036 (Fla. 4th DCA 2007).

\textsuperscript{250}Moraes \textit{v. State}, 967 So. 2d 1100 (Fla. 4th DCA 2007).
to withdraw the plea.\textsuperscript{251} The rule goes on to provide that the fact that a defendant may have entered a plea of guilty or no contest and later withdrawn the plea may not be used against the defendant in a trial of that cause.\textsuperscript{252}

A defendant who pleads guilty or \textit{nolo contendere} without expressly reserving the right to appeal a legally dispositive issue may file a motion to withdraw the plea within thirty days after rendition of the sentence pursuant to Fla. R. Crim. P. 3.170(l), but only upon the grounds specified in Fla. R. App. P. 9.140(b)(2)(A)(ii)(a) to (e),\textsuperscript{253} namely: (a) the lower tribunal’s lack of subject matter jurisdiction; (b) a violation of the plea agreement, if preserved by a motion to withdraw plea; (c) an involuntary plea, if preserved by a motion to withdraw plea; (d) a sentencing error, if preserved; or (e) as otherwise provided by law.\textsuperscript{254} Moreover, once sentence has been imposed, to withdraw a plea a defendant must demonstrate a manifest injustice requiring correction.\textsuperscript{255} A defendant who enters a plea of guilty or \textit{nolo contendere} and seeks to withdraw his or her plea after sentencing is required to file such a motion to withdraw the plea in order to preserve a claim that the plea was involuntary or that the sentence imposed was in violation of the plea agreement.\textsuperscript{256} Although Rule 3.170(l) does not expressly require the trial court to hold an evidentiary hearing on the motion, due process requires a hearing unless the record conclusively shows that the defendant is entitled to no relief.\textsuperscript{257}

A defendant is entitled to court-appointed counsel to advise and assist him or her in preparing his Rule 3.170(l) motion to withdraw his or her plea.\textsuperscript{258} Once it becomes clear that the defendant and his counsel have adversarial positions regarding what actually happened while counsel was advising the defendant concerning the plea, the defendant is entitled to conflict-free counsel, and the court must address the request for conflict-free counsel before addressing the substantive issues raised by

\begin{itemize}
  \item \textbf{251} \textit{Johnson v. State}, 460 So. 2d 954 (Fla. 5th DCA 1984), decision approved, 483 So. 2d 420 (Fla. 1986); \textit{State v. Herbert}, 99 Conn. App. 63, 913 A.2d 443 (2007); \textit{Smith v. State}, 840 So. 2d 404, 406 (Fla. 4th DCA 2003).
  \item \textbf{252} Fla. R. Crim. P. 3.170(f). Under the former version of the rule, a defendant was authorized to file a motion to withdraw a plea prior to sentencing whether the defendant had pled guilty or \textit{nolo contendere}, even though the wording of the rule did not specifically provide for withdrawal of a \textit{nolo contendere} plea prior to sentencing. See, \textit{Pope v. State}, 857 So. 2d 271 (Fla. 2d DCA 2003).
  \item \textbf{253} Fla. R. Crim. P. 3.170(l).
  \item \textbf{255} \textit{State v. Partlow}, 840 So. 2d 1040 (Fla. 2003).
  \item \textbf{256} See, Fla. R. Crim. P. 9.140(b)(2)(A) and 3.170(l).
  \item \textbf{257} \textit{Williams v. State}, 919 So. 2d 645 (Fla. 4th DCA 2006).
  \item \textbf{258} See, \textit{Mosley v. State}, 932 So. 2d 1239 (Fla. 1st DCA 2006); \textit{Banks v. State}, 927 So. 2d 169 (Fla. 1st DCA 2006); \textit{Norman v. State}, 897 So. 2d 553 (Fla. 1st DCA 2005); \textit{Smith v. State}, 849 So. 2d 485 (Fla. 2d DCA 2003); \textit{Meeks v. State}, 841 So. 2d 648 (Fla. 2d DCA 2003); \textit{Wofford v. State}, 819 So. 2d 891 (Fla. 1st DCA 2002); \textit{Padgett v. State}, 743 So. 2d 70 (Fla. 4th DCA 1999).\end{itemize}
the defendant’s motion to withdraw his or her plea.\textsuperscript{259} Such conflict necessitating the appointment of conflict-free counsel exists where, for example, a defendant seeks to withdraw his or her plea prior to sentencing, based on dissatisfaction with counsel’s representation, and counsel agrees that he or she cannot effectively advise the defendant.\textsuperscript{260} Providing a defendant with conflict-free counsel however does not necessarily require the trial court to conduct an evidentiary hearing.\textsuperscript{261}

A motion to withdraw plea under Fla. R. Crim. P. 3.170(l) must be filed within 30 days after rendition of sentence. The 30-day time period is jurisdictional. If the motion is not made within that time, the sentencing court is without jurisdiction to rule on the motion.\textsuperscript{262}

Where the defendant has filed his or her motion during the pendency of his or her direct appeal from the final judgment of conviction and sentence, the trial court lacks jurisdiction to consider or rule on the motion to withdraw plea.\textsuperscript{263} When a timely-filed motion to withdraw plea is pending, the final judgment of conviction is not deemed rendered if a notice of appeal is filed before the motion is decided. If a timely Rule 3.170(l) motion to withdraw plea after sentencing has been filed and notice of appeal is then filed before entry of an order disposing of such motion, the motion is not affected by the filing of notice of appeal from the judgment of guilt; the notice of appeal is treated as prematurely filed and the appeal is held in abeyance until the entry of an order disposing of such motion.\textsuperscript{264}

The trial court has an affirmative duty to permit a defendant to withdraw his or her plea when the court decides to impose a longer sentence than the sentence contemplated when the plea was entered.\textsuperscript{265} Manifest injustice occurs when a defendant enters a plea with the understanding that he or she would receive a suspended sentence of drug offender probation and, through no fault of his

\textsuperscript{259}See, \textit{Cooper v. State}, 956 So. 2d 1273 (Fla. 2d DCA 2007).

\textsuperscript{260} \textit{Harvey v. State}, 4 So. 3d 1266 (Fla. 5th DCA 2009).

\textsuperscript{261}See, \textit{Kelly v. State}, 925 So. 2d 383 (Fla. 4th DCA 2006) (upon the appointment of conflict-free counsel and the filing of the motion to withdraw, the trial court should then proceed to determine whether the state should respond and thereafter determine whether to summarily deny the motion to withdraw or hold an evidentiary hearing).

\textsuperscript{262} \textit{James v. State}, 12 So. 3d 1290 (Fla. 2d DCA 2009).

\textsuperscript{263}See, \textit{Huff v. State}, 937 So. 2d 258 (Fla. 3d DCA 2006); \textit{Sharp v. State}, 884 So. 2d 510, 512 (Fla. 2d DCA 2004).

\textsuperscript{264}Fla. R. App. P. 9.020(h)(3); see, \textit{Adams v. State}, 942 So. 2d 1024 (Fla. 4th DCA 2006).

\textsuperscript{265} \textit{Parker v. State}, 616 So. 2d 1121 (Fla. 1st DCA 1993); \textit{Rodriguez v. State}, 610 So. 2d 476 (Fla. 2d DCA 1992).
or her own, is subsequently sentenced to prison instead.  

A defendant should also be permitted to withdraw his or her plea if he or she proves that the plea was entered into under mental weakness, mistake, surprise, misapprehension, fear, promise, or other circumstance affecting his or her rights.  

A defendant who enters a plea to a nonexistent offense should also be allowed to withdraw his or her plea.  

When a defendant enters a plea with the understanding that the sentence he or she receives in exchange is legal, when in fact the sentence is not legal, the defendant should be given the opportunity to withdraw the plea when later challenging the legality of the sentence. 

A defendant’s post-sentence motion to withdraw plea may be denied without holding an evidentiary hearing on the motion where either the defendant makes no factual allegations or where factual allegations are made but are conclusively refuted by the record of the plea. 

The extent and quality of defense counsel advice preceding a plea is a significant determinant of whether a defendant meets his or her burden to withdraw a plea before or after sentencing. While defense counsel’s failure to inform a defendant of the collateral consequences of a plea may not render the plea involuntary, reasonable reliance on the attorney’s misadvice about collateral consequences can meet the “good cause” test for a pre-sentence withdrawal of plea, and if the attorney’s advice on such matters is measurably deficient in such circumstances a plea based on such deficient advice can be deemed involuntary. In order for the motion to be legally and factually sufficient, however, the defendant must plead that but for the misadvice of counsel he or she would not have entered his or her plea and would have instead insisted on going to trial, and the record must support this contention. A motion to withdraw plea is not legally or factually sufficient where, for example, the defendant does not make such an assertion and the record shows that the trial court made an incorrect finding of fact.

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266 *Griffin v. State*, 899 So. 2d 514 (Fla. 2d DCA 2005); *Lundgren v. State*, 581 So. 2d 206 (Fla. 1st DCA 1991) (defendant was entitled to withdraw his plea of guilty based on mistaken representations made by his attorney as to defendant’s entitlement to accrue gain time based on attorney’s conversations with Department of Corrections officials).

267 *Molina v. State*, 942 So. 2d 1036 (Fla. 2d DCA 2006) (misunderstanding of nature and scope of substantial assistance agreement); *Pope v. State*, 56 Fla. 81, 47 So. 487 (1908); *Johnson v. State*, 648 So. 2d 263 (Fla. 5th DCA 1994) (defendant entitled to withdraw plea on basis of his claim that he was unaware of his probationary status at time he entered plea).

268 *Coward v. State*, 547 So. 2d 990 (Fla. 1st DCA 1989).

269 *Williams v. State*, 934 So. 2d 632 (Fla. 5th DCA 2006).

270 *Wallace v. State*, 939 So. 2d 1123 (Fla. 3d DCA 2006); *Williams v. State*, 919 So. 2d 645 (Fla. 4th DCA 2006).

271 *Johnson v. State*, 971 So. 2d 212 (Fla. 4th DCA 2008); see, *State v. S.S.*, 40 So. 3d 6 (Fla. 4th DCA 2010).
carefully determined that no one had promised or advised the defendant of what his or her sentence would be.\textsuperscript{272}

\section*{§ 10. Plea negotiations}

Ultimate responsibility for sentence determination rests with the trial judge. However, the prosecuting attorney and the defense attorney, or the defendant when representing himself or herself, are encouraged to discuss and to agree on pleas that may be entered by a defendant. The discussion and agreement must be conducted with the defendant’s counsel. If the defendant represents himself or herself, all discussions between the defendant and the prosecuting attorney have to be of record.\textsuperscript{273}

A prosecuting attorney may, but is not required to, engage in discussions with defense counsel or a defendant who is without counsel with a view toward reaching an agreement that, upon the defendant’s entering a plea of guilty or \textit{nolo contendere} to a charged offense or a lesser or related offense, the prosecuting attorney will do any of the following: (1) abandon other charges; (2) make a recommendation, or agree not to oppose the defendant’s request for a particular sentence, with the understanding that such recommendation or request shall not be binding on the trial judge; or (3) agree to a specific sentence.\textsuperscript{274} A prosecuting attorney may also, but is not required to, consult with the victim, investigating officer, or other interested persons and advise the trial judge of their views during the course of plea discussions.\textsuperscript{275} The prosecuting attorney is required to apprise the trial judge of all material facts known to the attorney regarding the offense and the defendant’s background prior to acceptance of a plea by the trial judge,\textsuperscript{276} and maintain the record of direct discussions with a defendant who represents himself or herself and make the record available to the trial judge upon the entry of a plea arising from these discussions.\textsuperscript{277}

Defense counsel is not permitted to conclude any plea agreement on behalf of a defendant-client without the client’s full and complete consent thereto, being certain that any decision to plead guilty or \textit{nolo contendere} is made by the defendant.\textsuperscript{278} Defense counsel is also required to advise defendant of all plea offers and all pertinent matters bearing on the choice of

\begin{footnotesize}
\begin{enumerate}
\item[272] \textit{Alfred v. State}, 998 So. 2d 1197 (Fla. 4th DCA 2009).
\item[273] Fla. R. Crim. P. 3.171(a).
\item[278] Fla. R. Crim. P. 3.171(c)(1).
\end{enumerate}
\end{footnotesize}
which plea to enter and the particulars attendant upon each plea and the likely results thereof, as well as any possible alternatives that may be open to the defendant.  

After an agreement on a plea has been reached, the trial judge may have made known to him or her the agreement and reasons therefor prior to the acceptance of the plea. Thereafter, the judge is required to advise the parties whether other factors (unknown at the time) may make his or her concurrence impossible. The trial court cannot initiate a plea dialogue, but may participate in such discussions upon request of a party and once involved, the court may actively discuss potential sentences and comment on proposed plea agreements, so long as the court acts to minimize the potential coercive effect on the defendant, to retain the function of the judge as a neutral arbiter, and to preserve the public perception of the judge as an impartial dispenser of justice.

Specific limitations placed on judicial participation in the plea bargaining process include, but are not limited to, the following. First, the trial judge may participate in plea discussions upon the request of a party but must not initiate such discussions. Second, based on a preliminary evaluation of the information available at the time, the trial judge may state on the record the sentence which appears to be appropriate for the charged offense(s). However, if the trial judge later determines that the sentence to be imposed must exceed the preliminary evaluation, then the defendant who has pleaded guilty or no contest has an absolute right to withdraw the plea. Third, to avoid the potential for coercion, the trial judge must neither state nor imply alternative sentencing possibilities which hinge upon future procedural choices, such as the defendant exercising his right to trial. Fourth, all plea discussions involving the trial judge must be made on the record.

Judicial participation in plea negotiations in which the defendant rejects the court’s offer and elects to go to trial, followed by a harsher sentence upon conviction is, however, one of the circumstances that, along with other factors, are considered in determining whether there is a reasonable likelihood that the harsher sentence was imposed in retaliation for the defendant not pleading guilty and instead exercising his or her right to proceed to trial. The other factors that are considered include but are not limited to: (1) whether the trial judge initiated the plea discussions with the defendant in violation of State v. Warner; (2) whether the trial judge, through his or her comments on the record, appears to have departed from his or her role as an impartial arbiter by

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279 Fla. R. Crim. P. 3.171(c)(2).
280 Fla. R. Crim. P. 3.171(d).
281 Wilson v. State, 845 So. 2d 142 (Fla. 2003).
282 State v. Warner, 762 So. 2d 507 (Fla. 2000).
283 State v. Warner, 762 So. 2d 507 (Fla. 2000).
285 State v. Warner, 762 So. 2d 507 (Fla. 2000).
either urging the defendant to accept a plea, or by implying or stating that the sentence imposed would hinge on future procedural choices, such as exercising the right to trial; (3) the disparity between the plea offer and the ultimate sentence imposed; and (4) the lack of any facts on the record that explain the reason for the increased sentence other than that the defendant exercised his or her right to a trial or hearing.\textsuperscript{286}

\section*{§ 11. Plea agreements}

Often, criminal cases are resolved through an agreed-upon disposition between the defendant and the State, between the defendant and the trial court over the State’s objection, or among all three. There is, however, no constitutional right to plea bargain; the prosecutor need not plea bargain so if he or she prefers to go to trial.\textsuperscript{287}

A plea agreement is a contract and the rules of contract law are applicable to plea agreements.\textsuperscript{288} A party to a plea agreement may waive any right to which he or she is legally entitled under the Constitution, a statute, or a contract.\textsuperscript{289} The making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs-not on the parties having meant the same thing but on their having said the same thing.\textsuperscript{290} Where, for example, the plea is a result of negotiations, the defendant cannot file a motion to correct his or her sentence pursuant to Fla. R. Crim. P. 3.800(b)(2) on the basis of an erroneous scoresheet which led the defendant to believe that the negotiated sentence was close to the minimum when in fact it was much greater, because there is no basis for finding that the preparation of the scoresheet had any impact on the sentence.\textsuperscript{291} A defendant will not be relieved of an obligation that was included as a specific component of a plea agreement that was bargained for and voluntarily entered into by the defendant.\textsuperscript{292}

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\textsuperscript{286} Wilson \textit{v. State}, 845 So. 2d 142 (Fla. 2003); see also, \textit{Wilson v. State}, 951 So. 2d 1039 (Fla. 3d DCA 2007) (although the trial judge stopped short of affirmatively recommending that the defendant accept the plea offer, the judge’s statement “[y]ou either want it or you don’t” coupled with “[i]t’s the bottom of the guidelines” constituted judicial participation in plea negotiations).
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\textsuperscript{287} Weatherford \textit{v. Bursey}, 429 U.S. 545, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977); see also, \textit{McDowell v. State}, 789 So. 2d 956 (Fla. 2001); \textit{Fairweather v. State}, 505 So. 2d 653, 654 (Fla. 2d DCA 1987).
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\textsuperscript{288} \textit{State v. Frazier}, 697 So. 2d 944 (Fla. 3d DCA 1997).
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\textsuperscript{289} \textit{State, Dept. of Health and Rehabilitative Services v. E.D.S. Federal Corp.}, 631 So. 2d 353 (Fla. 1st DCA 1994).
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\textsuperscript{290} \textit{Schneir v. State}, 43 So. 3d 135 (Fla. 3d DCA 2010), citing \textit{Gendzier v. Bielecki}, 97 So. 2d 604, 608 (Fla. 1957).
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\textsuperscript{291} \textit{Ruff v. State}, 840 So. 2d 1145 (Fla. 5th DCA 2003); \textit{Poole v. State}, 777 So. 2d 1186 (Fla. 5th DCA 2001).
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\textsuperscript{292} \textit{Allen v. State}, 642 So. 2d 815 (Fla. 1st DCA 1994).
\end{flushright}
The stipulation to enter a plea cannot validly act as a plea without a contemporaneous plea colloquy indicating that the defendant knowingly, intelligently, and voluntarily waived his or her rights. The fact that an executory agreement is accepted by the court does not transform that executory agreement into a plea agreement due to the requirement that a plea to waive any constitutionally protected right must be knowingly, intelligently, and voluntarily entered into by the defendant with an adequate inquiry by the trial court. Thus a plea bargain, standing alone, is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest. It is the ensuing guilty plea that implicates the Constitution.

The trial court is not bound, in any event, by negotiations between the State and the defendant and can reject a disposition agreed to by the defendant and the State. When faced with a negotiated plea agreement, a trial court may not unilaterally impose additional conditions after it has formally accepted the plea agreement between the defendant and the State without the acquiescence of the defendant or the defendant’s counsel.

It is common practice for a sentencing court to take an “open” plea to an offense and to set off sentencing to a date certain with the promise that the incarcerative portion of the sentence will be capped at a certain level if the defendant appears at the appointed time and place with no new law violations in the interim, and the understanding that if the defendant fails to either appear on schedule or encumbers new law violations the court will be free to disregard the cap and impose any lawful sentence on the defendant. A plea bargain that includes a sentencing cap does not create a “statutory maximum” for the offenses before the court for sentencing. This means that a sentencing court can decide to sentence a defendant above the cap on the basis of facts found by that court (e.g., that the defendant violated the terms of the plea agreement), and the court does not have to empanel a jury pursuant to Blakely and Apprendi to find those facts before a greater sentence that does not exceed the statutory maximum can be imposed. Where the defendant does accept a plea offer from the court that includes a sentencing cap of a term of years in prison with no mention of probation or community control, the court is not free to impose a term of imprisonment followed by

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293 A.D.W. v. State, 777 So. 2d 1101 (Fla. 2d DCA 2001); see, D.V.L. v. State, 693 So. 2d 693 (Fla. 2d DCA 1997); Koenig v. State, 597 So. 2d 256 (Fla. 1992).

294 Mabry v. Johnson, 467 U.S. 504, 507–08, 104 S. Ct. 2543, 2546, 81 L. Ed. 2d 437 (1984); see also, State v. Vixamar, 687 So. 2d 300 (Fla. 4th DCA 1997).


296 Lewis v. State, 959 So. 2d 800 (Fla. 2d DCA 2007).


299 Mack v. State, 955 So. 2d 51 (Fla. 1st DCA 2007).
a term of probation where the combined length of the imprisonment and probation exceed the length of the sentence cap offered by the court and accepted by the defendant.\footnote{Pralle v. State, 60 So. 3d 556 (Fla. 5th DCA 2011); Echeverria v. State, 949 So. 2d 331 (Fla. 1st DCA 2007).}

Where a defendant violates a plea agreement that does not provide that the court can impose any lawful sentence upon noncompliance, the court is not free to so sentence the defendant summarily upon failure to abide by the terms of the agreement and must allow the defendant to withdraw his or her plea in lieu of resentencing.\footnote{Henson v. State, 977 So. 2d 736 (Fla. 2d DCA 2008).}

\textit{Modification}

Plea agreements are modifiable with the consent of the parties. Additional conditions may be imposed as a modification of the plea agreement only if those conditions have been clearly and unequivocally understood by and agreed to by the defendant and, if a party to the agreement, the State. If the defendant does not agree to the additional conditions unilaterally imposed by the trial court, the defendant has the right to withdraw his or her plea.\footnote{Lewis v. State, 959 So. 2d 800 (Fla. 2d DCA 2007).}

Similarly, where the court has accepted a plea agreement entered into between the defendant and the State that calls for a certain sentence, and the defendant has been sentenced in accordance with that agreement, the court is without jurisdiction thereafter to modify the sentence by reducing the sanctions agreed to without the consent of the State.\footnote{State v. Howell, 59 So. 3d 301 (Fla. 5th DCA 2011); State v. Swett, 772 So. 2d 48 (Fla. 5th DCA 2000).} Like an initial contract a modification or novation requires lawful consideration for its validity.\footnote{Schneir v. State, 43 So. 3d 135 (Fla. 3d DCA 2010), citing Newkirk Constr. Corp. v. Gulf County, 366 So. 2d 813 (Fla. 1st DCA 1979); Fla. Jur. 2d, Contracts § 207.} The rule that a promise to perform what one is already required to do by an existing contract or otherwise is not valid consideration\footnote{Schneir v. State, 43 So. 3d 135 (Fla. 3d DCA 2010), citing F.L. Stitt & Co. v. Powell, 94 Fla. 550, 114 So. 375 (1927); Slattery v. Wells Fargo Armored Service Corp., 366 So. 2d 157 (Fla. 3d DCA 1979); Fla. Jur. 2d, Contracts § 89.} applies directly to modification or novation of a plea agreement.\footnote{Schneir v. State, 43 So. 3d 135 (Fla. 3d DCA 2010), citing Davidpur v. Counne, 972 So. 2d 891, 892 (Fla. 3d DCA 2007) (“Counne presented no evidence at trial of any addition action she promised to do as consideration for the modification which she was not already bound to do. In light of these facts, Counne failed to prove her affirmative defense that there was a binding oral contract to modify ….”); see also, Blair v. Howard, 144 Fla. 421, 198 So. 80, 81 (1940).}
Severability

The terms of a plea agreement may be severable under certain conditions. Where, for example, timely appearance for sentencing is made a condition of a plea agreement, a nonwillful failure to appear is severable and will not vitiate the plea agreement such as to permit the court to impose a greater sentence. Where, for example, timely appearance for sentencing is made a condition of a plea agreement, a nonwillful failure to appear is severable and will not vitiate the plea agreement such as to permit the court to impose a greater sentence. Tardiness for sentencing where the defendant was given a specific date, place, and time to appear for sentencing as part of a plea agreement creates a situation in which the sentencing court can choose to sentence the defendant in accordance with the plea agreement or, where the tardiness is not _de minimis_ and is willful, disregard the sentence cap and impose any lawful sentence. Note that, while a 15 minute tardiness at the Broward County Courthouse is _de minimis_, a two-hour tardiness at the Palm Beach County Courthouse is not. In any event, additional punishment may not be added for tardiness in and of itself.

Mutual Mistake

A plea bargain is a contract which can be set aside for mutual mistake of material fact. Where mutual mistake of fact occurs, as where at the time of the plea both the State and the defendant are in error as to the minimum sentencing range and the defendant is sentenced to a term of imprisonment that is, in fact, below the true sentencing minimum, the court may re-sentence the defendant to the true minimum sentence and the defendant may withdraw his or her plea. If the defendant does withdraw his or her plea and is subsequently convicted after trial, the defendant may be sentenced to a sentence longer than the true minimum. Note that, in such situations, the court may not maintain the erroneous sentence once the error is brought to the court’s attention, as mutual mistake is not a lawful basis for a downward departure.

Impossibility of Performance

A plea bargain can also be set aside for frustration of purpose or impossibility of performance on the part of one or more of the parties to the agreement.

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307 _Orange v. State_, 983 So. 2d 4 (Fla. 3d DCA 2007) (failure to appear at sentencing due to incarceration in another state for violation of preexisting probation in that state); _Robinson v. State_, 946 So. 2d 565 (Fla. 2d DCA 2006) (failure to appear at sentencing allegedly due to flat tire).

308 _Eulo v. State_, 786 So. 2d 43 (Fla. 4th DCA 2001).

309 _Kuehl v. Bradshaw_, 954 So. 2d 653 (Fla. 4th DCA 2007); but see, _Navedo v. State_, 847 So. 2d 585 (Fla. 3d DCA 2003) (five hour and 50 minute tardiness for scheduled surrender date was _de minimis_ where defendant overslept).

310 See, _Amaya v. State_, 653 So. 2d 1112 (Fla. 3d DCA 1995).

311 _Handley v. State_, 890 So. 2d 529 (Fla. 2d DCA 2005).

312 _State v. Fulks_, 884 So. 2d 1083 (Fla. 2d DCA 2004).
Where, after a contract is made, a party’s performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.\(^{313}\)

Impossibility may discharge a contract when an unanticipated or unforeseeable event renders performance impossible or impracticable.\(^{314}\) A defense of impossibility is not allowed, however, where the supervening event might have been foreseen or anticipated.\(^{315}\)

**Specific Performance**

A trial court retains the authority to alter a prior plea arrangement up until the time sentence is imposed, so long as the trial court provides the defendant an opportunity to withdraw any plea that was entered in reliance on the promised sentence. It does not matter whether the judge simply changed his or her mind, or whether there was a misunderstanding: A defendant is not entitled to specific performance against the court of an agreement with the prosecution absent a showing of irrevocable prejudice to the defendant resulting from the agreement.\(^{316}\)

A defendant’s acceptance of a prosecutor’s proposed plea offer creates no constitutional right to have the bargain specifically enforced. A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest. It is the ensuing guilty plea that implicates the Constitution.\(^{317}\)

If a condition of a plea is that a defendant will serve an agreed-upon state sentence in federal prison concurrently with a longer federal sentence, a defendant is entitled to post-conviction relief

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\(^{313}\)Restatement Second, Contracts § 261.

\(^{314}\)See, Doe v. State, 834 So. 2d 420 (Fla. 2d DCA 2003); Janney v. State, 599 So. 2d 731 (Fla. 1st DCA 1992); see also, Karl Wendt Farm Equipment Co., Inc. v. International Harvester Co., 931 F.2d 1112, 1116–17 (6th Cir. 1991); Seaboard Lumber Co. v. U.S., 308 F.3d 1283, 1295 (Fed. Cir. 2002).

\(^{315}\)See, e.g., U.S. v. Ellis, 470 F.3d 275, 2006 FED App. 0442P (6th Cir. 2006).

\(^{316}\)Rollman v. State, 887 So. 2d 1233 (Fla. 2004); Simpson v. State, 467 So. 2d 437 (Fla. 5th DCA 1985); Rowe v. Griffin, 676 F.2d 524 (11th Cir. 1982); Davis v. State, 308 So. 2d 27 (Fla. 1975); State v. Borrego, 445 So. 2d 666 (Fla. 3d DCA 1984) (showing of detrimental reliance and showing of prejudice are necessary before promise not to prosecute is enforceable); Ivey v. Eastmoore, 402 So. 2d 1248 (Fla. 5th DCA 1981); Odom v. State, 310 So. 2d 770 (Fla. 2d DCA 1975).

\(^{317}\)Mabry v. Johnson, 467 U.S. 504, 507–08, 104 S. Ct. 2543, 2546, 81 L. Ed. 2d 437 (1984); see also, State v. Vixamar, 687 So. 2d 300 (Fla. 4th DCA 1997).
if the terms of that agreement are not met.\textsuperscript{318} Such relief can include specific performance or its equivalent.

An example of a situation in which specific performance of a plea agreement was deemed appropriate is the case of Donald A. Hutchinson. Hutchinson was sentenced to a 10-year term in federal prison, and was then transferred to state custody to face pending Florida charges. Hutchinson entered into a plea agreement with the State for a five-year term in each of his two state cases, with those sentences to run concurrently with each other and concurrently with the federal sentence. The record supported the view that it was clearly contemplated that upon pronouncement of the sentence in the state court, Hutchinson would be returned to prison to resume serving his federal sentence. Instead, Hutchinson was turned over to Florida Department of Corrections custody and began to serve his Florida sentences. Since there was no agreement with the federal authorities to give Hutchinson credit against the federal sentences for time spent in the state prison system, Hutchinson was placed in the position of having to complete his state sentences before he could resume serving the remainder of his federal sentence, resulting in greater total incarceration than contemplated, and contrary to, the plea agreement. On appeal of an order denying Hutchinson post-conviction relief, the Third District Court of Appeal held that Hutchinson was entitled to specific performance of the agreement, reversed the order of the lower court, and remanded the case with directions to sentence Hutchinson to time served on the Florida cases.\textsuperscript{319}

Such prejudice is not shown, however, where the defendant enters into a plea agreement for a sentence to run concurrent with a federal sentence after being specifically warned by the sentencing court that it could not control the decisions of the Department of Corrections and federal authorities and that there was a possibility that the defendant might serve his or her entire state sentence before being transferred to federal custody to serve his or her sentence there.\textsuperscript{320}

\section*{§ 11.1. Waiver of rights by plea agreement}

A defendant may waive constitutional, statutory, or procedural rights during the criminal process.\textsuperscript{321} In a typical plea bargain, a defendant “gives up the right to appeal all matters relating to the judgment, including the issue of guilt or innocence.”\textsuperscript{322} Pursuant to a plea bargain, the defendant

\textsuperscript{318} Sadler v. State, 980 So. 2d 567 (Fla. 5th DCA 2008); Glenn v. State, 776 So. 2d 330 (Fla. 4th DCA 2001).

\textsuperscript{319} Hutchinson v. State, 845 So. 2d 1019 (Fla. 3d DCA 2003); see also, Taylor v. State, 710 So. 2d 636 ( Fla. 3d DCA 1998).

\textsuperscript{320} See, Anthony v. State, 877 So. 2d 28 (Fla. 3d DCA 2004).


\textsuperscript{322} Fla. R. Crim. P. 3.172(c)(4).
can waive all manner of rights, including the right to travel to certain places where the victim of the crime lives,"\textsuperscript{323} ex post facto protections,\textsuperscript{324} the protection against double jeopardy,\textsuperscript{325} the right to appeal,\textsuperscript{326} and credit for time served.\textsuperscript{327}

An exception exists for situations in which the plea is a general one with no agreement as to the sentence the defendant will receive, and the double jeopardy violation is apparent from the record, and there has been no waiver of the violation.\textsuperscript{328} An agreement to a specific sentence or a specific sentencing benefit is a key element distinguishing a bargained plea agreement from a general one.\textsuperscript{329} When a defendant enters into a conditional plea agreement that provides for a certain sentence in exchange for compliance by the defendant with specified conditions, double jeopardy is deemed waived pursuant to the agreement and the State may move in accordance with Rule 3.170 to vacate the plea and sentence if the agreement is breached by the defendant.\textsuperscript{330} Another exception is that a defendant cannot waive the defense of inability to pay restitution, and the imposition of such a condition of a probationary sentence renders the sentence illegal.\textsuperscript{331}

\textsuperscript{323}Larson v. State, 572 So. 2d 1368 (Fla. 1991).

\textsuperscript{324}Lebron v. State, 799 So. 2d 997 (Fla. 2001).

\textsuperscript{325}Guynn v. State, 861 So. 2d 449 (Fla. 1st DCA 2003) (plea bargain in which defendant pled guilty to dealing in stolen property and grand theft of the same property, simultaneous convictions for which would otherwise violate the prohibition against double jeopardy); Melvin v. State, 645 So. 2d 448 (Fla. 1994); Novaton v. State, 634 So. 2d 607 (Fla. 1994) (holding that a bargained-for plea waives the right to attack multiple convictions on double jeopardy grounds); Blair v. State, 805 So. 2d 873, 878 (Fla. 2d DCA 2001) (“Where a guilty plea is bargained for, double jeopardy claims as to the conviction and sentence are waived.”); Colson v. State, 717 So. 2d 554 (Fla. 4th DCA 1998); Johnson v. State, 676 So. 2d 1017 (Fla. 5th DCA 1996); Powell v. State, 657 So. 2d 37 (Fla. 5th DCA 1995); Bryant v. State, 644 So. 2d 513 (Fla. 5th DCA 1994); see also, Jones v. State, 711 So. 2d 633, 634 (Fla. 1st DCA 1998) (“There was no plea bargain involved here; the double jeopardy violation is apparent from the record; and there is nothing in the record to indicate a waiver. Accordingly, we conclude that appellant has not waived the double jeopardy claim.”) (citing Novaton v. State, 634 So. 2d 607, 609 n.1 (Fla. 1994)).

\textsuperscript{326}Leach v. State, 914 So. 2d 519 (Fla. 4th DCA 2005) (state law does not preclude a defendant from waiving his right to appeal under the state constitution).

\textsuperscript{327}Castro v. State, 912 So. 2d 62 (Fla. 3d DCA 2005).

\textsuperscript{328}See, Novaton v. State, 634 So. 2d 607, 609 n.1 (Fla. 1994).

\textsuperscript{329}Williamson v. State, 859 So. 2d 553 (Fla. 1st DCA 2003).

\textsuperscript{330}Metellus v. State, 817 So. 2d 1009 (Fla. 5th DCA 2002).

\textsuperscript{331}Holland v. State, 882 So. 2d 510 (Fla. 4th DCA 2004); Stephens v. State, 630 So. 2d 1090 (Fla. 1994) (before a person on probation can be imprisoned for failing to make restitution, there must be a determination that that person has, or has had, the ability to pay, but has willfully refused to do so); Dirico v. State, 728 So. 2d 763 (Fla. 4th DCA 1999).
No Florida rule of criminal procedure directly controls a post-conviction sentencing bargain. After a jury’s finding of guilt, a defendant has a right to appeal and to file postconviction motions, and it may be in his best interest to use those rights as a bargaining chip. Once a defendant has time to review a plea agreement, discuss it with his lawyer, and consider alternatives, he may waive his statutory right to a direct appeal, right to collaterally attack his or her judgment and sentence, and right to postconviction motions when the waiver is expressly stated in the plea agreement and he knowingly and voluntarily agrees to the waiver. However, ineffective assistance of counsel claims attacking the advice received from counsel in entering into the plea and waiver cannot be waived.

§ 11.2. Failure to abide by plea agreement

Defendants who freely and voluntarily enter into a plea agreement with the State are required to abide by the terms of that agreement. If a criminal defendant does not feel so bound by the terms of a plea agreement that he or she will comply with it, then the State is likewise not bound, and, once a defendant reneges on the plea agreement, the State has the option of withdrawing from the agreement, and either going to trial or seeking a new agreement.

The State can, before sentencing, withdraw from the agreement or seek enforcement of the punitive terms of the agreement if it provides for the sentencing consequences of a breach of its terms by the defendant. Where the defendant breaches the agreement after sentencing, the State can move under Rule 3.170(g) to have the court vacate the plea and corresponding sentence.

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332 Leach v. State, 914 So. 2d 519, 522 (Fla. 4th DCA 2005).

333 Leach v. State, 914 So. 2d 519, 522 (Fla. 4th DCA 2005).


335 See, Williams v. U.S., 396 F.3d 1340, 1342 (11th Cir. 2005); Stahl v. State, 972 So. 2d 1013 (Fla. 2d DCA 2008) (defendant may waive right to file Rule 3.850 motion attacking his or her conviction).

336 Leach v. State, 914 So. 2d 519, 523 (Fla. 4th DCA 2005); Fla. Jur. 2d, Criminal Law § 1296.


338 See, Jolly v. State, 392 So. 2d 54 (Fla. 5th DCA 1981).

339 Forsythe v. State, 840 So. 2d 440 (Fla. 5th DCA 2003); cf., Latiif v. State, 787 So. 2d 834 (Fla. 2001); Gray v. State, 774 So. 2d 809 (Fla. 5th DCA 2000); Parker v. State, 767 So. 2d 532 (Fla. 5th DCA 2000); see also, Capio v. State, 765 So. 2d 853 (Fla. 5th DCA 2000).

340 See, Puentes v. State, 58 So. 3d 912 (Fla. 3d DCA 2011).

341 Brenner v. State, 337 So. 2d 1007 (Fla. 3d DCA 1976) (attempt to renege on agreement to pay proportional share of costs of investigation as part of negotiated plea).
In *McCoy v. State*, the Florida Supreme Court prescribed the procedure to be used when a defendant fails to abide by his plea agreement after the imposition of sentence. This procedure was then adopted as Fla. R. Crim. P. 3.170(g), titled “Vacation of Plea and Sentence Due to Defendant’s Noncompliance.”

The provisions of Rule 3.170(g) are as follows: Whenever a plea agreement requires the defendant to comply with some specific terms, those terms shall be expressly made a part of the plea entered into in open court. Specific clarifications of a plea agreement made during the course of a plea colloquy become part of the agreement for purposes of its enforcement. Unless otherwise stated at the time the plea is entered:

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The State may move to vacate a plea and sentence within 60 days of the defendant’s noncompliance with the specific terms of a plea agreement. The 60-day time limit for filing a motion to vacate a plea and judgment is not jurisdictional, however, because the rule permits the time for filing to be altered: a jurisdictional rule cannot be altered by the court or agreement of the parties. This means that failure on the part of the defendant to raise any objection to the timeliness of such a motion, where the time for filing has not previously been altered, constitutes waiver of such an objection. Where the State moves after 60 days to vacate the plea and the defense objects to the motion as being untimely, the defense has the burden of showing that vacating the plea is banned by the doctrine of laches.

The equitable defense of laches exists where there has been an unexplainable delay of such duration or character as to render the enforcement of an asserted right inequitable and is appropriate when a party is aware of his or her rights but fails to act. For laches to apply, the party asserting the right must have knowledge, or the means of knowledge of his or her right, or the facts which created his or her cause of action, but nonetheless fail to timely assert it. So long as there is no knowledge of the wrong committed and no refusal to embrace an opportunity to ascertain the facts, there can be no laches. Laches thus cannot be imputed to one who has been justifiably ignorant of the facts creating his or her cause of action, and who has therefore failed to assert it. After the facts

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343 See, Amendments to Florida Rules of Criminal Procedure 3.170 and 3.700, 633 So. 2d 1056 (Fla. 1994).

344 Fla. R. Crim. P. 3.170(g)(1).

345 *Metellus v. State*, 817 So. 2d 1009 (Fla. 5th DCA 2002) (failure to testify in an associate’s trial), approved 900 So. 2d 491 (Fla. 2005); *Deramus v. State*, 652 So. 2d 1245 (Fla. 5th DCA 1995).


348 *Ticktin v. Kearin*, 807 So. 2d 659 (Fla. 3d DCA 2001) (laches is an omission to assert a right for an unreasonable and unexplained length of time, under circumstances prejudicial to the adverse party).
have become known to a party, he or she must use reasonable diligence to enforce his or her right. Actual knowledge is generally a prerequisite to applying the doctrine of laches.\(^{349}\) Where one has only constructive notice, laches must be predicated on an intentional neglect to make inquiry, rather than mere carelessness to do so.\(^{350}\)

A finding of laches in a criminal case requires a showing of both lack of due diligence on the part of the person bringing the claim and prejudice to the person against whom the claim is being made.\(^{351}\) Delay, standing alone, is not enough.\(^{352}\) The true test to apply laches is whether or not the delay has resulted in injury, embarrassment, or disadvantage to any person and particularly to the person against whom relief is sought.\(^{353}\) The delay required to render the doctrine of laches available must have been such as practically to preclude the court from arriving at a safe conclusion as to the truth of the matters in controversy, and thus make the doing of equity either doubtful or impossible, as through loss or obscuration of evidence of the transaction in issue; or where there must have occurred in the meantime a change in conditions that would render it inequitable to enforce the right asserted.\(^{354}\) Application of the doctrine of laches depends on the circumstances of each case and often involves factual issues that are not properly resolved without an evidentiary hearing.\(^{355}\)

—When a motion is filed pursuant to Rule 3.170(g)(2)(A), the court is required to hold an evidentiary hearing on the issue unless the defendant admits noncompliance with the specific terms of the plea agreement.\(^{356}\) This evidentiary hearing is called a Rule 3.170(g) non-compliance hearing.

—No plea or sentence shall be vacated unless the court finds that there has been substantial noncompliance with the express plea agreement.\(^{357}\) The standard to be applied is “substantial noncompliance” and not “material breach.”\(^{358}\) This means that, in the absence of an admission or

\(^{349}\)30A C.J.S. Equity § 158.

\(^{350}\)Anderson v. Northrop, 30 Fla. 612, 12 So. 318 (1892).

\(^{351}\)See, State v. Lindo, 863 So. 2d 1237 (Fla. 4th DCA 2003) (defendant’s notion to vacate plea brought within two years of time he had or should have had knowledge of the threat of deportation based on plea was timely).

\(^{352}\)Baker v. Baker, 920 So. 2d 689 (Fla. 2d DCA 2006).

\(^{353}\)Baker v. Baker, 920 So. 2d 689 (Fla. 2d DCA 2006); Stephenson v. Stephenson, 52 So. 2d 684, 686 (Fla. 1951); Lightsey v. Lightsey, 150 Fla. 664, 8 So. 2d 399, 400 (1942).

\(^{354}\)Stephenson v. Stephenson, 52 So. 2d 684, 686 (Fla. 1951).

\(^{355}\)See, Bain v. State, 9 So. 3d 723 (Fla. 2d DCA 2009).


\(^{357}\)Fla. R. Crim. P. 3.170(g)(2)(C).

\(^{358}\)Rivas v. State, 43 So. 3d 154 (Fla. 3d DCA 2010).
stipulation by the defendant, the evidentiary hearing conducted by the court must address the matter of willfulness on the part of the defendant, as where timely appearance for sentencing is made a condition of the plea agreement and the defendant fails to appear for sentencing.\(^{359}\)

—When a plea and sentence is vacated pursuant to Rule 3.170(g), the cause has to be set for trial within 90 days of the order vacating the plea and sentence.\(^{360}\)

Defendants who seek to avail themselves of the salutary upside of a substantial plea agreement do not have the right to make unilateral modifications to the agreement.\(^{361}\) The double jeopardy clause does not protect a defendant from reprosecution or resentencing if the defendant willfully refuses to perform a condition of a plea bargain.\(^{362}\) When a court finds non-compliance, the only option for the court is to vacate the plea and sentence. A court may not unilaterally increase a defendant’s sentence for non-compliance with the plea agreement.\(^{363}\)

Where, however, the State does not reach a clear understanding with the defendant on what it would receive and fails to take routine steps necessary to protect its interests, a lawful sentence imposed on the defendant may not be vacated or increased.\(^{364}\) Note that, in any event, the State has the burden of putting on evidence and proving noncompliance with a specific term of a plea agreement before the court can void it.\(^{365}\)

§ 12. Definition of “sentence”

A “sentence” means punishment by confinement or fine, while probation is a conditional deferment of a sentence. To say that probation is not a sentence is of fundamental substance in view of the constitutional prohibition against double jeopardy which applies to sentences (punishment), as well as to trials and convictions, but does not apply to probation. Constitutionally, as to one

\(^{359}\)See, *Breland v. State*, 951 So. 2d 74 (Fla. 1st DCA 2007).

\(^{360}\)Rule 3.170(g)(2)(D).

\(^{361}\) *McFord v. State*, 877 So. 2d 874 (Fla. 3d DCA 2004); see, *State v. Frazier*, 697 So. 2d 944 (Fla. 3d DCA 1997) (a party who reaps the benefits of the agreement must be held to its detriments).

\(^{362}\) *Metellus v. State*, 900 So. 2d 491 (Fla. 2005).

\(^{363}\) *Spain v. State*, 849 So. 2d 340 (Fla. 2d DCA 2003) (trial court’s increase of defendant’s sentence after defendant violated terms of cooperation agreement with State reversed for lack of jurisdiction).

\(^{364}\)See, *State v. Acosta*, 506 So. 2d 387 (Fla. 1987) (defendant charged with trafficking in cocaine and conspiracy to traffic in cocaine and facing two 15-year minimum mandatory sentences entered into agreement with State under which he agreed to provide substantial assistance in the form of a statement about the drugs; after the State dropped one charge and agreed to a reduced sentence of seven years on the other, the defendant told prosecutors that he had found the drugs on the street).

\(^{365}\) *Neeld v. State*, 977 So. 2d 740 (Fla. 2d DCA 2008) (defendant picked up new arrest prior to sentencing).
offense, a defendant can be put on probation many times (i.e., any number of times he or she may violate probation and it can be terminated and yet he or she be again placed on probation, with new conditions, etc.) but he or she can be sentenced for “the same offense” but once. For other purposes, the term “sentence” has been slightly more narrowly drawn to mean the pronouncement by the court of the penalty imposed on a defendant for the offense of which the defendant has been adjudged guilty. As a practical matter, however, any penalty imposed on a defendant which results in the execution of a formal judgment and sentence as to a criminal offense, whether or not the defendant is adjudicated guilty or guilt is withheld, and whether or not the defendant is fined, incarcerated, or placed on probation, is understood to comprise a “sentence” for general purposes.

Every sentence or other final disposition of the case must be pronounced in open court, including, if available at the time of sentencing, the amount of jail time credit the defendant is to receive. The final disposition of every case must be entered in the minutes in courts in which minutes are kept and must be docketed in courts that do not maintain minutes. The “pronouncement” becomes final when the sentencing hearing ends. While Rule 3.800(a) authorizes a sentencing court to correct an illegal sentence, the rule does not permit the court to increase a legal and unambiguous sentence after the pronouncement becomes final, even if the orally pronounced sentence was based on mistake. The written sentence must comport with the oral pronouncement. Where no oral sentence is pronounced, a written sentence is invalid. In some instances, an ambiguous oral pronouncement of a sentence may be revisited in order to make the sentence clear.

§ 13. Meaning of “year” and “month”

The issue of what a “year” is can occur in several circumstances, one of which is where a defendant faces possible deportation. E.g., in a recent case in Pinellas County, an immigration lawyer for a naturalized U.S. citizen defendant who had been sentenced to a year in the county jail

366 McKinley v. State, 519 So. 2d 1154 (Fla. 5th DCA 1988).
369 Fla. R. Crim. P. 3.700(b).
370 Comtois v. State, 891 So. 2d 1130 (Fla. 5th DCA 2005).
371 See, Madrigal v. State, 683 So. 2d 1093, 1096 (Fla. 4th DCA 1996); Arroyo v. State, 651 So. 2d 223 (Fla. 4th DCA 1995).
372 See, Sprankle v. State, 677 So. 2d 307 (Fla. 1st DCA 1996).
373 See, e.g., Jackson v. State, 615 So. 2d 850 (Fla. 2d DCA 1993); Nobles v. State, 605 So. 2d 996 (Fla. 2d DCA 1992); Duncan v. State, 59 So. 3d 1197 (Fla. 5th DCA 2011).
made a post-sentencing motion for “clarification” in an unsuccessful effort to get the sentencing judge to “clarify” a sentence of one year to mean 364 days, in an attempt to avoid deportation of the defendant.\footnote{374} There is no legislative definition of the term “year” in the context of sentencing, nor do the Florida Rules of Criminal Procedure define the term. Black’s Law Dictionary defines “year” as follows:

The period in which the revolution of the earth round the sun, and the accompanying changes in the order of nature, are completed. Generally, when a statute speaks of a year, twelve calendar, and not lunar, months are intended. The year is either astronomical, ecclesiastical, or regnal, beginning on the 1st of January, or 25th of March, or the day of the sovereign’s accession. The civil year differs from the astronomical, the latter being composed of three hundred and sixty-five days, five hours, forty-eight minutes, forty-six seconds and a fraction, while the former consists sometimes of three hundred and sixty-five days, and at others, in leap years, of three hundred and sixty-six days. When the period of a “year” is named, a calendar year is generally intended, but the subject-matter or context of a statute or contract in which the term is found or to which it relates may alter its meaning.\footnote{375}

Florida courts have consistently interpreted the term “year” to mean 365 days, and in leap years 366.\footnote{376}

There is also no legislative definition of the term “month” in the context of sentencing or in the Florida Rules of Criminal Procedure. The Florida Supreme Court has interpreted the word “month” to mean a calendar month, as opposed to a lunar month of 28 days.\footnote{377}

\section*{§ 14. Pre-sentence investigation}

Any circuit court of Florida, when the defendant in a criminal case has been found guilty or has entered a plea of \textit{nolo contendere} or guilty, may refer the case to the Department of Corrections for investigation and recommendation.\footnote{378} In all cases in which the court has discretion as to what sentence may be imposed, the court may refer the case to the Department of Corrections for

\footnotetext[374]{See, \textit{State v. Vitaliy Vosmak}, Pinellas County Circuit Court Case No. CRC04–02387CFANO–B.}

\footnotetext[375]{\textit{BLACK’S L. DICT.}, 1615 (1990 Ed.).}

\footnotetext[376]{See, for example, \textit{Gibson v. Florida Dept. of Corrections}, 885 So. 2d 376 (Fla. 2004) (gain time); \textit{Gilbert v. State}, 805 So. 2d 70 (Fla. 2d DCA 2002) (prison credit); \textit{Williams v. State}, 591 So. 2d 295 (Fla. 4th DCA 1991) (condition of probation); \textit{Waldrup v. Dugger}, 562 So. 2d 687 (Fla. 1990) (gain time); \textit{Carter v. Cerezo}, 495 So. 2d 202 (Fla. 5th DCA 1986) (Florida Rules of Civil Procedure); \textit{Spoelter Elec. Supplies, Inc. v. Kalb}, 275 So. 2d 594 (Fla. 4th DCA 1973) (concurring opinion) (same).}

\footnotetext[377]{\textit{Guaranty Trust & Safe-Deposit Co. v. Buddington}, 27 Fla. 215, 9 So. 246 (1891).}

\footnotetext[378]{\textsection{921.231(1)}, Fla. Stat.
investigation and recommendation. No sentence or sentences other than probation can be imposed on any defendant found guilty of a first felony offense or found guilty of a felony while under the age of 18 years, until after such investigation has first been made and the recommendations of the Department of Corrections received and considered by the sentencing judge. Should a defendant in a capital case choose not to challenge the death penalty and refuse to present mitigation evidence, the court must refer the case to the Department of Corrections for the preparation of a presentence report. The report must be comprehensive and should include information such as previous mental health problems (including hospitalizations), school records, and relevant family background.

Upon request of the court, it will be the duty of the department to make either or both of the following reports in writing to the circuit court at a specified time prior to sentencing, depending upon the circumstances of the defendant and the offense.

The full report is required to include:

1. A complete description of the situation surrounding the criminal activity with which the defendant has been charged, including a synopsis of the trial transcript, if one has been made; nature of the plea agreement including the number of counts waived, the pleas agreed upon, the sentence agreed upon, and additional terms of agreement; and, at the defendant’s discretion, his or her version and explanation of the act.

2. The defendant’s sentencing status, including whether the offender is a first offender, habitual offender, or youthful offender or is currently on probation.

3. The defendant’s prior record of arrests and convictions.

4. The defendant’s educational background.

5. The defendant’s employment background, including any military record, his or her present employment status, and his or her occupational capabilities.

6. The defendant’s financial status, including total monthly income and estimated total debts.

7. The social history of the defendant, including his or her family relationships, marital status, interests, and related activities.

8. The residence history of the defendant.

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379 Fla. R. Crim. P. 3.710(a).

380 Fla. R. Crim. P. 3.710(b).

9. The defendant’s medical history and, as appropriate, a psychological or psychiatric evaluation.

10. Information about the environments to which the defendant might return or to which the defendant could be sent should a sentence of nonincarceration or community supervision be imposed by the court and consideration of the defendant’s plan concerning employment supervision and treatment.

11. Information about any resources available to assist the offender, such as:
   a. Treatment centers.
   b. Residential facilities.
   c. Vocational training programs.
   d. Special education programs.
   e. Services that may preclude or supplement commitment to the department.

12. The views of the person preparing the report as to the defendant’s motivations and ambitions and an assessment of the defendant’s explanations for his or her criminal activity.

13. An explanation of the defendant’s criminal record, if any, including his or her version and explanation of any previous offenses.

14. A statement regarding the extent of the victim’s loss or injury.

15. A recommendation as to disposition by the court. The department is required to make a written determination as to the reasons for its recommendation. The department must include an evaluation of the following factors:
   a. The appropriateness or inappropriateness of community facilities, programs, or services for treatment or supervision.
   b. The ability or inability of the department to provide an adequate level of supervision for the defendant in the community and a statement of what constitutes an adequate level of supervision.
   c. The existence of other treatment modalities which the defendant could use but which do not exist at present in the community.
If requested by the court, the department must also provide to the court a summary report designed to expeditiously give the court information critical to its approval of any plea. The summary report must include the information required by subsection 921.231(1)(a), (b), (c), (j), (m), (n), and (o). In those instances in which a presentence investigation report has been previously compiled, the department may elect to complete a short-form report updating the above information. All information in the presentence investigation report is supposed to be factually presented and verified if reasonably possible by the preparer of the report. On examination at the sentencing hearing, the preparer of the report, if challenged on the issue of verification, bears the burden of explaining why it was not possible to verify the challenged information. The nonconfidential portion of the presentence investigation will constitute the basic classification and evaluation document of the Department of Corrections and must contain a recommendation to the court on the treatment program most appropriate to the diagnosed needs of the defendant, based upon the defendant’s custody classification, rehabilitative requirements, and the utilization of treatment resources in proximity to the defendant’s home environment.

A defendant has a Fifth Amendment right to remain silent during the pre-sentence investigation. The sentencing court may, however, consider the defendant’s silence or lack of cooperation in such an investigation as evidence of the defendant’s character, and a lack of mitigation when the defendant asks the court to mitigate a sentence. The fact that the defendant receives a harsher sentence than he or she might have received had the defendant cooperated or not exercised the right to remain silent does not implicate the right against self-incrimination where the defendant is not affirmatively punished for the act of remaining silent.

§ 15. Discovery

It is appropriate for the trial court to conduct a sentencing hearing before imposing sentence, and each side is entitled to due process at such a hearing. In almost all cases, the State and the defendant have entered into reciprocal discovery prior to sentencing, yet an issue often overlooked at sentencing is discovery, especially at departure hearings.

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Criminal defendants have the right to conduct discovery following a plea (or a finding of guilt by a jury or judge sitting as fact-finder) but prior to sentencing. In fact, defendants have a right to conduct discovery at any critical stage of a criminal proceeding, and the trial court should treat discovery disputes at any such stage in the same manner as those brought before trial and at trial.

Reciprocal discovery is a continuing obligation under Fla. R. Crim. P. Rule 3.220(j), and the rules of reciprocal discovery apply to sentencing. Rule 3.220 prohibits trial by ambush. Issues such as mitigation or restitution, both of which are unique to sentencing, require the introduction of evidence. As sentencing hearings normally involve substantive issues of law and fact, both the State and the defendant have the need, and the right, to review any evidence to be offered by the opposing party, including witness testimony, and to have sufficient notice to subpoena witnesses and documents to respond to the opposing party.

The right to discovery in the sentencing stage of a criminal prosecution is not unlimited, but is subject to the same considerations as are made in the pretrial and trial stages. An example is where a defendant convicted of sexual activity with a minor makes a post-conviction motion for deposition of the victim for the purpose of seeking evidence for use in mitigation at sentencing that the sexual activity was consensual, and the State moves for a protective order to prevent the deposition. The trial court should evaluate the motion by weighing the possibility that the deposition would uncover evidence pertinent to sentencing against such factors as the victim’s young age and emotional state. The trial court should also consider the defendant’s ability to obtain evidence regarding consent from other sources. If the conviction is the product of a plea agreement, the trial court also should consider whether the State entered into the plea agreement based on its desire to protect the victim from the ordeal of testimony.

§ 16. Right to counsel

Even though the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding at which he or she

387 Davis v. State, 73 So. 3d 304 (Fla. 1st DCA 2011).
388 Davis v. State, 73 So. 3d 304 (Fla. 1st DCA 2011).
389 Elledge v. State, 613 So. 2d 434 (Fla. 1993); State v. Clark, 644 So. 2d 556 (Fla. 2d DCA 1994); Sexton v. State, 643 So. 2d 53 (Fla. 2d DCA 1994); Booker v. State, 634 So. 2d 301 (Fla. 5th DCA 1994).
390 See, Cuciak v. State, 410 So. 2d 916, 917 (Fla. 1982) (“A basic philosophy underlying discovery is the prevention of surprise and the implementation of an improved fact finding process.”).
391 Davis v. State, 73 So. 3d 304 (Fla. 1st DCA 2011).
392 Davis v. State, 73 So. 3d 304 (Fla. 1st DCA 2011).
is entitled to the effective assistance of counsel.\textsuperscript{393} Fla. R. Crim. P. 3.111(d)(5) provides that an offer of assistance of counsel shall be renewed by the court at each subsequent stage of the proceeding at which the defendant appears without counsel,\textsuperscript{394} even if the defendant has previously waived counsel.\textsuperscript{395} The defendant can waive counsel but, even if a defendant does not request appointment of counsel, this omission is not considered a knowing waiver of the right to counsel before sentencing.\textsuperscript{396} The complete denial of counsel at sentencing is fundamental error.\textsuperscript{397}

\textsection{17. Confrontation and due process}

The defendant has the right to be present at all critical stages of his or her prosecution. Rule 3.180 provides that in all prosecutions for crime the defendant shall be present: (1) at first appearance;\textsuperscript{398} (2) when a plea is made, unless a written plea of not guilty shall be made in writing under the provisions of rule 3.170(a);\textsuperscript{399} (3) at any pretrial conference, unless waived by the defendant in writing;\textsuperscript{400} (4) at the beginning of the trial during the examination, challenging, impanelling, and swearing of the jury;\textsuperscript{401} (5) at all proceedings before the court when the jury is present;\textsuperscript{402} (6) when evidence is addressed to the court out of the presence of the jury for the purpose of laying the foundation for the introduction of evidence before the jury;\textsuperscript{403} (7) at any view by the jury;\textsuperscript{404} (8) at the rendition of the verdict;\textsuperscript{405} and (9) at the pronouncement of judgment and the imposition of sentence.\textsuperscript{406} A defendant is present for purposes of this rule if the defendant is


\textsuperscript{394}Fla. R. Crim. P. 3.111(d)(5).

\textsuperscript{395}\textit{See, Beard v. State}, 751 So. 2d 61, 62 (Fla. 2d DCA 1999).

\textsuperscript{396}\textit{See, Hardy v. State}, 655 So. 2d 1245, 1248 (Fla. 5th DCA 1995).

\textsuperscript{397}\textit{Jackson v. State}, 983 So. 2d 562 (Fla. 2008).

\textsuperscript{398}Fla. R. Crim. P. 3.180(a)(1).

\textsuperscript{399}Fla. R. Crim. P. 3.180(a)(2).

\textsuperscript{400}Fla. R. Crim. P. 3.180(a)(3).

\textsuperscript{401}Fla. R. Crim. P. 3.180(a)(4).

\textsuperscript{402}Fla. R. Crim. P. 3.180(a)(5).

\textsuperscript{403}Fla. R. Crim. P. 3.180(a)(6).

\textsuperscript{404}Fla. R. Crim. P. 3.180(a)(7).

\textsuperscript{405}Fla. R. Crim. P. 3.180(a)(8).

\textsuperscript{406}Fla. R. Crim. P. 3.180(a)(9).
physically in attendance for the courtroom proceeding, and has a meaningful opportunity to be heard through counsel on the issues being discussed. If the defendant is present at the beginning of the trial and thereafter, during the progress of the trial or before the verdict of the jury has been returned into court, voluntarily absents himself or herself from the presence of the court without leave of court, or is removed from the presence of the court because of his or her disruptive conduct during the trial, the trial of the cause or the return of the verdict of the jury in the case shall not thereby be postponed or delayed, but the trial, the submission of the case to the jury for verdict, and the return of the verdict thereon shall proceed in all respects as though the defendant were present in court at all times. If the defendant is present at the beginning of the trial and thereafter absents himself or herself as described in (c)(1) of the Rule, or if the defendant enters a plea of guilty or no contest and thereafter absents himself or herself from sentencing, the sentencing may proceed in all respects as though the defendant were present at all times. Persons prosecuted for misdemeanors may, at their own request, by leave of court, be excused from attendance at any or all of the proceedings aforesaid. A corporation may appear by counsel at all times and for all purposes. The right of presence has been extended to probation or community control revocation proceedings. The right to be present, the right to confront the State’s witnesses and evidence, and due process also entitle a non-English speaking defendant to the services of an interpreter.

Sentencing proceedings are not subject to the same evidentiary restrictions as trial proceedings. Tribunals passing on the guilt of a defendant always have been hedged in by strict evidentiary procedural limitations. But both before and since the American colonies became a nation, however, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law. A sentencing judge, moreover, is not confined to the narrow issue of guilt. His or her task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant—if not essential—to his or her selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant’s life and characteristics.

408 Fla. R. Crim. P. 3.180(c)(1).
409 Fla. R. Crim. P. 3.180(c)(2).
410 Fla. R. Crim. P. 3.180(d).
411 Fla. R. Crim. P. 3.180(e).
412 See, Summerall v. State, 588 So. 2d 31 (Fla. 3d DCA 1991).
413 See, Benitez v. State, 57 So. 3d 939 (Fla. 3d DCA 2011).
Generally, because the right of confrontation is a trial right, it applies during the guilt or innocence phase of a prosecution, but not to sentencing, as sentencing is not conceived as part of the trial. The narrow exception to the rule is where the Confrontation Clause has been applied to capital cases.  

Hearsay is admitted at sentencing, so long as it is accompanied by some minimal indicia of reliability. An example would be the use of a presentence investigation report in a case involving a plea without a trial, where the sentencing court must make its own determination of credibility from the information provided in the report. Beyond that, there are only two statutory restrictions on the introduction of hearsay evidence at sentencing, in capital sentencing and in cases where the State is introducing victim impact evidence.

In capital sentencing, for example, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in section 921.141(5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. This rule applies to the defendant as well as to the State. When a defendant challenges the admission of hearsay evidence during the penalty phase of a capital case, moreover, the reviewing court examines whether the defendant had the opportunity to rebut the hearsay, and the fact that the defendant did not or could not rebut this evidence does not make it inadmissible.

In cases where the State is introducing victim impact evidence, statements of the victim of the crime for which the defendant is being sentenced, the victim’s parent or guardian if the victim is a minor, the lawful representative of the victim or of the victim’s parent or guardian if the victim is a minor, or the next of kin of the victim if the victim has died from causes related to the crime are required to be under oath.

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415 Box v. State, 993 So. 2d 135 (Fla. 5th DCA 2008); see also, Rodgers v. State, 948 So. 2d 655 (Fla. 2006) (Cantero, J., concurring); State v. Harris, 2009 WL 1871919 (Tenn. Crim. App. 2009); State v. Rodriguez, 738 N.W.2d 422 (Minn. Ct. App. 2007), aff’d, 754 N.W.2d 672 (Minn. 2008); Way v. State, 760 So. 2d 903 (Fla. 2000); Tompkins v. State, 502 So. 2d 415 (Fla. 1986).


417 See, for example, Mayes v. State, 604 A.2d 839 (Del. 1992) and cases cited therein.


419 Blackwood v. State, 777 So. 2d 399 (Fla. 2000).

420 Bowles v. State, 804 So. 2d 1173, 1184 (Fla. 2001).

The confrontation clauses of the United States and Florida constitutions, which guarantee the right of an accused to confront and cross-examine witnesses against him or her, are expressly limited to criminal prosecutions, and so do not apply to civil commitment proceedings, including the involuntary commitment of sexually violent predators.\textsuperscript{422} The Florida courts have held to date that the confrontation clauses, and in particular the “testimonial hearsay” rule set forth in \textit{Crawford v. Washington},\textsuperscript{423} also do not apply to supervision revocation proceedings, as such proceedings are not the equivalent of a criminal proceeding.\textsuperscript{424}

\section*{§ 18. Jurisdiction to impose sentence}

While the power to define and fix punishment for crimes is vested with the legislature, the imposition of a sentence within the limits prescribed by the legislature is purely a judicial function.\textsuperscript{425} A court has the authority to impose sentence if the requirements of venue and jurisdiction are met. Jurisdiction includes subject matter jurisdiction and in personam jurisdiction over the defendant. The statutes in effect at the time of the commission of a crime control as to the offenses for which the perpetrator can be convicted, as well as the punishments which may be imposed.\textsuperscript{426} The defendant must have either voluntarily entered a plea of guilty or \textit{nolo contendere} to the charge, or the defendant must have been found guilty (by the jury in a jury trial, or by the presiding judge in a bench trial) after trial, before the judge can sentence the defendant. A plea of \textit{nolo contendere}, whether or not a “best interest” plea, admits the facts for the purpose of the pending prosecution and is the same as a guilty plea insofar as it gives the court the power to punish.\textsuperscript{427}

\section*{§ 19. Judicial discretion in the imposition of sentence}

Historically, in Florida and most jurisdictions, the judiciary were given the discretion to tailor a sentence appropriate to each defendant appearing in court within the statutory maximums for each

\begin{itemize}
\item \textsuperscript{422} \textit{In re Commitment of Cartwright}, 870 So. 2d 152 (Fla. 2d DCA 2004).
\item \textsuperscript{424} \textit{Wilcher v. State}, 946 So. 2d 114 (Fla. 5th DCA 2007) (affirming revocation of defendant’s probation based upon business record evidence of positive urinalysis for cocaine); \textit{Jackson v. State}, 931 So. 2d 1062, 1063 (Fla. 4th DCA 2006) (probation revocation based on 911 recording); \textit{Russell v. State}, 920 So. 2d 683 (Fla. 5th DCA 2006) (revocation of probation based upon victim’s hearsay and officer’s testimony); \textit{Peters v. State}, 919 So. 2d 624 (Fla. 1st DCA 2006) (affirming revocation of community control based upon business record evidence showing defendant’s positive drug test for amphetamines and methamphetamines).
\item \textsuperscript{425} Am Jur. 2d Constitutional Law § 284, citing State v. Ford, 539 N.W.2d 214 (Minn. 1995).
\item \textsuperscript{426} \textit{Vonador v. State}, 857 So. 2d 323 (Fla. 2d DCA 2003); \textit{Heath v. State}, 532 So. 2d 9 (Fla. 1st DCA 1988); \textit{Ellis v. State}, 298 So. 2d 527 (Fla. 2d DCA 1974).
\item \textsuperscript{427} \textit{Vinson v. State}, 345 So. 2d 711 (Fla. 1977); see also \textit{Montgomery v. State}, 821 So. 2d 464 (Fla. 4th DCA 2002).
\end{itemize}
class of offense, subject to constitutional and statutory limitations. Judicial discretion, operating within the law and the norms of society, has historically been the filler that seals the gaps between the law and the facts of a given case, thereby ensuring, at least theoretically, that justice prevails. The modern trend, however, is toward greater limits on judicial discretion.

Tribunals passing on the guilt of a defendant always have been hedged in by strict evidentiary procedural limitations. But both before and since the American colonies became a nation, however, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law. A sentencing judge, moreover, is not confined to the narrow issue of guilt. His or her task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant’s life and characteristics.

A court’s jurisdiction to try an accused defendant is not invoked and does not exist unless the State files an information or indictment. A *nolle prosequi* effectively ends the proceeding, and, as a general rule any action taken subsequent to the filing of the *nolle prosequi* is a nullity. As a result, the State’s written withdrawal of a *nolle prosequi* has no force or effect. The State also has

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429 “Discretion unrestrained by principle, by methodology and by standards is contrary to our rule of law. It would substitute rule by the whim of judges. Discretion exercised without guiding principles or standards is without rudder or anchor and is subject to prevailing tides and winds and little else. Judicial discretion exists not for its own sake but merely because it is impossible to set down a single rule to govern all procedural questions that arise in judicial proceedings.” *Rigabar v. State*, 658 So.2d 1038 (Fla. Dist. Ct. App. 4th Dist. 1995) (Farmer, J).


431 See, *State v. Anderson*, 537 So. 2d 1373, 1374 (Fla. 1989) (holding “jurisdiction to try an accused does not exist under article I, section 15 of the Florida Constitution unless there is an extant information, indictment, or presentment filed by the state”); *Winter v. State*, 781 So. 2d 1111, 1114 (Fla. 1st DCA 2001).


433 See, *Sadler v. State*, 949 So. 2d 303 (Fla. 5th DCA 2007); *State v. R.J.*, 763 So. 2d 370, 371 (Fla. 4th DCA 1998) (“Everything which occurs in a proceeding subsequent to the filing of a *nolle prosse* by the state is a nullity.”).
no power to nolle pros a charge after jeopardy has attached. Therefore, the State has no authority to nolle pros a charge after a jury is sworn, or after a judge accepts a plea to the charge.

A court may not impose sentence for an offense unless the offense is before the court for sentencing. The matter of whether an offense is, or is not, pending before the court for sentencing often leads to considerable debate. As a general rule, an offense should not be considered as “pending” before the trial court for sentencing unless a verdict of guilt or a plea of guilty or nolo contendere has been obtained; offenses for which the defendant has entered a not guilty plea or denial, and is awaiting trial or a final hearing, are not considered pending for sentencing purposes.

One scoresheet must be used for every pending case that meets this definition. As a corollary, a presumption then arises that sentencing should not be delayed merely because other cases that fail to meet this definition are pending against the same defendant in the same court. In other words, a judge does not have to wait for disposition of a pending case before imposing sentence in a case that has been resolved by plea or trial.

A broad exception to this rule is that defendants are allowed to move a trial court to delay sentencing so that a single scoresheet can be used in two or more cases pending against the same defendant in the same court at the same time, regardless of whether a plea of guilty or nolo contendere or a conviction has been obtained. The trial court must grant the motion when the defendant can show that the use of a single scoresheet would not result in an unreasonable delay in sentencing. For each sentence that would not be unreasonably delayed, the trial court must order simultaneous sentencing. There is, however, no requirement that a trial court delay sentencing on a completed case while awaiting the outcome of future trials where it is only speculative that those other cases might be ready for disposition soon and where those cases in fact might not be ready for disposition for many months or years.

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434 See, State v. Sokol, 208 So. 2d 156 (Fla. 3d DCA 1968).
435 See, State v. Sokol, 208 So. 2d 156 (Fla. 3d DCA 1968).
436 See, State v. R.J., 763 So. 2d 370 (Fla. 4th DCA 1998); Cabrera v. State, 415 So. 2d 898 (Fla. 3d DCA 1982).
437 Clark v. State, 572 So. 2d 1387 (Fla. 1991); see, Nelson v. State, 498 So. 2d 553 (Fla. 4th DCA 1986).
440 Jacobs v. State, 533 So. 2d 911 (Fla. 2d DCA 1988); Parrish v. State, 527 So. 2d 926 (Fla. 2d DCA 1988).
441 Clark v. State, 572 So. 2d 1387 (Fla. 1991).
442 Clark v. State, 572 So. 2d 1387 (Fla. 1991); Parrish v. State, 527 So. 2d 926 (Fla. 2d DCA 1988).
In combined proceedings, such as where the defendant has a new offense that is also the basis of a violation of probation, the discretion of the court is quite limited. A judge must, when he or she knows that both the offense underlying the probation and the new charge which forms the basis for the violation of probation would be pending (or would be pending shortly) before the court for sentencing, impose sentence on the basis of a single scoresheet that includes the violation of probation and the new open offense and may not split the two and sentence them using separate scoresheets.\textsuperscript{443} This also means that a trial court may not engage in sentence manipulation through the use of separate scoresheets to impose an illegal departure or alternative sentence in derogation of the sentencing guidelines or the Criminal Punishment Code\textsuperscript{444} for, as the Florida Supreme Court has often made clear, only when the legislature expressly authorizes sentencing outside the guidelines or Criminal Punishment Code may a court do so\textsuperscript{445} and sentencing alternatives should not be used to thwart sentencing guidelines or the Criminal Punishment Code.\textsuperscript{446}

The burden falls on the defendant to request simultaneous sentencing when one or more of the offenses do not meet the “pending for sentencing” definition. Otherwise, it is the trial court’s burden to assure that all of a defendant’s cases pending for sentencing in a particular county at the time of the defendant’s first sentencing hearing are disposed of using one scoresheet.\textsuperscript{447} The defendant has the burden to move a trial court to delay sentencing so that a single scoresheet can be used in two or more cases pending against the same defendant in the same court at the same time, regardless of whether a plea of guilty or \textit{nolo contendere} or a conviction has been obtained, although the State normally seeks consolidated sentencing of all pending charges. The trial court must grant the motion and order simultaneous sentencing when the defendant can show that the use of a single scoresheet would not result in an unreasonable delay in sentencing.\textsuperscript{448} An example would be where

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\item \textsuperscript{443} Gonzalez \textit{v. State}, 821 So. 2d 1194 (Fla. 3d DCA 2002); Joyce \textit{v. State}, 586 So. 2d 456 (Fla. 2d DCA 1991); Bembow \textit{v. State}, 520 So. 2d 312 (Fla. 2d DCA 1988); Render \textit{v. State}, 516 So. 2d 1085 (Fla. 2d DCA 1987) (“\textit{T}he spirit of \textit{[Rule 3.701(d)(1)]} would be defeated by allowing separate sentencing based on separate scoresheets where … the sentences are imposed in the same day in combined proceedings”), approved by, Clark \textit{v. State}, 572 So. 2d 1387 (Fla. 1991).

\item \textsuperscript{444} See, Vileta \textit{v. State}, 454 So. 2d 792 (Fla. 2d DCA 1984).

\item \textsuperscript{445} See, Disbrow \textit{v. State}, 642 So. 2d 740, 741 (Fla. 1994) at 741.

\item \textsuperscript{446} See, Jones \textit{v. State}, 813 So. 2d 22 (Fla. 2002); Disbrow \textit{v. State}, 642 So. 2d 740, 741 (Fla. 1994); Poore \textit{v. State}, 531 So. 2d 161, 165 (Fla. 1988); see also King \textit{v. State}, 648 So. 2d 183, 190 (Fla. 1st DCA 1994).

\item \textsuperscript{447} Snouffer \textit{v. State}, 684 So. 2d 247 (Fla. 2d DCA 1996).

\item \textsuperscript{448} Clark \textit{v. State}, 572 So. 2d 1387 (Fla. 1991); see also, Foster \textit{v. State}, 576 So. 2d 937 (Fla. 5th DCA 1991), wherein it was observed:

The Clark court has, by permitting the defendant (at his option) to require a continuance so that multiple offenses charged in different informations eventually come before a sentencing court at or about the same time, converted the language of the rule to merely mean “pending before the court” and has eliminated the limiting language “for sentencing.” The original wording of the rule at least encouraged the defendant to consolidate his charges for simultaneous disposition in order to get

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the defendant enters an admission to a violation of probation (VOP) and asks that the court not sentence him or her until a verdict is obtained in an upcoming trial on an unrelated charge. Failure of the defense to seek consolidated sentencing where the defendant’s total overall sentence would be shorter will result in reversal of the sentence for ineffective assistance of counsel.

In any event, as soon as practicable after the determination of guilt and after the examination of any presentence reports, the sentencing court is required to order a sentencing hearing. At the hearing, the court is required to inform the defendant of the finding of guilt against the defendant and of the judgment and ask the defendant whether there is any legal cause to show why sentence should not be pronounced. The defendant may allege and show as legal cause why sentence should not be pronounced only: (1) that the defendant is insane; (2) that the defendant has been pardoned of the offense for which he or she is about to be sentenced; (3) that the defendant is not the same person against whom the verdict or finding of the court or judgment was rendered; or (4) if the defendant is a woman and sentence of death is to be pronounced, that she is pregnant. The court is also required to entertain submissions and evidence by the parties that are relevant to the sentence. In cases where guilt was determined by plea, the court also has to inform itself, if not previously informed, of the existence of plea discussions or agreements and the extent to which they involve recommendations as to the appropriate sentence. If the defendant was represented by a public defender or other appointed counsel the court is required to notify the defendant of the imposition of a lien pursuant to section 938.29, Florida Statutes, with the amount of the lien given and a judgment entered in that amount against the defendant. Notice of the defendant’s right to a hearing to contest the amount of the lien must be given at the time of sentence. If the defendant requests

the benefit of a single scoresheet: the “new” rule eliminates this incentive. Further, any rule that gives the defendant a free ride after his initial conviction for all additional crimes in the hopper makes crimes, like donuts, cheaper by the dozen. While this is a good marketing device to increase the sales of donuts, its value in discouraging multiple crimes is suspect.

- (Harris, J., concurring specially).

449 See, Gallagher v. State, 476 So. 2d 754 (Fla. 5th DCA 1985).

450 Gonzalez v. State, 821 So. 2d 1194 (Fla. 3d DCA 2002); State v. Williams, 624 So. 2d 407 (Fla. 2d DCA 1993).


452 Fla. R. Crim. P. 3.720(a).


454 Fla. R. Crim. P. 3.720(b).

455 Fla. R. Crim. P. 3.720(c).

456 Fla. R. Crim. P. 3.720(d)(1); Gonzalez v. State, 40 So. 3d 60 (Fla. 2d DCA 2010).
a hearing to contest the amount of the lien, the court is required to set a hearing date within 30 days of the date of sentencing.\textsuperscript{457}

Sentencing may not proceed without allowing the defendant the opportunity to present mitigation evidence, if such evidence exists. The court may not, for example, proceed to sentencing immediately after the jury returns a guilty verdict where the defense makes a good-faith claim of not having been given a completed scoresheet or of not being ready to present mitigation evidence.\textsuperscript{458}

At the sentencing hearing, and prior to the imposition of sentence upon any defendant who has been convicted of any felony or who has pleaded guilty or \textit{nolo contendere} to any crime, including a criminal violation of a provision of chapter 316, the sentencing court must permit the victim of the crime for which the defendant is being sentenced, the victim’s parent or guardian if the victim is a minor, the lawful representative of the victim or of the victim’s parent or guardian if the victim is a minor, or the next of kin of the victim if the victim has died from causes related to the crime, to appear before the sentencing court for the purpose of making a statement under oath for the record, and submit a written statement under oath to the office of the state attorney, which statement must be filed with the sentencing court.\textsuperscript{459} Section 921.143 requires that the victim or family member either appear before the sentencing court under oath or submit a written statement under oath to the state attorney.\textsuperscript{460} If neither is done, such statements cannot be properly admitted and it is reversible error for the presiding judge to rely on them in sentencing the defendant.\textsuperscript{461} The state attorney or any assistant state attorney is required to advise all victims or, when appropriate, the victim’s parent, guardian, next of kin, or lawful representative that statements, whether oral or written, shall relate to the facts of the case and the extent of any harm, including social, psychological, or physical harm, financial losses, loss of earnings directly or indirectly resulting from the crime for which the defendant is being sentenced, and any matter relevant to an appropriate disposition and sentence.\textsuperscript{462}

The court may not accept a plea agreement that prohibits a law enforcement officer, correctional officer, or correctional probation officer from appearing or speaking at a parole hearing or clemency hearing.\textsuperscript{463} In any case in which the victim is a law enforcement officer, correctional officer, or correctional probation officer, a plea agreement may not prohibit the officer or an

\textsuperscript{457}Fla. R. Crim. P. 3.720(2).

\textsuperscript{458}See, \textit{Pringle v. State}, 6 So. 3d 673 (Fla. 2d DCA 2009).

\textsuperscript{459}§ 921.143(1), Fla. Stat.

\textsuperscript{460}§ 921.143(1)(a) & (b), Fla. Stat.

\textsuperscript{461}\textit{Patterson v. State}, 994 So. 2d 428 (Fla. 1st DCA 2008).

\textsuperscript{462}§ 921.143(2), Fla. Stat.

\textsuperscript{463}§ 921.143(3)(b), Fla. Stat.
authorized representative of the officer’s employing agency, as defined in section 943.10, from appearing or providing a statement at the sentencing hearing.\textsuperscript{464} The court may refuse to accept a negotiated plea and order the defendant to stand trial.\textsuperscript{465}

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.\textsuperscript{466} A policy of mechanically rounding up a prison sentence to the nearest whole number (\textit{e.g.}, 7.83 years to eight years or 6.16 years to seven years) without any reflection on the individual merits of a particular defendant’s case is arbitrary and consequently a denial of due process.\textsuperscript{467} A judge may not deny a defendant even one day of presentence jail credit.\textsuperscript{468} Under the former sentencing guidelines, a judge may not impose an upward departure sentence of even one day without providing written reasons supporting that departure.\textsuperscript{469} \textit{De minimis} downward departure sentences with no written reasons appearing in the record to legally justify the departure, however, may\textsuperscript{470} or may not\textsuperscript{471} warrant reversal.

\section{§ 19.1. Reduction of offense}

There are only two circumstances when a trial court judge has the authority to reduce a charged offense. The first is where the State consents, and the second is where the evidence does not sustain the jury’s verdict after trial.

The decision to file or not file criminal charges is an exclusive function of the State Attorney or Statewide Prosecutor acting in his or her capacity as a member of the executive branch of the

\begin{footnotes}
\item[464] § 921.143(3)(c) & (d), Fla. Stat.
\item[465] § 921.143(4), Fla. Stat.
\item[466] Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980); see also, Booker v. State, 514 So. 2d 1079, 1084 (Fla. 1987) (“The abuse of discretion standard exists to ensure that sentences are not imposed arbitrarily or capriciously or at the whim of an individual judge whose personal feelings against a particular defendant, or a particular type of crime, may render the sentence imposed so offensive to traditional notions of justice that it does not meet the objective test of reasonableness.”); Pressley v. State, 73 So. 3d 834 (Fla. 1st DCA 2011).
\item[467] Cromartie v. State, 70 So. 3d 559 (Fla. 2011).
\item[468] Austin v. State, 765 So. 2d 945 (Fla. 5th DCA 2000).
\item[469] Doyle v. State, 788 So. 2d 368 (Fla. 2d DCA 2001).
\item[470] State v. Bleckinger, 746 So. 2d 553, 555 (Fla. 5th DCA 1999) (reversal of downward departure of .9 month).
\item[471] Davis v. State, 775 So. 2d 350 (Fla. 2d DCA 2000) (refusal to reverse downward departure of .45 month).
\end{footnotes}
government. The discretion of a prosecutor in deciding whether and how to prosecute is absolute. The trial court, as a member of the judiciary, thus may not second-guess the prosecutor’s filing decision and substitute his or her judgment as to an appropriate filing decision for the decision of the prosecutor in a particular case. As such, a trial court lacks jurisdiction to unilaterally reduce the charged offense or offenses against a defendant, accept a plea to a lesser included offense, or sentence a defendant for a lesser included offense without the consent of the prosecutor. Consent of the prosecutor, for purposes of the court’s authority to accept a plea to a lesser offense, cannot be implied by the State’s silence at the sentencing hearing; consent must be an on-the-record acquiescence to the reduction in charges.

The situation is different in the circumstance of a jury verdict. When the offense is divided into degrees or necessarily includes lesser offenses and the court, on a motion for new trial, is of the opinion that the evidence does not sustain the verdict but is sufficient to sustain a finding of guilt of a lesser degree or of a lesser offense necessarily included in the one charged, the court must not grant a new trial but must find or adjudge the defendant guilty of the lesser degree or lesser offense necessarily included in the charge, unless a new trial is granted by reason of some other prejudicial error. The window of jurisdiction for such a reduction of offense is limited to the moment the court first enters its judgment of conviction and before the court announces its sentence. Absent statutory authority, the trial court lacks jurisdiction to reduce the offense in post-conviction proceedings.

§ 19.2. Accepting pleas to lesser offenses

In Florida, sentencing discretion is subject to several additional limitations, particularly in the areas of the option to withhold adjudication of guilt and in the application of enhancements such as minimum mandatory penalties and reclassification of offenses. Judges may not, for instance, initially withhold adjudication of guilt for driving under the influence (DUI), DUI manslaughter, or

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473 See, State v. Cain, 381 So. 2d 1361 (Fla. 1980), and cases cited therein.

474 See, State v. Serra, 529 So. 2d 1262 (Fla. 3d DCA 1988).

475 State v. Vesquez, 755 So. 2d 674 (Fla. 4th DCA 1999) (trial judge was without jurisdiction to sentence defendant for lesser included offense of crime to which defendant had pled no contest in absence of State’s consent to reduction in charge).

476 State v. Vesquez, 755 So. 2d 674 (Fla. 4th DCA 1999).


478 Note that the Indiana state legislature in 2012 gave its trial courts jurisdiction to reduce a Class D felony conviction to a Class A misdemeanor conviction under limited circumstances. See, Ind. Code § 35-50-2-7; also, Alden v. State, 983 N.E.2d 186 (Ind. Ct. App. 2013).
vehicle homicide;\textsuperscript{479} for bookmaking;\textsuperscript{480} or for drug trafficking;\textsuperscript{481} they must also adjudicate the defendant guilty of the charged offense whenever probation or community control is revoked.\textsuperscript{482}

A judge may not accept a plea of guilty to a lesser offense such as reckless driving from a defendant charged with DUI who has been given a breath or blood test to determine blood or breath alcohol concentration with results of 0.15 or more,\textsuperscript{483} nor accept a plea of guilty to such a lesser offense from a defendant charged with manslaughter resulting from the operation of a motor vehicle or vehicular homicide.\textsuperscript{484}

\textbf{§ 19.3. Rendition of judgment}

If the defendant is found guilty, a judgment of guilty and, if the defendant has been acquitted, a judgment of not guilty must be rendered in open court and in writing, signed by the judge, filed, and recorded. However, where allowed by law, the judge may withhold and adjudication of guilt if the judge places the defendant on probation. When a judge renders a final judgment of conviction, withholds adjudication of guilt after a verdict of guilty, imposes a sentence, grants probation, or revokes probation, the judge must forthwith inform the defendant concerning the rights to appeal therefrom, including the time allowed by law for taking an appeal. Within 15 days after the signed written judgment and sentence is filed with the clerk of court, the clerk of the court must serve on counsel for the defendant and counsel for the State a copy of the judgment of conviction and sentence entered, noting thereon the date of service by a certificate of service. If it is the practice of the trial court or the clerk of court to hand deliver copies of the judgment and sentence at the time of sentencing and copies are in fact hand delivered at that time, hand delivery must be noted in the court file, but no further service is required and the certificate of service need not be included on the hand-delivered copy.\textsuperscript{485}

The lack of an oral adjudication of guilt does not affect the validity of a written judgment of guilt that is properly rendered, because there is no requirement that a judgment of guilt must be orally

\textsuperscript{479} § 316.656, Fla. Stat.

\textsuperscript{480} § 849.25(2) & (3), Fla. Stat.

\textsuperscript{481} § 893.135(3), Fla. Stat.

\textsuperscript{482} § 948.06(1), Fla. Stat.

\textsuperscript{483} § 316.656(2), Fla. Stat.

\textsuperscript{484} § 316.656(3), Fla. Stat.; see, \textit{Travelers Indem. Co. of America v. McInroy}, 342 So. 2d 842 (Fla. 1st DCA 1977).

\textsuperscript{485} Fla. R. Crim. P. 3.670.
pronounced. Where there is an ambiguity in the oral pronouncement, the proper remedy is for the trial court to clarify the sentence imposed.

§ 19.4. Withholding adjudication

If it appears to the court upon a hearing of the matter that the defendant is not likely again to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by law, the court, in its discretion, may either adjudge the defendant to be guilty or stay and withhold the adjudication of guilt. In either case, the court shall stay and withhold the imposition of sentence upon the defendant and shall place a felony defendant upon probation. If the defendant is found guilty of a nonfelony offense as the result of a trial or entry of a plea of guilty or nolo contendere, regardless of whether adjudication is withheld, the court may place the defendant on probation. In addition to court costs and fees and notwithstanding any law to the contrary, the court may impose a fine authorized by law if the offender is a nonfelony offender who is not placed on probation. However, a defendant who is placed on probation for a misdemeanor may not be placed under the supervision of the department unless the circuit court was the court of original jurisdiction.

This means that the court can withhold adjudication, and assess courts costs and fines, without putting a misdemeanor defendant on probation. The law remains that a felony defendant getting a withhold of adjudication must be put on Department of Corrections probation. The court may not grant a withhold of adjudication and sentence the defendant to “court-supervised probation,” as court-supervised probation is not a sanction recognized under Florida law, and nothing in chapter 948, which governs probation and community control, allows a judge to personally supervise probationers.

The trial court therefore has jurisdiction to modify judgment and to withhold adjudication of guilt following a jury verdict of guilt for a felony, but only if the defendant was placed on probation; ordering a fine and restitution is insufficient. Adjudication cannot be withheld once a defendant is sentenced to time served for a felony; if both the defendant and the State are satisfied with the withholding of adjudication, the court should impose probation with a condition that the defendant serve jail time in an amount already served, with credit for time served.

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486 Brantley v. State, 32 So. 3d 89 (Fla. 2d DCA 2009).
487 Chapman v. State, 14 So. 3d 273 (Fla. 5th DCA 2009).
488 § 948.01(2), Fla. Stat.
489 State v. Luxenburg, 13 So. 3d 137 (Fla. 2d DCA 2009).
490 Wiltzer v. State, 756 So. 2d 1063 (Fla. 4th DCA 2000); McClellan v. State, 819 So. 2d 946 (Fla. 2d DCA 2002).
491 State v. Messina, 13 So. 3d 153 (Fla. 4th DCA 2009); State v. Seward, 543 So. 2d 398 (Fla. 4th DCA 1989); see also, State v. Sylvio, 846 So. 2d 1271 (Fla. 4th DCA 2003) (trial court’s sentencing of defendant who pled guilty to possession of cocaine to a “withhold and waive,” in which the court withheld adjudication of guilt, was not
A trial court may not withhold adjudication if a defendant is given a prison sentence.\textsuperscript{492} The court may not withhold adjudication when sentencing a defendant pursuant to the Florida Youthful Offender Act when sentencing the defendant to more than 364 days of incarceration, even if the incarceration is imposed as a condition of probation.\textsuperscript{493}

Another example of legislative limits on judicial discretion to withhold adjudication is the enactment on May 13, 2004, of chapter 2004–60, Laws of Florida, which created section 775.08435, Fl. Stat. effective July 1, 2004. Under the provisions of this statute, the court may not withhold adjudication of guilt upon a defendant for:

1. Any capital, life, or first-degree felony offense;

2. A second-degree felony offense unless (a) the state attorney requests in writing that adjudication be withheld, or (b) the court makes written findings that the withholding of adjudication is reasonably justified based on circumstances or factors in accordance with those set forth in section 921.0026, Fla. Stat. (dealing with mitigating circumstances for downward departures in sentencing). Notwithstanding any other provision of this section, however, no adjudication of guilt can be withheld for a second-degree felony offense if the defendant has a prior withholding of adjudication for a felony that did not arise from the same transaction as the current felony offense;

3. A third-degree felony if the defendant has a prior withholding of adjudication for a felony offense that did not arise from the same transaction as the current felony offense unless (a) the state attorney requests in writing that adjudication be withheld, or (b) the court makes written findings that the withholding of adjudication is reasonably justified based on circumstances or factors in accordance with those set forth in section 921.0026. Notwithstanding any other provision of this section, however, no adjudication of guilt may be withheld for a third-degree felony if the defendant has two or more withholdings of adjudication for a felony that did not arise from the same transaction as the current felony offense.

Generally speaking, the State has the burden of proving prior convictions under Florida law. The same burden of proof applies for proof of prior offenses. Thus the State has the burden of proving that the defendant was previously charged with a felony for which adjudication was withheld in order for the defendant to be disqualified under section 775.08435 from receiving a withhold of adjudication for which the defendant is otherwise qualified.\textsuperscript{494} In asserting the defendant’s

\textsuperscript{492}Fla. R. Crim. P. 3.670 (“[T]he judge may withhold an adjudication of guilt if the judge places the defendant on probation.”). See also, \textit{Switzer v. State}, 940 So. 2d 1248 (Fla. 1st DCA 2006).


\textsuperscript{494}\textit{State v. Barfield}, 995 So. 2d 1138 (Fla. 5th DCA 2008).
disqualification, the State is required to prove specifically that the defendant has prior withholds of adjudication, not that the defendant has prior convictions for one or more felonies. This means that a defendant with prior adjudications of guilt but no withholds of adjudication may be qualified for a withholding of adjudication at sentencing.495

Section 775.08435 does not, by its own terms, apply to any adjudication or withholding of adjudication under chapter 985 (pertaining to delinquency). Chapter 2004–60 also amended section 924.07, Fla. Stat., to allow for State appeals from any withholding of adjudication of guilt in violation of section 775.08435.

Another example is the enactment, out of the same legislative session, of chapter 2004–388, Laws of Florida, which enhances fleeing or attempting to elude an officer and prohibits the trial court from suspending, deferring or withholding the imposition of guilt or imposition of sentence for any fleeing or eluding offense.496

An adjudication of guilt that is not otherwise mandatory may, in the trial court’s discretion, be removed within 60 days of imposition pursuant to Fla. R. Crim. P. 3.800(c), but not thereafter.497

§ 19.5. Withholding of sentence

The power to suspend or withhold the imposition of sentence upon a convicted criminal can be exercised by a trial judge only as an incident to probation under the provisions of Chapter 948, Fla. Stat. When, for example, a defendant admits the commission of a felony offense and pursuant to a plea agreement receives a withhold of adjudication a “suspended entry of sentence” without any probation results in an illegal sentence.498

A defendant who has received a withheld sentence upon conviction for a criminal offense, and such withheld sentence has not been altered for a period of five years, can not thereafter be sentenced for the conviction of the same crime for which sentence was originally withheld.499 “Conviction” in this context means a determination of guilt by verdict of a jury or a plea of guilty and does not require adjudication by the court.500

495 State v. Good, 30 So. 2d 661 (Fla. 4th DCA 2010).
497 Sanchez v. State, 541 So. 2d 1140 (Fla. 1989).
498 State v. Galazz, 2 So. 3d 1083 (Fla. 3d DCA 2009).
500 State v. Gazda, 257 So. 2d 242 (Fla. 1971).
This provision of the law is triggered when, for example, a defendant enters a plea to an offense and the trial court orders that “adjudication of sentence be withheld and a presentence investigation be ordered,” and the defendant fails to appear for sentencing and is not returned to the court for five years.\textsuperscript{501} This provision is equally applicable to those cases in which sentencing was validly deferred or withheld for a proper judicial purpose and to those cases in which the imposition of sentence has been illegally suspended or “withheld” in contravention of the probation laws.\textsuperscript{502}

Section 775.14, authorizing the withholding of sentence, predates the passage of section 948.01(2), which provides in relevant part:

If it appears to the court upon a hearing of the matter that the defendant is not likely again to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by law, the court, in its discretion, may adjudge the defendant to be guilty or stay and withhold the adjudication of guilt; and, in either case, it shall stay and withhold the imposition of sentence upon such defendant and \textit{shall place the defendant on probation} …. [emphasis added]

Presently, an order purporting to defer sentence without placing the defendant on probation is beyond the court’s jurisdiction and a denial of due process of law.\textsuperscript{503}

\section*{§ 19.6. Deferred sentencing}

A court may accept a defendant’s plea, but postpone, or defer, sentencing until the defendant returns on an appointed date, pursuant to plea agreement. For more than 20 years, and particularly since the practice was approved by the Florida Supreme Court in \textit{Quarterman},\textsuperscript{504} trial courts in Florida have been granting furloughs between the plea hearing and the sentencing hearing for defendants who can reasonably be expected to obey the law while released and can be relied upon to voluntarily appear for sentencing. Such an arrangement can be beneficial to the defendant who

\begin{itemize}
  \item \textit{State v. Gazda}, 257 So. 2d 242 (Fla. 1971).
  \item \textit{Helton v. State}, 106 So. 2d 79 (Fla. 1958) (where defendant pled guilty to breaking and entering with intent to commit a misdemeanor, so that the court could have imposed a maximum sentence of five years or place the defendant on probation for a maximum of seven years, the court did not have jurisdiction to withhold imposition of sentence from day to day and term to term, and then, 12 years later, to revoke the order illegally suspending sentence and to impose sentence on the defendant).
  \item \textit{Bateh v. State}, 101 So. 2d 869 (Fla. 1st DCA 1958); Fla. Jur. 2d, Criminal Law § 2239, Limitation on Withheld Sentence.
  \item \textit{Quarterman v. State}, 527 So. 2d 1380 (Fla. 1988).
\end{itemize}
is preparing to go to prison, and it can also be cost-effective for a county that has limited space in its local jail when a period of time must elapse between the plea and the sentence.505

The plea agreement under which the defendant is released is essentially a civil contract. In consideration for the privilege to remain free, the defendant agrees that if he does not appear for sentencing at the agreed upon time and place, the trial court can sentence the defendant to any lawful sentence even if it is a sentence in excess of the sentence specified in the negotiated plea agreement. Under the original sentencing guidelines, such an agreement required the defendant to agree that he or she would allow the judge to impose an upward departure sentence based on the defendant’s failure to appear for sentencing. This practice was approved in *Quarterman* and thus the agreement became known as a *Quarterman* agreement.506

The facts of *Quarterman* are instructive: Quarterman entered a plea of guilty to the charge of armed robbery pursuant to a plea bargain. Under the plea agreement, he was to be sentenced to 5½ years imprisonment. Prior to his plea of guilty, the defendant requested a few days continuance to visit a sister who was hospitalized. At the beginning of the plea hearing, defense counsel announced the terms of the bargain as follows:

This plea is tendered based upon the understanding that Mr. Quarterman will show up for sentencing this coming Monday, and at that time he would be sentenced to five and a half years in the Department of Corrections with credit for time served.

I have explained to Mr. Quarterman that there is a minimum mandatory three years involved in the sentence. I have also explained to Mr. Quarterman if he failed to show up for court Monday or if he committed a new crime between now and Monday, that the Court’s offer would not be binding on the Court and the Court could sentence him to anything in the Court’s discretion (emphasis added).508

Prior to accepting the plea, the trial court reiterated these conditions, specifically asking Quarterman if he understood the conditions and agreed to them. Quarterman agreed and the plea was accepted. Quarterman failed to appear for sentencing on the following Monday, at which time, he was sentenced in absentia to 15 years, which represented an upward departure from the applicable determinant sentencing guidelines. On appeal, the Florida Supreme Court held that the conditions to which Quarterman had agreed were not imposed after the plea bargain was accepted, but were

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accepted as an integral part of the plea bargain itself and served as a clear and convincing reason for an upward departure.\footnote{Quarterman v. State, 527 So. 2d 1380 (Fla. 1988).}

With the enactment of the Criminal Punishment Code, the concept of an “upward departure” sentence has effectively disappeared.\footnote{See, § 921.0024(2), Fla. Stat.} A Quarterman agreement is thus no longer an agreement to permit an upward departure sentence; the defendant merely agrees to a specific sentence with the caveat that the trial court can impose any greater lawful sentence if he or she does not appear. Note that imposition of a greater sentence upon a defendant’s failure to appear under a Quarterman agreement does not violate double jeopardy.\footnote{See, Adams v. State, 780 So. 2d 955, 958-59 (Fla. 4th DCA 2001); cf. Quarterman v. State, 527 So. 2d 1380 (Fla. 1988).}

If a defendant does not fulfill a Quarterman agreement, his or her failure to appear is obvious. At the time and place of sentencing, when the case is called, the defendant is not present. This occurs in the same court of record where the contract was created. In many respects, the failure to appear is comparable to an act in direct contempt of court. When the defendant does eventually appear before the court for sentencing, the State may often have no need to prove anything. The trial court can merely recite the facts of record that the defendant entered into the agreement and did not appear as promised and can then ask the defendant to show cause why he or she should not be sentenced to any lawful sentence. Unless the defendant has some reasonable explanation or justification for the failure to appear, the trial court can use its discretion to impose an appropriate, lawful sentence.\footnote{See, Neeld v. State, 977 So. 2d 740 (Fla. 2d DCA 2008).}

Any determination that a failure to appear for sentencing was willful must be supported by competent substantial evidence, which is tantamount to legally sufficient evidence.\footnote{Peacock v. State, 77 So. 3d 1285 (Fla. 4th DCA 2012) (trial court could not sentence defendant to three years in prison based on defendant’s failure to appear because she was hospitalized following a suicide attempt); Ingmire v. State, 9 So. 3d 1278 (Fla. 2d DCA 2009) (defendant claimed confusion as to the date of sentencing, came to court the day following).} This burden does not leave the State, even if the defendant is deemed by the court to not be credible, and no matter how outlandish the reason for failing to appear offered by the defendant seems to be.\footnote{Garcia v. State, 10 So. 3d 687 (Fla. 2d DCA 2009) (defendant claimed that he failed to appear for sentencing because he had been kidnapped while visiting in Mexico and held for ransom until after his court date).}

In contrast, when a defendant agrees to “stay out of trouble” or avoid arrest or conviction in exchange for a furlough between the plea hearing and the sentencing hearing, the act that is a breach
of contract does not occur in a public courtroom. Such an action is more comparable to an act of indirect criminal contempt. Just as an adjudication of indirect criminal contempt requires more notice, proof, and due process, this type of plea agreement requires proof by the State that the defendant has breached the contract. If the defendant challenges the willfulness of the violation of the terms of his or her furlough, the State need only present evidence establishing the breach by a preponderance of the evidence.\footnote{Schwingdorf v. State, 16 So. 3d 835 (Fla. 2d DCA 2009).} Note in this regard that “trouble” might be a rather ambiguous standard, and that “arrest” is an action by a police officer based on that officer’s evaluation of probable cause, not a willful action of the defendant.\footnote{Neeld v. State, 977 So. 2d 740 (Fla. 2d DCA 2008); Henson v. State, 977 So. 2d 736 (Fla. 2d DCA 2008).}

Similarly, if there is agreement as to the sentence the defendant will receive at the postponed sentencing date, and but no agreement as to the consequences of failure to appear on that date, the court is limited to imposing the agreed-upon sentence when the defendant is sentenced after failing to appear as previously agreed.\footnote{Barber v. State, 901 So. 2d 364 (Fla. 5th DCA 2005) (defendant’s failure to appear at scheduled sentencing hearing after being released from custody did not allow trial court to sentence him to longer term than provided for in plea agreement without first giving him opportunity to withdraw his plea, where neither release from custody nor consequences of failure to return for scheduled sentencing were specific terms of plea agreement).} If the court sentences the defendant before allowing him to leave on furlough, the principles announced in \textit{Troupe v. Rowe}\footnote{Troupe v. Rowe, 283 So. 2d 857 (Fla. 1973).} and \textit{Coll v. State}\footnote{Coll v. State, 629 So. 2d 1056 (Fla. 2d DCA 1993).} apply; the double jeopardy clauses bar the court from resentencing the defendant to a greater term of imprisonment even though the defendant did not live up to his or her part of the agreement.\footnote{Joslin v. State, 826 So. 2d 324 (Fla. 2d DCA 2002).} The crucial moment when jeopardy attaches is when the trial court orally pronounces the defendant’s sentence. This submits the defendant to jeopardy, and his or her sentence cannot be increased without violating principles of double jeopardy.\footnote{Flynn v. State, 119 So. 3d 468, 2013 WL 3014143 (Fla. 4th DCA 2013).}

Unless a defendant admits that he or she has breached the terms of his or her plea agreement, the sentencing court cannot declare that the defendant violated the terms of the plea agreement in the absence of competent, substantial evidence to support that finding. Although proof of a violation of the plea agreement is required, the State need only present evidence establishing the breach by the preponderance of the evidence.\footnote{Neeld v. State, 977 So. 2d 740 (Fla. 2d DCA 2008); Schwingdorf v. State, 16 So. 3d 835 (Fla. 2d DCA 2009).}
Deferred sentencing agreements are comparatively complex undertakings, and recurring problems with such arrangements are that they usually are unwritten, are not planned for in advance, and often leave out many important details. Under the circumstances, it might be a useful practice for courts to incorporate each deferred sentencing into a written plea agreement. The written plea agreement currently used in Seminole County, for example, contains the following language at the end of the agreement:

If I am not in custody, I acknowledge that part of the plea agreement in this case includes my continued release pending sentencing on bond, pretrial release or release on recognizance. I understand that this portion of the plea agreement is conditioned upon the following requirements:

1. If a presentence investigation has been ordered, I must appear at the Department of Corrections office as directed by the court and schedule a presentence investigation not later than the first business day following the entry of my plea.
2. I must obey the order of the court requiring me to undergo drug or alcohol screening or for other evaluation if such an order has been made in my case.
3. I must appear on time for all appointments with the assigned probation officer and not be under the influence of any illegal drugs or alcohol.
4. I must appear in court on time for sentencing and not be under the influence of any illegal drugs or alcohol.

I realize that this agreement will be provisionally accepted upon entry of my plea and is subject to being accepted or rejected by the Judge at any time prior to the sentence being imposed, and if it is rejected for any reason other than for a breach of this agreement, I may withdraw my plea and go to trial.

I acknowledge receipt of a copy of the notice for my sentencing date. I understand and agree that if I fail to comply with any of the conditions set forth above I will have breached my plea agreement. In that event, I will not be allowed to withdraw my plea and the Judge may sentence me to any sentence authorized by law for the offense(s) to which I have pled.523

§ 19.7. Specific correctional facility

A trial court cannot order that a defendant serve his or her prison sentence in a specific correctional facility. Trial courts lack the authority to regulate the treatment and placement of a sentenced defendant in the prison system.524 At the same time the Department of Corrections has

523 See, Neeld v. State, 977 So. 2d 740 (Fla. 2d DCA 2008).

524 State, Dept. of Corrections v. Mikle, 855 So. 2d 1279 (Fla. 3d DCA 2003); Moore v. Burns, 796 So. 2d 1261 (Fla. 3d DCA 2001).
no power to reverse a sentence, to impose a more onerous sentence than actually imposed by the court, or to disobey a sentence, when it is not ambiguous.\footnote{\textit{Fuston v. State}, 838 So. 2d 1205 (Fla. 2d DCA 2003).}

\section*{§ 19.8. Placement of certain inmates in local detention facilities}

Misdemeanors are not punishable by imprisonment in a state prison.\footnote{§ 775.08(2), Fla. Stat.} When a statute expressly directs that imprisonment be in a state prison and the defendant qualifies for non-state prison sanctions, the court may impose a sentence of imprisonment in the county jail if the total of the defendant’s cumulative sentences is not more than one year.\footnote{§ 922.051, Fla. Stat.; \textit{Singleton v. State}, 554 So. 2d 1162 (Fla. 1990).} This means that when a defendant is convicted of both a felony and a misdemeanor, the trial court may properly sentence a defendant to county jail time on the misdemeanor to be followed by a prison sentence on the felony count even if the total of the defendant’s cumulative sentences exceeds one year. By contrast, if a defendant is convicted of both a misdemeanor and a felony, section 921.051 would prevent a court from imposing county jail time for the felony conviction if the total of the defendant’s cumulative sentences would exceed one year.\footnote{\textit{Flores v. State}, 974 So. 2d 556 (Fla. 5th DCA 2008); \textit{Singleton v. State}, 554 So. 2d 1162 (Fla. 1990).}

Effective June 17, 1993, a person whose presumptive sentence under the sentencing guidelines is one year and one day up to 22 months in a state correctional institution may be placed by the court into the custody of a local detention facility as a condition of probation or community control for a felony offense contained in sentencing guidelines categories five through nine contained in Fla. R. Crim. P. 3.701 and 3.988, or similar levels described in section 921.0012,\footnote{§ 921.188, Fla. Stat. erroneously references § 921.0022, Fla. Stat.} except for such person whose total sentence points are greater than 52 or less than 40. The court may place such person for the duration of the presumptive sentence. The court may only place a person in a local detention facility pursuant to this section if there is a contractual agreement between the chief correctional officer of that county and the Department of Corrections. This does not limit the court’s ability to place a person in a local detention facility for less than one year.\footnote{§ 921.188, Fla. Stat.}

Where a defendant is sentenced to a term of imprisonment it is possible under certain circumstances for the sentencing court to effect a “sideways departure” sentence that places the defendant in a local detention facility in lieu of a Department of Corrections facility. Where, for example, a defendant is given a split sentence of prison followed by probation, the defendant violates probation by leaving his or her residential treatment program without permission, and the presumptive minimum sentence calls for imprisonment, the court can sentence the defendant to a
term in the county jail while not granting credit for time the defendant previously served in prison, so long as the time the defendant served in prison when combined with the new county jail sentence is equal to or greater than the presumptive minimum sentence.\textsuperscript{531} The fact that the sentence is to be served in the county jail rather than in a state prison is immaterial and the location of imprisonment does not qualify as a downward departure sentence.\textsuperscript{532} Note that this option would also be available as a straightforward modification of probation, so long as the basis of the violation of probation was not a new felony offense before the court for sentencing.

\textbf{§ 19.9. Concurrent state and federal sentences}

Although trial courts have the statutory authority to impose a sentence that is to be served concurrently with a sentence imposed by another state or federal court, the Department of Corrections has discretionary authority regarding the placement of an inmate sentenced to serve multiple sentences.\textsuperscript{533} If the Department of Corrections decides to place such an inmate in a Florida prison first, the Florida sentence will be served before the inmate is transferred to serve the federal sentence in a federal prison where the order of concurrent sentence imposed by the state court is not binding on the federal correctional authorities or courts.\textsuperscript{534} Hence, an order providing that a state sentence is to be served concurrently with a federal sentence is really only a recommendation.\textsuperscript{535}

\textbf{§ 19.10. Orders of no contact}

A sentencing judge generally has wide discretion, in crimes in which there are victims, to order at the time of sentencing that the defendant has no contact with the victim or victims of the crime or crimes for which the defendant is being sentenced. Where the defendant is given a sentence of probation or community control, the order of no contact can be made a condition of the defendant’s supervision. Where the defendant is being sentenced to incarceration, such a no contact order is enforceable through the inherent power of the court to punish contempts. Such orders also can, but do not have to, incorporate the terms of any preexisting civil injunctions prohibiting contact between the defendant and his victim or victims.

The judge has less discretion when the defendant is being sentenced for certain sex crimes. At the time of sentencing a defendant convicted of a violation of section 794.011, section 800.04, or section 847.0135(5), the court is required to order that the defendant be prohibited from having

\textsuperscript{531}See, \textit{State v. Perez}, 979 So. 2d 986 (Fla. 3d DCA 2008).

\textsuperscript{532}\textit{State v. Perez}, 979 So. 2d 986 (Fla. 3d DCA 2008).

\textsuperscript{533}\textit{§ 921.16(2)}, Fla. Stat.

\textsuperscript{534}See, \textit{U.S. v. Smith}, 972 F.2d 243 (8th Cir. 1992); see also, \textit{Taylor v. Sawyer}, 284 F.3d 1143 (9th Cir. 2002).

\textsuperscript{535}\textit{Doyle v. State}, 615 So. 2d 278 (Fla. 3d DCA 1993); see also, \textit{Davis v. State}, 852 So. 2d 355 (Fla. 5th DCA 2003).
any contact with the victim, directly or indirectly, including through a third person, for the duration of the sentence imposed. The court may reconsider the order upon the request of the victim if the request is made at any time after the victim has attained 18 years of age. In considering the request, the court must conduct an evidentiary hearing to determine whether a change of circumstances has occurred which warrants a change in the court order prohibiting contact and whether it is in the best interest of the victim that the court order be modified or rescinded. Any defendant who violates a court order issued under section 921.244 commits a felony of the third degree, punishable as provided in section 775.082, section 775.083, or section 775.084. The punishment imposed under section 921.244 must run consecutive to any former sentence imposed for a conviction for any offense under section 794.011, section 800.04, or section 847.0135(5).

§ 19.11. Structured sentencing

The sentencing discretion of the judiciary has been further limited with the implementation of sentencing guidelines, the Criminal Punishment Code, minimum mandatory sentencing, and enhanced classification of offenses, discussed infra.


The trial court also retains jurisdiction over the defendant post-sentencing, but only in limited specific circumstances. Examples include the following: Section 947.16(4), Fla. Stat., allows the trial court to retain jurisdiction over the first one-third of a maximum prison sentence imposed for the purpose of monitoring any Parole Commission release order. Section 960.292(2) provides that the court “shall retain continuing jurisdiction over the convicted offender for the sole purpose of entering civil restitution lien orders.” Fla. R. Crim. P. 3.800(b) allows the State to file a motion to correct a sentencing error only if the correction of the sentencing error would benefit the defendant. Sections 948.01 and 948.06(1) allow the court, upon finding a violation of probation, to impose any sentence which it might originally have imposed before placing the defendant on probation. Fla. R. Crim. P. 3.170(g)(2)(A) specifically provides that, unless otherwise stated at the time a plea is entered, “the State may move to vacate a plea and sentence within 60 days of the defendant’s noncompliance with the specific terms of a plea agreement.”

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536 § 921.244(1), Fla. Stat.
537 § 921.244(2), Fla. Stat.
538 § 921.244(3), Fla. Stat.
§ 20. Sentencing alternatives

Sentencing alternatives provided by the legislature for the disposition of criminal cases must be used in a manner that will best serve the needs of society, punish criminal offenders, and provide the opportunity for rehabilitation.\(^{539}\)

In summary fashion, defendants convicted of a felony may be sent to state prison or be incarcerated in the county jail; defendants convicted of misdemeanors only may be incarcerated in the county jail, but not in state prison. If the defendant does not receive a state prison sentence, the court may:

1. Impose a split sentence whereby the defendant is to be placed on probation upon completion of any specified period of such sentence, which period may include a term of years or less.\(^{540}\)

2. Make any other disposition that is authorized by law.\(^{541}\)

3. Place the defendant on probation with or without an adjudication of guilt pursuant to section 948.01.\(^{542}\)

4. Impose a fine and probation pursuant to section 948.011 when the offense is punishable by both a fine and imprisonment and probation is authorized.\(^{543}\)

5. Place the defendant into community control requiring intensive supervision and surveillance pursuant to chapter 948.\(^{544}\)

6. Impose, as a condition of probation or community control, a period of treatment which must be restricted to a county facility, a Department of Corrections probation and restitution center, a probation program drug punishment treatment community, or a community residential or nonresidential facility, excluding a community correctional center as defined in section 944.026, which is owned and operated by any qualified public or private entity providing such services. Before admission to such a facility, the court must obtain an individual assessment and recommendations on the appropriate treatment needs, which must be considered by the court in

\(^{539}\)§ 921.187(1), Fla. Stat.  
\(^{540}\)§ 921.187(1)(a), Fla. Stat.  
\(^{541}\)§ 921.187(1)(b), Fla. Stat.  
\(^{542}\)§ 921.187(1)(c), Fla. Stat.  
\(^{544}\)§ 921.187(1)(e), Fla. Stat.
ordering such placements. Placement in such a facility, except for a county residential probation facility, may not exceed 364 days. Placement in a county residential probation facility may not exceed three years. Early termination of placement may be recommended to the court, when appropriate, by the center supervisor, the supervising probation officer, or the probation program manager.\(^{545}\)

7. Sentence the defendant pursuant to section 922.051 to imprisonment in a county jail when a statute directs imprisonment in a state prison, if the defendant’s cumulative sentence, whether from the same circuit or from separate circuits, is not more than 364 days.\(^{546}\)

8. Sentence the defendant who is to be punished by imprisonment in a county jail to a jail in another county if there is no jail within the county suitable for such prisoner pursuant to section 950.01.\(^{547}\)

9. Require the defendant to participate in a work-release or educational or technical training program pursuant to section 951.24 while serving a sentence in a county jail, if such a program is available.\(^{548}\)

10. Require the defendant to perform a specified public service pursuant to section 775.091.\(^{549}\)

11. Require the defendant who violates chapter 893 or violates any law while under the influence of a controlled substance or alcohol to participate in a substance abuse program.\(^{550}\)

12. Require the defendant who violates any criminal provision of chapter 893 to pay an additional assessment in an amount up to the amount of any fine imposed, pursuant to sections 938.21 and 938.23,\(^{551}\) and require the defendant who violates any provision of section 893.13 to pay an additional assessment in an amount of $100, pursuant to sections 938.055 and 943.361.\(^{552}\)

\(^{545}\)§ 921.187(1)(f), Fla. Stat.

\(^{546}\)§ 921.187(1)(g), Fla. Stat.

\(^{547}\)§ 921.187(1)(h), Fla. Stat.


\(^{551}\)§ 921.187(1)(l) 1, Fla. Stat.

\(^{552}\)§ 921.187(1)(l) 2, Fla. Stat.
13. Impose a split sentence whereby the defendant is to be placed in a county jail or county work camp upon the completion of any specified term of community supervision.\textsuperscript{553}

14. Impose split probation whereby upon satisfactory completion of half the term of probation, the Department of Corrections may place the offender on administrative probation pursuant to section 948.013 for the remainder of the term of supervision.\textsuperscript{554}

15. Require residence in a state probation and restitution center or private drug treatment program for defendants on community control or offenders who have violated conditions of probation.\textsuperscript{555}

16. Impose any other sanction which is provided within the community and approved as an intermediate sanction by the county public safety coordinating council as described in section 951.26.\textsuperscript{556}

17. Impose, as a condition of community control, probation, or probation following incarceration, a requirement that an offender who has not obtained a high school diploma or high school equivalency diploma or who lacks basic or functional literacy skills, upon acceptance by an adult education program, make a good faith effort toward completion of such basic or functional literacy skills or high school equivalency diploma, as defined in section 1003.435, in accordance with the assessed adult general education needs of the individual defendant.\textsuperscript{557}

The court must require a defendant to make restitution under section 775.089, unless the court finds clear and compelling reasons not to order such restitution. If the court does not order restitution, or orders restitution of only a portion of the damages, as provided in section 775.089, the court must state the reasons on the record in detail. An order requiring a defendant to make restitution to a victim under section 775.089 does not remove or diminish the requirement that the court order payment to the Crimes Compensation Trust Fund under chapter 960.\textsuperscript{558}

This means that, in practice, a judge has three basic sentencing alternatives in Florida: (1) a period of confinement; (2) a period of probation or community control; and (3) a “split sentence.” Split sentencing is further subdivided into (a) a true split sentence; (b) a probationary split sentence; (c) a Villery sentence; (d) a reverse split sentence; and (e) reverse probation.

\textsuperscript{553}\$ 921.187(1)(m), Fla. Stat.

\textsuperscript{554}\$ 921.187(1)(n), Fla. Stat.

\textsuperscript{555}\$ 921.187(1)(o), Fla. Stat.

\textsuperscript{556}\$ 921.187(1)(p), Fla. Stat.

\textsuperscript{557}\$ 921.187(1)(q), Fla. Stat.

\textsuperscript{558}\$ 921.187(2), Fla. Stat.
§ 20.1. Straight confinement

The sentencing court has the discretion to impose a sentence of incarceration on any criminal defendant, and is not obligated to impose probation or community control in lieu of or in addition to incarceration. A sentence of incarceration of a year or less must be served in a county jail facility, while a sentence of more than a year must be served in a Department of Corrections facility. Probation or community control is a matter of grace and is subject to exercise of the trial court’s discretion.559

Note that a person who is convicted of a crime committed on or after January 1, 1994, may be released from incarceration only: (1) upon expiration of the person’s sentence; (2) upon expiration of the person’s sentence as reduced by accumulated meritorious or incentive gain-time; (3) as directed by an executive order granting clemency; (4) upon placement in a conditional release program pursuant to section 947.1405 or a conditional medical release program pursuant to section 947.149; or (5) upon the granting of control release, including emergency control release, pursuant to section 947.146.560 A person who is convicted of a crime committed on or after December 1, 1990, and who receives a control release date may not refuse to accept the terms or conditions of control release.561

§ 20.2. Straight probation or community control

Except where incarceration is mandated, a sentencing court may impose a sentence of straight probation or (for felonies) straight community control on a defendant. Where such a sentence is imposed and the defendant subsequently violates the terms or conditions of his or her supervision, the court may impose upon revocation any lawful sentence that it could have imposed at the defendant’s original sentencing.

§ 20.3. True split sentence

Whenever punishment by imprisonment for a misdemeanor or a felony, except for a capital felony, is prescribed, the court, in its discretion, may, at the time of sentencing, impose a split sentence whereby the defendant is to be placed on probation or, with respect to any such felony, into community control upon completion of any specified period of such sentence which may include a term of years or less. In such case, the court must stay and withhold the imposition of the remainder of sentence imposed upon the defendant and direct that the defendant be placed upon probation or into community control after serving such period as may be imposed by the court. The period of

559 Saidi v. State, 845 So. 2d 1022 (Fla. 5th DCA 2003); McCarthren v. State, 635 So. 2d 1005, 1006 (Fla. 5th DCA 1994); Bentley v. State, 411 So. 2d 1361 (Fla. 5th DCA 1982) (en banc).


561 § 921.001(11), Fla. Stat.
probation or community control must commence immediately upon the release of the defendant from incarceration, whether by parole or gain-time allowances.\textsuperscript{562}

A “true split sentence” consists of a total period of confinement with a portion of the confinement period suspended and the defendant placed on probation or community control for that suspended portion which remains suspended contingent upon completion on probation of the suspended term of years. As long as there exists a valid reason for downward departure, a trial court may impose a true split sentence in which the entire period of incarceration is suspended. A trial court may also impose a true split sentence in which the period of community control and probation is shorter than the suspended portion of incarceration.\textsuperscript{563} When a defendant violates a true split sentence, the most severe sentence the trial court may impose on resentencing is to “unsuspend” the previously suspended prison term. That is, that the defendant is reincarcerated and must actually serve the previously suspended term of years in prison. When a true split sentence is imposed, the court cannot, however, order new incarceration which exceeds the remaining balance of the suspended portion of the original sentence, on the theory that such an increase in sentence would violate the constitutional prohibition of double jeopardy.\textsuperscript{564} If the sentence constitutes a true split sentence, then the period of incarceration is merely capped at the remaining balance of the suspended sentence, and the court is authorized to impose a sentence less than the suspended portion.\textsuperscript{565}

When an original sentence is a true split sentence, the sentencing judgment following revocation of probation in no instance may order new incarceration that exceeds the remaining balance of the withheld or suspended portion of the original sentence. Imposing a suspending sentence followed by probation restricts the penalty options available upon violation. A sentencing judge may not order new incarceration that exceeds any remaining balance of the suspended incarceration portion of the original sentence, less credit for time served.\textsuperscript{566} The aggregate components of a sentence, or sentences imposed when probation is revoked in a true split sentence, cannot exceed the original suspended sentence of incarceration, less time served. For example, a defendant who received a true split sentence of one year and one day suspended upon successful completion of two years’ probation could not be sentenced, upon revocation of probation, to a guidelines sentence of 40.2 months in prison; the sentence could not exceed the suspended portion of the original sentence less credit for time served. It also does not matter if the original sentence has been subject to modification prior to the revocation.\textsuperscript{567}

\textsuperscript{562} § 948.012(1), Fla. Stat.

\textsuperscript{563} State v. Powell, 703 So. 2d 444 (Fla. 1997).

\textsuperscript{564} Poore v. State, 531 So. 2d 161, 164 (Fla. 1988); Sullivan v. State, 625 So. 2d 955 (Fla. 2d DCA 1993).

\textsuperscript{565} Lacey v. State, 831 So. 2d 1267 (Fla. 4th DCA 2002).

\textsuperscript{566} See, Poore v. State, 531 So. 2d 161 (Fla. 1988); State v. Powell, 703 So. 2d 444, 446 (Fla. 1997).

\textsuperscript{567} Snell v. State, 902 So. 2d 957 (Fla. 4th DCA 2005) (“We also reject the State’s contention that, here, the split sentence evaporated upon the earlier modification of the sentence.”).
Effective for offenses committed on or after January 1, 1994, if a defendant’s probation or community control is revoked and the defendant is serving a split sentence pursuant to section 948.012, upon recommitment to the Department of Corrections, the court must order credit for time served in state prison or county jail only, without considering any type of gain-time earned before release to supervision, or any type of sentence reduction granted to avoid prison overcrowding, including, but not limited to, any sentence reduction resulting from administrative gain-time, provisional credits, or control release. The court must determine the amount of jail-time credit to be awarded for time served between the date of arrest as a violator and the date of recommitment, and is required to direct the Department of Corrections to compute and apply credit for all other time served previously on the prior sentence for the offense for which the defendant is being recommitted. This provision, contained in section 921.0017, does not affect or limit the department’s authority to forfeit gain-time under sections 944.28(1) and 948.06(7).  

As a matter of practice, net sentencing on violation of a true split sentence is not advisable, because it can cause confusion. The Department of Corrections is not required to give prior prison credit on a true split sentence that imposes the net time remaining on the suspended portion of the sentence rather than the total time imposed, and standard sentencing forms do not contain language that allows for easy resolution of prison credit time when a court imposes only the net time remaining on the suspended portion of a true split sentence. If a trial court intends to impose the maximum period of imprisonment for a violation of the probationary portion of a true split sentence. It should impose the full original sentence of incarceration with credit for time served.

§ 20.4. Probationary split sentence

A “probationary split sentence” consists of a period of confinement, none of which is suspended, followed by a period of probation. In the probationary split sentence, if the defendant violates probation, the trial court may impose any sentence it might have originally imposed. Note that a defendant sentenced to a probationary split sentence who violates probation and is resentenced to prison is entitled to credit for all time actually served in prison prior to his release on probation unless such credit is waived.


569 Cruz v. State, 976 So. 2d 695 (Fla. 4th DCA 2008); Pressly v. Tadlock, 968 So. 2d 1057 (Fla. 2d DCA 2007); see also, Crews v. State, 779 So. 2d 492 (Fla. 2d DCA 2000); Roberts v. State, 702 So. 2d 239 (Fla. 2d DCA 1997).

570 Eldridge v. Moore, 760 So. 2d 888 (Fla. 2000).

571 Mann v. State, 109 So. 3d 1202 (Fla. 5th DCA 2013).
§ 20.5. Villery sentence

A Villery\textsuperscript{572} sentence consisted of a period of probation preceded by a period of confinement imposed as a special condition. This sentencing alternative should not be confused with probation with a condition of confinement which is an entirely different matter. The theory in Villery was that it is only after probation is revoked that a sentence is pronounced and imposed upon the defendant and that then the court may impose any sentence which it might have originally imposed, but only when the defendant was originally put on probation in lieu of being sentenced and is not correct when a true split sentence was originally imposed.\textsuperscript{573} Upon violation of probation in a Villery sentence, the trial court could impose whatever sentence it originally could have pronounced, which it may not do in a true split sentence.\textsuperscript{574} Note that this sentencing option was abrogated by section 921.187, Fla. Stat., effective October 1, 1983.\textsuperscript{575}

§ 20.6. Reverse split sentence

A “reverse split sentence” is one whereby the defendant is sentenced to a term of probation which may be followed by a period of incarceration or, with respect to a felony, into community control, as follows:

— If the defendant meets the terms and conditions of probation or community control, any term of incarceration may be modified by court order to eliminate the term of incarceration.\textsuperscript{576}

— If the defendant does not meet the terms and conditions of probation or community control, the court may revoke, modify, or continue the probation or community control as provided in section 948.06. If the probation or community control is revoked, the court may impose any sentence that it could have imposed at the time the defendant was placed on probation or community control. The court may not provide credit for time served for any portion of a probation or community control term toward a subsequent term of probation or community control. However, the court may not impose a subsequent term of probation or community control which, when combined with any amount of time served on preceding terms of probation or community control for offenses pending before the court for sentencing, would exceed the maximum penalty allowable as provided in section 775.082.

\textsuperscript{572}Villery v. Florida Parole and Probation Commission, 396 So. 2d 1107 (Fla. 1980).

\textsuperscript{573}Poore v. State, 531 So. 2d 161 (Fla. 1988).

\textsuperscript{574}Poore v. State, 531 So. 2d 161 (Fla. 1988).

\textsuperscript{575}Brown v. State, 460 So. 2d 427 (Fla. 5th DCA 1984); Andrews v. State, 462 So. 2d 18 (Fla. 2d DCA 1985).

\textsuperscript{576}\$ 948.012(2)(a), Fla. Stat.
Such term of incarceration must be served under applicable law or county ordinance governing service of sentences in state or county jurisdiction. This does not prohibit the court from imposing any other sanction provided by law.\textsuperscript{577}

The obvious expectation of the legislature in enacting provision for a reverse split sentence is that the court will eliminate the term of incarceration if the defendant complies with the terms of probation.\textsuperscript{578}

A reverse split sentence cannot be used to thwart the applicable sentencing guidelines or Criminal Punishment Code. Where the presumptive minimum sentence calls for imprisonment, the possibility of no incarceration is enough to constitute a downward departure, which requires contemporaneous written reasons under the guidelines or Criminal Punishment Code.\textsuperscript{579} Note that a reverse split sentence is not imposed when the incarcerative portion of a sentence is suspended and the elimination of the incarcerative portion is conditioned upon successful completion of the supervisory portion of the sentence: Such a sentence would properly be termed a conditional suspended sentence.\textsuperscript{580}

\section*{§ 20.7. Split probation}

A “split probation” sentence is one imposed whereby, upon satisfactory completion of half the term of probation, the Department of Corrections may place the defendant on administrative probation for the remainder of the term of supervision.\textsuperscript{581} Administrative probation is a form of noncontact supervision in which a defendant who presents a low risk of harm to the community may, upon satisfactory completion of half the term of probation, be transferred by the Department of Corrections to nonreporting status until expiration of the term of supervision.\textsuperscript{582} In practice, however, many trial courts do not impose split probation, but prefer to permit the defendant to seek early termination of probation at the halfway point if the defendant has completed all conditions of probation, is current with costs assessed, and has not violated the terms and conditions of probation.

\\textsuperscript{577}§ 948.012(2)(b), Fla. Stat.

\textsuperscript{578}\textit{State v. Powell}, 703 So. 2d 444 (Fla. 1997).

\textsuperscript{579}\textit{Disbrow v. State}, 642 So. 2d 740 (Fla. 1994).

\textsuperscript{580}See, \textit{Bell v. State}, 651 So. 2d 237 (Fla. 5th DCA 1995).

\textsuperscript{581}§§ 948.01, 948.012(3), Fla. Stat.; \textit{State v. Powell}, 703 So. 2d 444 (Fla. 1997); \textit{Poore v. State}, 531 So. 2d 161 (Fla. 1988).

\textsuperscript{582}See, § 948.001(1), Fla. Stat.
§ 20.8. General sentencing

The sentencing court must impose or suspend a distinct and individual sentence for each offense before the court for sentencing, and may not impose a general sentence for multiple convictions. 583 This means, for instance, that if the defendant has four third-degree felonies before the court for sentencing, the sentencing judge cannot multiply the statutory maximum of five years for each third-degree felony by four and impose a general sentence on the defendant of twenty years in prison on all counts. The judge can, however, impose concurrent or consecutive sentences of up to five years each on those offenses before the court for sentencing. 584

§ 20.9. Concurrent and consecutive sentencing

Defendants convicted of two or more offenses charged in the same indictment, information, or affidavit or in consolidated indictments, informations, or affidavits are required to serve sentences of imprisonment concurrently unless the court directs that two or more of the sentences be served consecutively. Sentences of imprisonment for offenses not charged in the same indictment, information, or affidavit have to be served consecutively unless the court directs that two or more of the sentences be served concurrently. 585 A punishment for a control-release violation is not an as-yet undetermined sentence, and therefore a court can order a new sentence to run consecutively to such punishment. This is true because only a court can impose a sentence. An as-yet undetermined action of the Department of Corrections is not a sentence. Rather, the department’s action is an administrative determination as to how an inmate’s control-release violation affects his status within the context of the sentence he has already received. 586 Similarly, the sentencing court also has authority to direct that incarceration arising from a conditional release violation be served concurrently with sentences imposed for new offenses committed while the defendant was on conditional release. 587

Where authorized by statute, the sentencing court can stack consecutive minimum mandatory sentences arising from a single criminal episode. Section 893.135, Fla. Stat., for example, authorizes consecutive minimum mandatory sentences for trafficking in cocaine and conspiracy to traffic in cocaine, even though these offenses may arise out of the same transaction. 588 Absent specific

583 See, Fla. R. Crim. P. 3.701(d)(12), 3.702(d)(19), and 3.703(d)(31); also, Brazley v. State, 871 So. 2d 986 (Fla. 3d DCA 2004).

584 See, e.g., Lawson v. State, 46 So. 3d 1189 (Fla. 2d DCA 2010).

585 § 921.16, Fla. Stat.

586 Scantling v. State, 711 So. 2d 524, 525–26 (Fla. 1998); see also, § 947.141, Fla. Stat.

587 See, Johnson v. State, 972 So. 2d 310 (Fla. 2d DCA 2008), and cases cited therein.

588 Kelly v. State, 964 So. 2d 135 (Fla. 2007).
legislative authorization, minimum mandatory enhancement sentences arising from a single criminal episode must run concurrently pursuant to the Florida Supreme Court’s decision in *Hale v. State*.\(^{589}\)

Once sentences from multiple crimes committed during a single criminal episode have been enhanced, as through the habitual offender statutes, however, the total penalty may not be further enhanced by ordering that the sentences run consecutively.\(^{590}\) This rule is meant to ensure that the sentences of defendants convicted of multiple offenses arising out of the same criminal episode are not doubly enhanced by first lengthening the sentences through enhancement and then by ordering that these sentences be served consecutively.\(^{591}\) This rule applies to situations in which the court imposes any form of consecutive sentencing, including a sentence of prison followed by a sentence of probation, for offenses arising out of the same criminal episode.\(^{592}\) However, a defendant who has been subjected to enhanced sentencing on two or more offenses arising out of a single criminal episode may have his or her sentence further enhanced by an order of the court that the sentences run consecutively so long as the statutory maximum for any offense is not exceeded.\(^{593}\)

The First, Second, Third and Fourth Districts have followed *Hale* and held that consecutive prison releasee reoffender sentences that arose from a single criminal episode were illegal.\(^{594}\) While consecutive minimum mandatory sentences for offenses arising out of the same criminal episode are forbidden, if the offenses do not arise out of the same criminal episode, then the trial court has discretion to impose concurrent or consecutive sentences.\(^{595}\)

The Fifth District Court of Appeals has taken the position that the imposition of consecutive minimum mandatory sentences under section 775.087(2) is improper where the offenses occurred during a single criminal episode, unless the defendant discharges the firearm and injures multiple


\(\footnotesize{591}\) Fla. Jur. 2d, Criminal Law § 2594.

\(\footnotesize{592}\) *Benjamin v. State*, 667 So. 2d 437 (Fla. 2d DCA 1996).

\(\footnotesize{593}\) *Richardson v. State*, 698 So. 2d 551 (Fla. 1st DCA 1997); see also, Fla. Jur. 2d, Criminal Law § 2594.

\(\footnotesize{594}\) *Mosley v. State*, 112 So. 3d 538 (Fla. 1st DCA 2013); *Smith v. State*, 824 So. 2d 263 (Fla. 2d DCA 2002) (prison releasee reoffender statute); *Spivey v. State*, 789 So. 2d 1087 (Fla. 2d DCA 2001) (violent career criminal sanctions); *Green v. State*, 845 So. 2d 895 (Fla. 3d DCA 2003) (habitual violent felony offender statute and 10/20/life statute); *Philmore v. State*, 760 So. 2d 1063 (Fla. 4th DCA 2000) (prison releasee reoffender statute).

\(\footnotesize{595}\) *Elozar v. State*, 872 So. 2d 934 (Fla. 5th DCA 2004).
victims or causes multiple injuries to one victim.\textsuperscript{596} The First District has recently adopted the position that stacking minimum mandatory sentences under section 775.087(2) is permissible under such circumstances.\textsuperscript{597} The Fourth District has recently adopted the position that the trial court is required to impose consecutive sentences for each qualifying felony in accordance with the plain language of section 775.087(2)(d), whether or not a firearm is discharged.\textsuperscript{598} Where the defendant is convicted of multiple offenses that have occurred in separate criminal episodes and one of the offenses carries a minimum mandatory sentence pursuant to the 10/20/Life statute (as where a defendant on probation for one offense commits two new offenses, and one of the new offenses carries a minimum mandatory term of imprisonment under the 10/20/Life statute), the sentencing court must sentence the 10/20/Life offense consecutively to the other new offense and may also run the violation of probation sentence consecutively to the new offenses.\textsuperscript{599}

A trial judge has the discretion to stack minimum mandatory sentences in cases involving capital felonies together with non-capital felonies committed with the use of a firearm, where the predicate offenses all occurred during the course of a single episode.\textsuperscript{600} Where, however, the defendant is convicted of first-degree felony murder and robbery (the underlying felony) for killing the same victim in the course of a robbery, consecutive minimum mandatory sentences for the murder and robbery are improper.\textsuperscript{601} Note that, where the State charges a defendant with first-degree murder and robbery and proceeds on both a premeditated murder theory and a felony murder theory, and the jury returns a verdict of “guilty as charged,” the trial court cannot presume that the defendant was convicted on a premeditated murder theory.\textsuperscript{602}

Although sentences imposed under certain enhancement statutes must, by the language of those statutes, run concurrently if the offenses occurred during the same criminal episode,\textsuperscript{603} those statutes create exceptions to the rule, and there is nothing in the Criminal Punishment Code that

\textsuperscript{596} Swainigan v. State, 57 So. 3d 989 (Fla. 5th DCA 2011); Valentin v. State, 963 So. 2d 317, 319-20 (Fla. 5th DCA 2007).

\textsuperscript{597} Walton v. State, 106 So. 3d 522 (Fla. 1st DCA 2013).

\textsuperscript{598} Williams v. State, 124 So. 3d 879, 38 Fla. L. Weekly D912, 2013 WL 1748687 (Fla. 4th DCA 2013).

\textsuperscript{599} State v. Sousa, 903 So. 2d 923 (Fla. 2005); State v. Christian, 692 So. 2d 889 (Fla. 1997).

\textsuperscript{600} Downs v. State, 616 So. 2d 444 (Fla. 1993) (consecutive 25-year minimum mandatory for first-degree murder with a firearm and three-year minimum mandatory for using a firearm in the commission of an aggravated assault arising from a single criminal episode).

\textsuperscript{601} Boler v. State, 678 So. 2d 319 (Fla. 1996).

\textsuperscript{602} Traylor v. State, 785 So. 2d 1179 (Fla. 2000).

\textsuperscript{603} See, Murray v. State, 890 So. 2d 451 (Fla. 2d DCA 2004); Philmore v. State, 760 So. 2d 239 (Fla. 4th DCA 2000).
prohibits the imposition of consecutive standard sentences, even when the sentences arise from offenses committed in a single criminal episode.\textsuperscript{604}

Any sentence for sexual battery as defined in chapter 794, or murder as defined in section 782.04, must be imposed consecutively to any other sentence for sexual battery or murder which arose out of a separate criminal episode or transaction. The punishment imposed under section 784.048 is required to run consecutively to any former sentence imposed for a conviction for any offense under section 794.011, section 800.04, or section 847.0135(5).\textsuperscript{605} A county court or circuit court of this state may also direct that the sentence it imposes be served consecutively with a sentence imposed by a court of another state, of the United States, or of another jurisdiction. A county court or circuit court of this state may not direct that the sentence imposed by such court be served coterminously with a sentence imposed by another court of this state or by a court of another state.\textsuperscript{606} Note that consecutive county jail sentences that exceed one year for misdemeanors, as opposed to felonies, are permitted, because, by its plain language, section 922.051, Fla. Stat., does not apply to misdemeanors.\textsuperscript{607}

The court must affirmatively express its intention that such sentences are to run concurrently; otherwise, they will run consecutively. For example, where a defendant is on control release from prison at the time he or she is sentenced for an offense committed while the defendant was under such legal restraint, the new sentence and any sentence that results from revocation of control release by the Department of Corrections must run consecutively unless the trial court that imposes the new sentence states on the record that the new sentence is to run concurrently with any prospective control release revocation sentence, even if the length of the new sentence is discussed and is part of a plea bargain. Where a defendant enters a plea to a negotiated prison sentence absent indication of the court’s intent that it be run concurrently with a control release revocation sentence and the

\begin{footnotes}
\textsuperscript{604} Almendares v. State, 916 So. 2d 29 (Fla. 4th DCA 2005); Rodriguez v. State, 883 So. 2d 908 (Fla. 2d DCA 2004).

\textsuperscript{605} § 784.048(8), Fla. Stat.

\textsuperscript{606} § 921.16, Fla. Stat.

\textsuperscript{607} Armstrong v. State, 656 So. 2d 455 (Fla. 1995) (a defendant may be sentenced to consecutive terms in county jail exceeding one year if convicted of multiple misdemeanors); Goodloe v. State, 661 So. 2d 820 (Fla. 1995); Gwynn v. Orange County Bd. of County Com’rs, 527 So. 2d 866 (Fla. 5th DCA 1988) (following adjudication of guilt in county court on fifteen misdemeanor traffic offenses and several contempt of court charges, defendant properly sentenced to 12 consecutive one year terms of imprisonment in the county jail); Amrein v. State, 504 So. 2d 783 (Fla. 1st DCA 1987) (consecutive eight month county jail sentences for each of five misdemeanor counts, the sentences to run consecutively to each other, permitted); Mancebo v. State, 338 So. 2d 268 (Fla. 3d DCA 1976) (defendant properly sentenced to serve three consecutive sentences of one year each in the county jail following the entry of pleas of guilty to three separate first-degree misdemeanors); see, Carson v. State, 635 So. 2d 1007 (Fla. 5th DCA 1994) (error for a trial court to sentence a defendant to multiple consecutive one-year sentences in a county jail when the sentences imposed are for felony crimes).
\end{footnotes}
defendant subsequently has his or her control release revoked on the earlier sentence or sentences, the defendant is not entitled to relief via a motion for clarification of sentence. 608

Since Florida Statutes do not authorize intermittent or interrupted sentences, when a defendant is given a split sentence, the nonincarcерative portion must immediately follow the prison sentence. 609 Note, however, that section 948.012 does authorize a “reverse split sentence” whereby the defendant is sentenced to a term of probation which is followed by a period of incarceration or community control under certain circumstances. 610 A defendant cannot serve a prison term and be on probation simultaneously: The rehabilitative concept of probation presupposes that the probationer is not in prison confinement. 611 A defendant may not be sentenced to prison and community supervision where the community supervision is scheduled to commence prior to the completion of the term of imprisonment. 612 A prison sentence imposed partly concurrent with and partly consecutive to another prison sentence is illegal since a prisoner has the right to serve a sentence at one stretch, rather than in bits and pieces. 613 It is impossible to comply with a sentence of simultaneous incarceration and probation, and any term of probation presumed to run when the defendant cannot be supervised is a nullity. 614 Note however, that this does not apply in the situation in which incarceration in county jail is a condition of probation.

Although the simultaneous imposition of incarceration and probation is illegal, this rule does not apply to separate sentences received from different courts at different times, in which cases the

608 See, Platt v. State, 664 So. 2d 307 (Fla. 2d DCA 1995); Kirkland v. State, 633 So. 2d 1138 (Fla. 2d DCA 1994).

609 Calhoun v. State, 522 So. 2d 509 (Fla. 1st DCA 1988) (defendant cannot be sentenced to a period of incarceration, followed by a period of probation, then recalled to serve more prison time before being released to be placed on probation again for separate counts of burglary).

610 § 948.012(2), Fla. Stat.

611 See, Bernhardt v. State, 288 So. 2d 490 (Fla. 1974); Porter v. State, 585 So. 2d 399 (Fla. 1st DCA 1991).

612 Flowers v. State, 899 So. 2d 1257 (Fla. 4th DCA 2005); Joseph v. State, 752 So. 2d 656 (Fla. 2d DCA 2000).

613 Stroman v. State, 837 So. 2d 1207 (Fla. 2d DCA 2003); Butler v. State, 548 So. 2d 780, 781 (Fla. 2d DCA 1989); see also, Massey v. State, 389 So. 2d 712 (Fla. 2d DCA 1980); Rozmestor v. State, 381 So. 2d 324 (Fla. 5th DCA 1980) (“Imposing a prison sentence that is part concurrent with and part consecutive to another prison sentence is a punishment that no judge under the entire body of sentencing statutes could possibly inflict under any set of factual circumstances, and is an illegal sentence.”).

614 Clemons v. State, 629 So. 2d 1067 (Fla. 2d DCA 1994); Ware v. State, 474 So. 2d 332 (Fla. 1st DCA 1985); Brudie v. State, 467 So. 2d 1113 (Fla. 2d DCA 1985).
probationary portion of the sentence that completes its incarcerative portion first is tolled until the imprisonment portion of the latter sentence is complete.615

Where the defendant is being sentenced for an offense committed while on control release, a court may order a sentence to run concurrently or consecutively to the pending control release violation.616 In fact, the trial court must exercise its discretion to order a sentence imposed for an offense committed while on community release to run concurrently or consecutively to his or her community release sentence and cannot defer the structure of the sentence to the Department of Corrections because the Department lacks such sentencing authority.617

§ 20.10. Coterminous sentencing

A county court or circuit court of this state may not direct that the sentence imposed by such court be served coterminously with a sentence imposed by another court of this state or imposed by a court of another state.618 This does not, however, prohibit coterminous sentences imposed by a sentencing judge on his or her own cases.619

A coterminus sentence is one which ends at the same time as another, separate, sentence. When a sentencing court orders that one sentence is to run coterminous with another sentence, the net effect is that the two sentences will end on the soonest ending date of the two. This is because a sentencing court cannot increase a sentence once imposed, but, where lawful, may decrease a sentence. The imposition of a coterminous sentence is a sentencing decision in which a court exercises its discretion to mitigate a defendant’s sentence.620 Although a trial court’s order that a prison sentence run coterminously with another could cause a sentence to expire and a prisoner to be released prior to serving a minimum of 85% of the sentence imposed, the order does not violate the prohibition, contained in section 944.275(4)(b) 3., on the award of gain time that would result

615 Foster v. State, 889 So. 2d 951 (Fla. 5th DCA 2004); Schurman v. State, 847 So. 2d 569 (Fla. 1st DCA 2003).

616 Richardson v. State, 947 So. 2d 1219 (Fla. 1st DCA 2007).

617 § 921.16(1), Fla. Stat.; Richardson v. State, 947 So. 2d 1219 (Fla. 1st DCA 2007) (trial court may order a sentence to run concurrently or consecutively to a pending control release violation); McCarthur v. State, 766 So. 2d 292 (Fla. 4th DCA 2000) (trial court must exercise its discretion to sentence the offender to concurrent or consecutive sentences to control release violation in an earlier case); Art. I, § 8, Fla. Const. (barring an administrative agency from imposing a sentence of imprisonment); Pearson v. Moore, 767 So. 2d 1235, 1238–39 (Fla. 1st DCA 2000).

618 § 921.16(3), Fla. Stat.

619 Cottengim v. State, 44 So. 3d 209 (Fla. 5th DCA 2010).

620 See, Thomas v. State, 921 So. 2d 657 (Fla. 2d DCA 2006).
in a prisoner serving less than 85% of his or her sentence.\textsuperscript{621} The Department of Corrections violates the separation of power doctrine when it refuses to carry out a coterminous sentencing provision.\textsuperscript{622} Where, however, the coterminous language of a sentencing order refers to a sentence that has already been served, such language is mere surplusage and is void, ineffective and a nullity as a matter of law.\textsuperscript{623} This is because a sentence that has been fully served leaves nothing for another sentence to be attached as concurrent or coterminous.\textsuperscript{624}

Courts and prosecutors should be aware that, where a defendant is being sentenced to periods of incarceration for multiple offenses, language in the plea agreement of in the judge’s sentencing order that the sentences shall be coterminous means that all sentences will end simultaneously with the shortest sentence, even if the intent of the court (and the prosecutor) was otherwise and even if the court sentenced the defendant to longer minimum mandatory sentences. If, for example, a defendant is sentenced simultaneously to a three-year minimum mandatory sentence for one count, a concurrent five-year Prison Releasee Reoffender sentence for another count, and a 10-year habitual offender sentence for a third count, and the plea agreement or sentencing order agreed to by the parties provides that all sentences shall be coterminous, the defendant’s sentences will end upon completion of the three-year minimum mandatory sentence of the first count. Thus the language of cotermination will trump all other provisions as to sentence length in the absence of fraud, even if the insertion of such language is the result of mistake or misapprehension on the part of the court or the prosecutor.\textsuperscript{625}

\textbf{§ 20.11. Sentencing length, commencement, proportionality and criteria}

The length of the sentence actually imposed is generally a matter of legislative prerogative.\textsuperscript{626} The Florida Constitution, however, prohibits indefinite imprisonment.\textsuperscript{627} Within this constitutional stricture, the length of a defendant’s sentence is limited by the statutory maximum incarceration for the offense for which the defendant is sentenced. The “statutory maximum” includes the statutory limits of 60 days for second-degree misdemeanors, one year for first-degree misdemeanors, five

\begin{itemize}
  \item \textsuperscript{621}Moore v. Pearson, 789 So. 2d 316 (Fla. 2001); Singletary v. Marchetti, 691 So. 2d 65 (Fla. 3d DCA 1997); Gaston v. State, 613 So. 2d 469 (Fla. Dist. Ct. App. 2d Dist. 1993).
  \item \textsuperscript{622}Moore v. Pearson, 789 So. 2d 316 (Fla. 2001); Art. I, § 18, Fla. Const.
  \item \textsuperscript{623}Whipple v. Department of Corrections, State, 892 So. 2d 554 (Fla. 3d DCA 2005).
  \item \textsuperscript{624}See, Rohaus v. State, 667 So. 2d 858 (Fla. 4th DCA 1996); State v. Franklin, 175 N.J. 456, 815 A.2d 964 (2003); Murray v. Goord, 298 A.2d 94, 747 N.Y.S.2d 492 (2002); Ex parte Sams, 67 So. 2d 657 (Fla. 1953).
  \item \textsuperscript{625}See, Thomas v. State, 921 So. 2d 657 (Fla. 2d DCA 2006).
  \item \textsuperscript{626}Rummel v. Estelle, 445 U.S. 263, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980) (rejecting a claim that a life sentence was grossly disproportionate to the felonies that formed the predicate for the sentence).
  \item \textsuperscript{627}Art. I, § 17, Fla. Const.
\end{itemize}
years for third-degree felonies, 15 years for second-degree felonies, 30 years for first-degree felonies, life for life felonies, and death for capital crimes. For defendants punished under the Criminal Punishment Code, the statutory maximum includes the lowest permissible sentence where that sentence exceeds the statutory maximum sentence as provided in section 775.082, Fla. Stat., as well as life imprisonment if the total sentence points are greater than or equal to 363. The statutory maximum also includes the upper limits set by the legislature for penalty enhancements and offense reclassifications.

In determining whether a sentence is “indefinite” or not, the defendant’s life expectancy is not used to mark the longest term which that defendant should serve: Mortality and life expectancy are irrelevant to limitations on the terms of incarceration set by the legislature for criminal misconduct. As such, neither a life sentence nor a series of consecutive sentences that in total exceed the life expectancy of the defendant is unconstitutionally indefinite.

Just as an indefinite length of sentence is improper, indefinite commencement of sentence is improper. Although section 921.16 provides that sentences of imprisonment for offenses charged in the same indictment, information, or affidavit have to be served consecutively unless the court directs that two or more of the sentences be served concurrently, it is error for a court to direct that a sentence commence at the conclusion of a future sentence yet to be announced.

It is generally accepted that for first offenders, nonincarcerative sanctions should be imposed unless the severity of the offense dictates otherwise. If there is a reason, or reasons, for treating a first offender differently, those reasons should appear on the record at sentencing. A defendant is entitled to a new sentencing hearing if it appears that the trial court’s sentencing decision was influenced by an impermissible consideration.

Sentencing criteria may be divided into two categories: criteria for sentencing defendants whose offenses were committed before October 1, 1983, and criteria for sentencing defendants whose offenses were committed on or after October 1, 1983.

The following criteria is used for sentencing all persons who committed crimes before October 1, 1983:

629 Ratliff v. State, 914 So. 2d 938 (Fla. 2005) (terms of life imprisonment did not violate provision of state constitution forbidding indefinite terms of imprisonment); Adaway v. State, 902 So. 2d 746 (Fla. 2005) (sentence of life imprisonment without parole is not unconstitutional as being a sentence of “indefinite imprisonment”); Alvarez v. State, 358 So. 2d 10 (Fla. 1978) (125–year sentence for armed robbery is within sentence of “life or any lesser term of years” authorized by legislature).
630 Jarrett v. State, 665 So. 2d 331 (Fla. 5th DCA 1995); Marino v. State, 635 So. 2d 1068 (Fla. 5th DCA 1994); Teffeteller v. State, 396 So. 2d 1171 (Fla. 5th DCA 1981).
631 See, Pruitt v. State, 682 So. 2d 629 (Fla. 3d DCA 1996).
1. A court can not impose a sentence of imprisonment unless, after considering the nature and circumstances of the crime and the prior criminal record, if any, of the defendant, the court finds that imprisonment is necessary for the protection of the public because a lesser sentence is not commensurate with the seriousness of the defendant’s crime, or there is a probability that during the period of a suspended sentence or probation the defendant will commit another crime.\(^{632}\)

2. The following grounds, while not controlling the discretion of the court, must be accorded weight in favor of withholding a sentence of imprisonment:

a. The defendant’s criminal conduct neither caused nor threatened serious harm.\(^{633}\)

b. The defendant did not know and had no reason to know that her or his criminal conduct would cause or threaten serious harm.\(^{634}\)

c. The defendant acted under a strong provocation.\(^{635}\)

d. There were substantial grounds tending to excuse or justify the defendant’s criminal conduct, though failing to establish a defense.\(^{636}\)

e. The defendant has compensated or will compensate the victim of her or his criminal conduct for the damage or injury that the victim sustained.\(^{637}\)

f. The defendant has no history of prior delinquency or criminal activity or had led a law-abiding life for a substantial period of time before the commission of the present crime.\(^{638}\)

\(^{632}\)§ 921.005(1)(a), Fla. Stat.

\(^{633}\)§ 921.005(1)(b) 1, Fla. Stat.

\(^{634}\)§ 921.005(1)(b) 2, Fla. Stat.

\(^{635}\)§ 921.005(1)(b) 3, Fla. Stat.

\(^{636}\)§ 921.005(1)(b) 4, Fla. Stat.

\(^{637}\)§ 921.005(1)(b) 5, Fla. Stat.

\(^{638}\)§ 921.005(1)(b) 6, Fla. Stat.
g. The defendant’s criminal conduct was the result of circumstances unlikely to recur.\textsuperscript{639}

h. The character and attitudes of the defendant indicate that she or he is unlikely to commit another crime.\textsuperscript{640}

i. The defendant is particularly likely to respond affirmatively to noncustodial treatment.\textsuperscript{641}

With the rise of structured sentencing schemes, the legislature has promulgated a number of sentencing criteria and principles in the context of noncapital felonies. The present Criminal Punishment Code embodies the following sentencing principles, derived mainly from those of the former sentencing guidelines that went into effect on October 1, 1983:

1. Sentencing is neutral with respect to race, gender, and social and economic status.\textsuperscript{642}

2. 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.\textsuperscript{643}

3. The penalty imposed is commensurate with the severity of the primary offense and the circumstances surrounding the primary offense.\textsuperscript{644}

4. The severity of the sentence increases with the length and nature of the offender’s prior record.\textsuperscript{645}

5. The sentence imposed by the sentencing judge reflects the length of actual time to be served, shortened only by the application of incentive and meritorious gain-time as provided by law, and may not be shortened if the defendant would consequently serve less than 85% of his or her term of imprisonment as provided in section 944.275(4)(b) 3. The provisions of chapter 947, relating to

\textsuperscript{639} § 921.005(1)(b) 7, Fla. Stat.

\textsuperscript{640} § 921.005(1)(b) 8, Fla. Stat.

\textsuperscript{641} § 921.005(1)(b) 8, Fla. Stat.

\textsuperscript{642} §§ 921.002(1)(a), 921.001(4)(a) 1, Fla. Stat.

\textsuperscript{643} §§ 921.002(1)(b), 921.001(4)(a) 2, Fla. Stat.

\textsuperscript{644} §§ 921.002(1)(c), 921.001(4)(a) 3, Fla. Stat.

\textsuperscript{645} §§ 921.002(1)(d), 921.001(4)(a) 4, Fla. Stat.
parole, shall not apply to persons sentenced under the Criminal Punishment Code. Note that, under the former Guidelines, defendants were not required to serve at least 85% of their sentences and were eligible for parole.

6. Departures below the lowest permissible sentence established by the Criminal Punishment Code must be articulated in writing by the trial court judge and made only when circumstances or factors reasonably justify the mitigation of the sentence. The level of proof necessary to establish facts that support a departure from the lowest permissible sentence is a preponderance of the evidence. Note that, under the former guidelines, presumptive sentencing was within a range from which downward departures were allowed on the basis of mitigation and upward departures were allowed on the basis of aggravation.

7. The trial court judge may impose a sentence up to and including the statutory maximum for any offense, including an offense that is before the court due to a violation of probation or community control. This was not a feature of the former Guidelines.

8. A sentence may be appealed on the basis that it departs from the Criminal Punishment Code only if the sentence is below the lowest permissible sentence or as enumerated in section 924.06(1).

9. 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.

Additional principles of proportionality can be found in the upper limits placed on fines, the sentencing aggravators and mitigators, and alternative sentencing schemes such as those for juveniles, youthful offenders, and habitualized criminals.

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647 § 921.001(4)(a) 5, Fla. Stat.
649 § 921.001(4)(a) 6, Fla. Stat.
650 § 921.002(1)(g), Fla. Stat.
651 § 921.002(1)(h), Fla. Stat.
652 §§ 921.002(1)(i), 921.001(4)(a) 7, Fla. Stat.
653 § 775.083(1), Fla. Stat.
§ 20.11.1. Length of sentence

At the constitutional level, the Eighth Amendment to the United States Constitution and Article I, Section 17 of the Florida Constitution have historically provided protection relative to the mode and method of punishment, not the length of incarceration, and outside the context of capital punishment successful challenges to the proportionality of particular sentences have been exceedingly rare. A proportionality analysis thus focuses on the crime charged and the legislatively imposed punishment for the crime, not the specific facts of a particular case. A “gross disproportionality” principle is applicable, however, to sentences for terms of years. In other words, in order to violate the cruel and unusual punishment clauses of the national and state constitutions a prison sentence must, at least, be grossly disproportionate to the crime. The proportionality analysis to be followed in such cases is guided, first of all, by the gravity of the offense and the harshness of the penalty. If an inference of gross disproportionality is raised at this stage, further consideration is given to the sentences imposed on other criminals in the same jurisdiction and the sentences imposed for the commission of the same crime in other jurisdictions. A state’s choice of sentence, however, will never be unconstitutional simply because the penalty is harsher than the sentence imposed by other states for the same crime, and the fact that a co-defendant received a lighter sentence does not mean that a defendant’s sentence is disproportionate.

The United States Supreme Court has invalidated a prison sentence because of its length on only one occasion. In fact, neither the Eighth Amendment nor its counterpart in the Florida Constitution require strict proportionality between crime and sentence, but rather forbid only sentences that are grossly disproportionate to the crime. A criminal sentence may qualify as a


656 *Edwards v. State*, 885 So. 2d 1039 (Fla. 4th DCA 2004); see, *State v. Nickerson*, 541 So. 2d 725 (Fla. 1st DCA 1989) (departure is erroneous insofar as it is based on the disproportionate severity of the sentence).

657 *Adaway v. State*, 902 So. 2d 746 (Fla. 2005).


659 *Atwater v. State*, 781 So. 2d 1149 (Fla. 5th DCA 2001).

660 *Solem v. Helm*, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983) (life sentence without possibility of parole for habitual offender who uttered a bad check for $100 and had three prior convictions for third-degree burglary, one prior conviction for obtaining money under false pretenses, one prior conviction of grand larceny, and one prior conviction for third-offense driving while intoxicated).

cruel and unusual punishment if it, among other things, is grossly disproportionate, involves the unnecessary and wanton infliction of pain, or otherwise shocks the conscience and sense of justice of the people, based on evolving standards of decency. Against this backdrop, the Florida Supreme Court has found that, in the Criminal Punishment Code, the legislature has provided a reasonable basis for its sentencing scheme for noncapital felonies which is neither discriminatory, arbitrary, or oppressive. Similarly, the Florida Supreme Court has also found that mandatory minimum sentencing schemes do not constitute cruel or unusual punishment.

Recently, however, the United States Supreme Court has extended the categorical challenge analysis which heretofore has been reserved for capital sentencing and which considers the nature of the offense and the characteristics of the offender, to noncapital sentencing. In Graham v. Florida, a majority of Justices held that the Constitution’s ban on cruel and unusual punishments prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide, adding that a state need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term. On June 25, 2012, the United States Supreme Court in Miller v. Alabama extended this prohibition by holding that mandatory life without parole for those under the age of 18 at the time of their crimes violate the Eighth Amendment’s prohibition on cruel and unusual punishments. The Miller opinion appears, however, to sanction a life sentence for homicide where the defendant’s youthfulness is considered in mitigation at sentencing.

Miller provides little guidance on how to proceed with resentencing juveniles convicted under mandatory sentencing schemes. Under Miller, while a sentence of life without parole remains constitutional in homicide cases, the sentencing court must be free to impose a lesser sentence when the defendant’s youth or the circumstances of the crime so indicate. Florida Statutes, however, do not currently provide for lesser sentences in first-degree murder cases. Miller has thus opened a breach in Florida’s sentencing statutes. The rule adopted by the First and Third Districts has been

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662 Provenzano v. Moore, 744 So. 2d 413 (Fla. 1999); Duncan v. Moore, 754 So. 2d 708 (Fla. 2000); see also, United States v. Rosenberg, 195 F.2d 583 (2d Cir. 1952).

663 Hall v. State, 823 So. 2d 757 (Fla. 2002).

664 See, e.g., State v. Benitez, 395 So. 2d 514 (Fla. 1981); McArthur v. State, 351 So. 2d 972 (Fla. 1977); Banks v. State, 342 So. 2d 469 (Fla. 1976); O'Donnell v. State, 326 So. 2d 4 (Fla. 1975).

665 Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 407 (2010); see also, Rioux v. State, 48 So. 3d 1029 (Fla. 2d DCA 2010) (reversal of life sentences for sexual battery and lewd molestation on persons less than 12 years old committed when defendant was 15); Manuel v. State, 48 So. 3d 94 (Fla. 2d DCA 2010), review denied, 63 So. 3d 750 (Fla. 2011) and cert. denied, 132 S. Ct. 446, 181 L. Ed. 2d 259 (2011) (Defendant’s convictions for attempted murder with a firearm were not homicide offenses, and thus Eighth Amendment’s prohibition of life sentences without the possibility of parole for nonhomicide offenses committed by juveniles applied to defendant, who was 13 years old when the offenses were committed; homicide required the death of the victim.).

for the court to exercise restraint and for the parties to make their case before the trial court, where testimony may be taken, evidence presented, and argument made on all material issues to include the potential range of sentencing options. The Fifth District has held that, as a consequence of *Miller*, and pursuant to the doctrine of statutory revival, the only sentence now available in Florida for a charge of capital murder committed by a juvenile is life without the possibility of parole after twenty-five years under the 1993 version of section 775.082(1), Fla. Stat.

Note that the First, Third and Fifth District Courts of Appeal have taken the position that *Miller* does not apply retroactively because that decision does not affect the determination of guilt or innocence and does not cast doubt on the integrity of the original trial proceeding, and so is a procedural rather than a substantive change in sentencing law. The Second District has held that the determination in *Miller* that the Eighth Amendment prohibition of cruel and unusual punishment precluded the imposition of a mandatory sentence of life without parole on a juvenile offender was retroactive. Federal and state courts are, however, sharply divided on the issue.

The rationale of the Supreme Court in the Graham and Miller decisions was that children are constitutionally different from adults for purposes of sentencing on the basis that (1) children have a lack of maturity and an underdeveloped sense of responsibility leading to recklessness, impulsivity, and heedless risk-taking, (2) children are more vulnerable to negative influences and outside pressures from their family and peers, having limited control over their own environment and lacking in the ability to extricate themselves from horrific, crime-producing settings, and (3) a child’s character is not as well-formed as an adult’s, his or her traits are less fixed, and his or her actions are less likely to be evidence of irretrievable depravity. Thus, the Supreme Court has reasoned that youthfulness is a factor that must be considered in the sentencing of an offender whose crimes were committed while he or she was less than 18 years of age. The holding of the Court that it is grossly disproportionate and hence unconstitutional for any judge or jury to impose a sentence of life without parole on an offender less than 18 years old under any circumstances for nonhomicide cases and as a mandatory sentence in homicide cases is, in any event, a significant diminution of the power and autonomy of judges, juries, prosecutors, state legislatures, and, ultimately, the citizenry when it comes to democratically selected methods of punishment.

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668 *Horsley v. State*, 121 So. 3d 1130 (Fla. 5th DCA 2013).

669 *Gonzalez v. State*, 101 So. 3d 886 (Fla. 1st DCA 2012); *Geter v. State*, 115 So. 3d 375 (Fla. 3d DCA 2012); see also, *Kennedy v. State*, 106 So. 3d 512 (Fla. 5th DCA 2013) (PCA citing *Geter*).


In the wake of *Graham*, the appellate courts been faced with the question of sentences involving terms-of-years that were the functional equivalent of a life sentence, and a conflict has emerged between the Second, Fourth and Fifth District Courts on the one hand and the First District Court on the other. The Second, Fourth and Fifth Districts have approved sentences of 60, 65, 90, 100, 150, and 270 years as not being violative of the Eighth Amendment. The First District has, however, adopted the following rule of law: First, *Graham* applies not only to life without parole sentences, but also to lengthy term-of-years sentences that amount to de facto life sentences; and second, a de facto life sentence is one that exceeds the defendant’s life expectancy based upon statistical evidence presented at sentencing. The rule of *Graham* does not extend to persons whose age at the time of their crimes was greater than 18 years, nor to those who were more than 18 years old but had a mental age of less than 18 or were otherwise mentally or developmentally delayed. Furthermore, *Graham* did not prohibit all life sentences for juvenile nonhomicide offenders, it does not require a resentencing court to use a juvenile nonhomicide offender’s resentencing hearing as the “meaningful opportunity” to seek release based on rehabilitation and maturity, it did add “maturity and rehabilitation” as grounds for downward departure under Florida’s

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673 *Guzman v. State*, 110 So. 3d 480 (Fla. 4th DCA 2013) (trial court’s imposition of 60-year sentence on juvenile offender did not constitute cruel and unusual punishment).

674 *Walle v. State*, 99 So. 3d 967 (Fla. 2d DCA 2012) (sentence of 65 years for defendant, who was 13 when he committed 18 non-homicide offenses, including armed kidnapping, armed sexual battery with a deadly weapon, and carjacking with a deadly weapon, which sentence was to run consecutively to previously imposed concurrent sentences totaling 27 years, did not violate the Eighth Amendment prohibition against cruel and unusual punishment, where defendant was sentenced for multiple convictions, sentence was for a term of years, and there was nothing in the record to indicate that a 65-year sentence equated to life imprisonment).

675 *Henry v. State*, 82 So. 3d 1084 (Fla. 5th DCA 2012).

676 *Johnson v. State*, 108 So. 3d 1153 (Fla. 5th DCA 2013).

677 *Mediate v. State*, 108 So. 3d 703 (Fla. 5th DCA 2013) (sentence of 130 years’ imprisonment imposed on juvenile convicted of kidnapping and sexual battery did not constitute de facto life sentence in violation of Eighth Amendment).

678 *Rosario v. State*, 122 So. 3d 412 (Fla. 4th DCA 2013).

679 See, *Adams v. State*, 37 Fla. L. Weekly D1865, 2012 WL 3193932 (Fla. 1st DCA 2012) (sentence, which required defendant, aged 16 years and 10 months at the time he committed attempted first-degree murder, armed burglary, and armed robbery, to serve at least 58.5 years in prison, was a de facto life sentence imposed on a juvenile for non-homicide offenses, thus violating Eighth Amendment); *Smith v. State*, 93 So. 3d 371 (Fla. 1st DCA 2012) (affirming an 80-year sentence for a 17-year-old defendant); *Floyd v. State*, 87 So. 3d 45 (Fla. 1st DCA 2012) (reversing an 80-year sentence for a 17-year-old defendant); *Thomas v. State*, 78 So. 3d 644 (Fla. 1st DCA 2011) (affirming a 50-year sentence with a 25-year minimum mandatory for a 17-year-old defendant); *Gridine v. State*, 89 So. 3d 909 (Fla. 1st DCA 2011) (affirming a 70-year sentence with a 25-year minimum mandatory for a 14-year-old defendant).

sentencing statutes. The Second and Third District Courts of Appeal have held that where a juvenile defendant is convicted of both a homicide and nonhomicide offense which arose out of single criminal episode, a sentence of life without parole on the nonhomicide offense falls squarely within the exception created in *Graham*, permitting the imposition of such a sentence for a juvenile who committed both homicide and nonhomicide crimes, and nothing in *Graham* requires that the sentence on the homicide equal or exceed the sentence on the nonhomicide offense in order for the sentences to be lawful. The First and Fifth Districts have taken the position that there is no exception in *Graham* for juvenile offenders who commit both homicide and nonhomicide offenses. Note that *Graham* is retroactive, as it imposed a substantive prohibition of life-without-parole upon minors for nonhomicide offenses. The different approaches to *Graham* are now before the Florida Supreme Court.

§ 20.11.2. Sentencing factors

Considerable attention has been given to the distinction the law has drawn between the elements of a crime and factors that influence a criminal sentence. While elements require either an admission by the defendant or a jury finding beyond a reasonable doubt, sentencing factors may be found by the sentencing court alone. The facts used to calculate the maximum potential sentence to which a defendant is exposed, and any applicable minimum mandatory sentence, must be based either on (1) findings made by the jury, (2) facts admitted by the defendant, or (3) the defendant’s prior convictions, and the term “sentencing factor” appropriately describes a circumstance that supports a specific sentence within this authorized range. When a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment and the judge exceeds his or her proper authority.

Sentencing factors may be generally grouped into aggravation and mitigation, with each of these categories subdivided into four subcategories: forbidden, encouraged, discouraged, or unaddressed. A forbidden factor is one which can never serve as mitigation or aggravation and never

681 See, *Young v. State*, 110 So. 3d 931 (Fla. 2d DCA 2013).

682 *Lawton v. State*, 109 So. 3d 825 (Fla. 3d DCA 2013); *Starks v. State*, 128 So. 3d 825 (Fla. 2d DCA 2013).


be the basis of a departure sentence, such as race or religion. Encouraged factors are often, but not always, taken into account by applicable sentencing rules and statutes. The statutory mitigators for the Criminal Punishment Code set forth in section 921.0026 are examples of encouraged factors that are taken into account. Courts may occasionally depart on the basis of a discouraged factor, but only if that factor is present to an extraordinary degree or in some way that makes the case different from the ordinary case where the factor is present. An example of a discouraged factor would be the use of extraordinary restitution as a basis for a downward departure sentence. An unaddressed factor is one which does not appear in statutory law or prior court rulings, is unique to the circumstances of the defendant who is to be sentenced, and is a matter of first impression for the court.

In resolving disputes concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable to trial, provided that the information has sufficient indicia of reliability to support its probable accuracy. This is because the sentencing process does not carry the same evidentiary protections guaranteed during a criminal trial. The evidence need not be limited to evidence relating to the scope of the crime and may include uncorroborated hearsay provided the defendant is given a chance to rebut or explain it. Where illegally seized evidence is reliable and it is clear that it was not gathered for the express purpose of improperly influencing the sentencing judge, there is no error in using it in connection with fixing sentence. A sentencing court may base a sentence on acquitted conduct if the conduct is proven by a preponderance of the evidence, so long as the sentence imposed does not exceed that which is authorized by the jury verdict, the admissions of the defendant, or the applicable statutory maximums.

In passing sentence on a defendant, the sentencing court is not allowed to consider anything that does not bear a rational relationship to sentencing or does not further a legitimate government interest. Examples of such prohibited factors which cannot be considered include the following:

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690 See, e.g., U.S. v. Schipani, 435 F.2d 26, 28 (2d Cir. 1970); also U.S. v. Hernandez Camacho, 779 F.2d 227, 230-32 (5th Cir. 1985).

691 See, U.S. v. Watts, 519 U.S. 148, 117 S. Ct. 633, 136 L. Ed. 2d 554 (1997); Witte v. U.S., 515 U.S. 389, 115 S. Ct. 2199, 132 L. Ed. 2d 351 (1995); Nusspickel v. State, 966 So. 2d 441 (Fla. 2d DCA 2007); Howard v. State, 820 So. 2d 337 (Fla. 4th DCA 2002) (trial court’s consideration of the “trafficking” amount of cocaine possessed by appellant in sentencing him on the lesser charge of possession of cocaine did not violate due process principles, because the amount of contraband was a proper factor to consider in determining the extent of punishment to be imposed within the limits fixed by law); Evans v. State, 816 So. 2d 742 (Fla. 4th DCA 2002); Reaves v. State, 655 So. 2d 1189 (Fla. 3d DCA 1995).
Race, gender, social and economic status. Consistent with the provision of sections 921.001(4)(a) 1. and 921.002(1)(a), it is unlawful to consider race, gender, or social and economic status in sentencing. Purposeful consideration of race in sentencing would also be in violation of the equal protection clauses of the state and federal constitutions.

Indigency. The Fourth District Court of Appeal has held that a defendant cannot be imprisoned solely because the defendant is indigent and cannot immediately pay a fine or restitution in full. While a defendant’s willingness and capacity to pay restitution can be among the reasons upon which a judge may decide to impose a lower sentence, the Equal Protection Clause of the United States Constitution prohibits a judge from conditioning a lower sentence on the payment of fines or restitution. The Fifth District, on the other hand, has taken a different approach, holding that (1) the Constitution’s Due Process Clause does not preclude a judge at the initial sentencing hearing from electing a prison sentence instead of probation if it appears that a defendant is unlikely to make restitution if placed on probation; (2) a judge may use the sentencing process as an incentive to encourage the payment of restitution to the victims; and (3) a sentencing judge’s providing a defendant an opportunity to mitigate the severity of an otherwise appropriate sentence by paying restitution does not violate due process.

National origin. While reference to national origin during sentencing is permissible, it cannot be a basis for determining the sentence.

Religion. Purposeful consideration of religion in sentencing would violate the free exercise and free speech clauses of the state and federal constitutions.

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§§ 921.001(4)(a) 1, 921.002(1)(a), Fla. Stat.


Nezi v. State, 119 So. 3d 517 (Fla. 5th DCA 2013).

Noel v. State, 127 So. 3d 769 (Fla. 4th DCA 2014).

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

Santisteban v. State, 72 So. 3d 187 (Fla. 4th DCA 2011) (judge relied upon religious consideration when determining the extent of downward sentence departure); see also, U.S. v. Bakker, 925 F.2d 728, 740, (4th Cir. 1991) (holding that judge violated due process by stating at sentencing that “those of us who do have a religion are ridiculed as being saps from money-grubbing preachers or priests”); also Singleton v. State, 783 So. 2d 970, 979 (Fla. 2001) (holding that biblical references should not be used at sentencing, but any error in the trial judge’s lone biblical reference in penalty phase of trial was harmless where jury was not exposed to the reference and the court’s order stated that it did not consider any aggravators other than the two set forth in the order).
Lifestyle. A defendant’s lifestyle is an impermissible consideration an increased sentence. 698

Acquitted conduct, unsubstantiated misconduct, and conduct for which the defendant was actually innocent. Generally, it is a violation of due process for the court to rely on conduct of which the defendant has actually been acquitted when imposing a sentence. 699 This rule evolved when Florida employed determinate sentencing under the former Guidelines, and limited the sentencing court’s power to impose an enhanced or aggravated departure sentence in excess of that authorized by law. 700 The viability of the rule under the Criminal Punishment Code’s indeterminate sentencing scheme is questionable, 701 but remains relevant in the context of Eighth Amendment analysis. Similarly, unsubstantiated allegations of misconduct may not be considered by a trial judge at a criminal sentencing hearing and to do so violates fundamental due process. 702 Specific examples include sentencing upon the judge’s belief that the defendant likely had committed previous acts of violence although the defendant had never been charged with committing any such acts, much less convicted of committing such acts, and its belief that the defendant was guilty of an offense of which he or she had been acquitted. 703 The sentencing court also cannot consider conduct of which the defendant is actually innocent in order to enhance the defendant’s sentence: For the actual innocence exception to apply in the noncapital sentencing context, a defendant must show that he or she is


699 See, Townsend v. Burke, 334 U.S. 736, 740–41, 68 S. Ct. 1252, 92 L. Ed. 1690 (1948); Evans v. State, 816 So. 2d 742, 744 (Fla. 4th DCA 2002); Pavlac v. State, 944 So. 2d 1064 (Fla. 4th DCA 2006); Doty v. State, 884 So. 2d 547, 549 (Fla. 4th DCA 2004); Epprecht v. State, 488 So. 2d 129, 131 (Fla. 3d DCA 1986) (reversal because trial judge made several statements indicating he believed defendant had committed many other offenses and complimenting defense attorney on his skill in obtaining acquittal for defendant in another case in which judge believed defendant was guilty).

700 See, e.g., Brown v. State, 763 So. 2d 1190 (Fla. 4th DCA 2000) (concluding that jury’s acquittal of defendant for charges of armed sexual battery and aggravated battery precluded sentencing court from considering evidence that supported those charges for purposes of imposing aggravated departure sentence); Woods v. State, 509 So. 2d 1370 (Fla. 5th DCA 1987) (holding that where defendant was charged with trafficking in cocaine, but was convicted of only possession, despite fact that uncontroverted evidence established that defendant possessed requisite quantity of cocaine sufficient for trafficking conviction, trial court could not depart from sentencing guidelines based on consideration of trafficking offense); Garcia v. State, 504 So. 2d 494 (Fla. 3d DCA 1987) (concluding that amount of cocaine possessed by defendant, who was acquitted of trafficking in over 400 grams of cocaine, was improper reason for departure sentence for conviction of lesser offense of possession of cocaine).

701 See, Harris v. State, 959 So. 2d 794 (Fla. 2d DCA 2007).

702 Crouse v. State, 101 So. 3d 901 (Fla. 4th DCA 2012); Reese v. State, 639 So. 2d 1067, 1068 (Fla. 4th DCA 1994) (victim’s testimony regarding defendant’s violation of another domestic violence injunction obtained by a different woman was type of allegation that court should not have permitted in evidence); see also, Doty v. State, 884 So. 2d 547 (Fla. 4th DCA 2004).

703 Epprecht v. State, 488 So. 2d 129 (Fla. 3d DCA 1986).
factually innocent of the conduct or the underlying crime that serves as the predicate for the enhanced sentence. The test is factual innocence, not mere legal insufficiency. 704

Speculation that the defendant has committed other crimes. Speculation that the defendant probably committed other crimes that the court and others do not know about, is an impermissible sentencing consideration. 705

Pending charges. A court may not consider pending charges not before the court for sentencing in imposing sentence for a charge, or charges, before the court unless those pending charges are relevant to sentencing. 706 A trial court can, however, consider a defendant’s prior or subsequent arrests not leading to convictions for purposes of sentencing so long as the court recognizes that these arrests are not convictions or findings of guilt, and the defendant is given an opportunity to explain or offer evidence on the issue of his or her prior arrests. 707

There is, in this regard, no significant difference between prior arrests and subsequent arrests for sentencing purposes, particularly where charges are still pending from the prior or subsequent arrest at the time of sentencing. In both circumstances, the sentencing court will have to ensure the relevance and reliability of information presented regarding the alleged criminal activity and allow the defendant an opportunity to explain or rebut the charges. Further, if the defendant has been acquitted of charges stemming from a prior or subsequent arrest, the trial court is prohibited from considering the arrest. The test for considering prior or subsequent arrests and new charges comprises the factors of (1) relevance to sentencing of the new charge or charges (e.g., to show a pattern of conduct and disrespect for the property of others), (2) evidence in the record supporting the allegations of criminal conduct; (3) non-acquittal of the charge that arose from the prior or subsequent arrest; (4) the trial court does not place undue emphasis on the prior or subsequent arrest and new charge in imposing sentence; and (5) opportunity for the defendant to explain or present evidence on the issue of his or her prior and subsequent arrests. A defendant facing old or new


705 Epprecht v. State, 488 So. 2d 129 (Fla. 3d DCA 1986); see, U.S. v. Cavazos, 530 F.2d 4 (5th Cir. 1976); U.S. v. Tobias, 662 F.2d 381, 388 (5th Cir. 1981).

706 Norvil v. State, — So. 3d —, 2014 WL 940724 (Fla. 4th DCA 2014); Seays v. State, 789 So. 2d 1209 (Fla. 4th DCA 2001) (consideration of pending attempted murder charge violated defendant’s due process rights); Reese v. State, 639 So. 2d 1067 (Fla. 4th DCA 1994) (consideration of unsubstantiated allegations of misconduct at sentencing violate fundamental due process); State v. Potts, 526 So. 2d 63 (Fla. 1988) (State through criminal process may not penalize someone merely for status of being indicted or otherwise accused of a crime); Epprecht v. State, 488 So. 2d 129 (Fla. 3d DCA 1986) (due process prohibits court from considering charges of which accused has been acquitted in passing sentence), citing Townsend v. Burke, 334 U.S. 736, 68 S. Ct. 1252, 92 L. Ed. 1690 (1948).

707 Whitehead v. State, 21 So. 3d 157 (Fla. 4th DCA 2009) (consideration of pending charge in another county for unlawful sex acts with a minor relevant to sentencing for conduct involving minors); Jansson v. State, 399 So. 2d 1061 (Fla. 4th DCA 1981) (consideration of PSI report that included arrests for which no conviction resulted).
charges may, however, have no meaningful way to explain the circumstances of the arrests to the sentencing court without endangering his or her defense to the charges. For this reason, the court should warn the defendant that his statements during sentencing could be used against him or her in the pending case. If the defendant decides not to offer an explanation, the court should respect his or her decision and not consider his or her silence in imposing sentence.\footnote{Norvil v. State, — So. 3d —, 2014 WL 940724 (Fla. 4th DCA 2014).}

Maintaining innocence. Generally speaking, a trial court may not hold a defendant’s protestation of innocence against that defendant in either the guilt or penalty phase of a trial or at sentencing.\footnote{See, Hannum v. State, 13 So. 3d 132 (Fla. 2d DCA 2009) Johnson v. State, 948 So. 2d 1014 (Fla. 3d DCA 2007) (during sentencing trial court improperly considered defendant’s lack of remorse and/or culpability when defendant requested downward departure sentence as youthful offender); 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) (defendant has constitutional right not to penalized during sentencing for maintaining innocence); A.S. v. State, 667 So. 2d 994 (Fla. 3d DCA 1996).} A criminal defendant has the right to maintain his or her innocence and have a trial by jury.\footnote{Art. I, § 22, Fla. Const.; see, A.S. v. State, 667 So. 2d 994, 996 (Fla. 3d DCA 1996) (quoting Holton v. State, 573 So. 2d 284, 292 (Fla. 1990)).} The fact that a defendant has pled not guilty cannot be used against him or her during any stage of the proceedings because due process guarantees an individual the right to maintain innocence even when faced with evidence of overwhelming guilt. A trial court violates due process by using a protestation of innocence against a defendant. This applies to the penalty phase as well as to the guilt phase of a capital case under article I, section 9 of the Florida Constitution. Therefore, entering a plea of not guilty does not preclude consideration by the sentencer of matters relevant to mitigation.\footnote{Holton v. State, 573 So. 2d 284 (Fla. 1990).} Juveniles also have a constitutional right not to be unfairly penalized for the assertion of innocence and demand for trial; this is so even if the juvenile’s desire to maintain his or her innocence was not the sole factor in the court’s decision making process.\footnote{T.R. v. State, 26 So. 3d 80 (Fla. 3d DCA 2010).}

Failure to confess. The protection provided by the fifth amendment to the United States Constitution guarantees an accused the right against self-incrimination. As with the prohibition of considering a defendant’s lack of remorse, a sentencing court may not consider a defendant’s failure to confess or otherwise admit guilt in determining the defendant’s sentence.\footnote{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).} This does not mean, however, that a defendant cannot be compelled to allocute the nature and extent of his or her involvement in a criminal offense as part of a plea agreement with the State. The sentencing court may also consider the defendant’s silence or lack of cooperation in such an investigation as evidence of the defendant’s character, and a lack of mitigation when the defendant asks the court to mitigate a sentence. The fact that the defendant receives a harsher sentence than he or she might have

\footnote{\textsuperscript{708} Norvil v. State, — So. 3d —, 2014 WL 940724 (Fla. 4th DCA 2014).}
received had the defendant cooperated or not exercised the right to remain silent does not implicate the right against self-incrimination where the defendant is not affirmatively punished for the act of remaining silent.  

Lack of remorse. It is constitutionally impermissible for a sentencing court to consider the fact that a defendant fails to show remorse, exercised his or her right not to testify at trial, refused to recant his or her trial testimony, continues to maintain his or her innocence, or is unwilling to admit guilt. Although remorse and an admission of guilt may be grounds for mitigation of sentence, the opposite is not true. Reliance on these impermissible factors violates the defendant’s due process rights. A statutory exception exists in section 921.0026(2)(j), Fla. Stat., which allows a sentencing court to grant a downward departure sentence to a defendant on the grounds that the offense was committed in an unsophisticated manner and was an isolated incident for which the defendant has shown remorse. Stated otherwise, although remorse and an admission of guilt may be grounds for mitigation of sentence in such situations, the opposite is not true. Note that in capital cases where all aggravators permissible are set forth by statute, the use of lack of remorse as evidence in aggravation in the penalty phase is prohibited. The Florida Supreme Court has, however, permitted the introduction of lack of remorse to rebut proposed mitigation, such as remorse and rehabilitation. Introduction of evidence lack of remorse is also allowed when a defense mitigation witness opens the door to such a line of questioning. It is further permissible for a sentencing court in a non-capital case to directly consider the defendant’s lack of remorse as an aggravator in sentencing where the defendant admits the accusations against him or her and does not


715 Ritter v. State, 885 So. 2d 413 (Fla. 1st DCA 2004); see, e.g., Lyons v. State, 730 So. 2d 833 (Fla. 4th DCA 1999); Peters v. State, 485 So. 2d 30 (Fla. 3d DCA 1986); Hubler v. State, 458 So. 2d 350 (Fla. 1st DCA 1984).

716 See, K.N.M. v. State, 793 So. 2d 1195 (Fla. 5th DCA 2001).

717 See, Holton v. State, 573 So. 2d 284 (Fla. 1990); Soto v. State, 874 So. 2d 1215 (Fla. 3d DCA 2004); K.N.M. v. State, 793 So. 2d 1195 (Fla. 5th DCA 2001).


719 See, K.N.M. v. State, 793 So. 2d 1195 (Fla. 5th DCA 2001).

720 Tanzi v. State, 964 So. 2d 106 (Fla. 2007); Atwater v. State, 626 So. 2d 1325 (Fla. 1993); Pope v. State, 441 So. 2d 1073 (Fla. 1983).

721 Tanzi v. State, 964 So. 2d 106 (Fla. 2007); Singleton v. State, 783 So. 2d 970 (Fla. 2001); Derrick v. State, 581 So. 2d 31 (Fla. 1991).

722 Tanzi v. State, 964 So. 2d 106 (Fla. 2007).
continue to maintain his or her innocence in the face of those accusations. Note in this regard, however, that there is a conflict between the First District, which holds that a defendant’s lack of contrition or remorse is a constitutionally impermissible consideration in imposing a sentence under all circumstances, and the Fourth and Fifth Districts, which hold that it is proper for a court to consider lack of contrition or remorse in cases where the defendants do not contest their commission of criminal acts but fail to exhibit remorse for them.

Lying. A trial judge’s opinion as to whether a defendant testified falsely should not enter into a decision to impose a harsher sentence unless the court is determining the sentence after a separate perjury conviction.

It is constitutionally impermissible as a denial of due process for a trial judge to consider and give weight to such impermissible factors and on that basis impose any sentence, not just a sentence that is more harsh than that sought by the State, even if the sentence imposed is within the range allowed by the applicable guidelines or the statutory maximum under the Criminal Punishment Code. A resentencing is required even if such was but one of several factors considered by the court in imposing sentence. The same rule applies to a court’s rejection of a defendant’s request for a downward departure sentence, or sentencing under an alternative scheme such as that for youthful offenders. This rule also applies to juvenile proceedings.

§ 20.11.3. Rule of lenity

The rule of lenity is applicable to sentencing proceedings. A defendant is entitled to the benefit of the doubt and should be sentenced under the most lenient version of the offense and

723 Peake v. State, 490 So. 2d 1325 (Fla. 1st DCA 1986).

724 Jackson v. State, 39 So. 3d 427 (Fla. 1st DCA 2010); K.Y.L. v. State, 685 So. 2d 1380 (Fla. 1st DCA 1997).

725 Lincoln v. State, 978 So. 2d 246 (Fla. 5th DCA 2008); St. Val v. State, 958 So. 2d 1146 (Fla. 4th DCA 2007).

726 Carswell v. State, 75 So. 3d 419 (Fla. 1st DCA 2011); Robinson v. State, 637 So. 2d 998 (Fla. 1st DCA 1994).

727 Ritter v. State, 885 So. 2d 413 (Fla. 1st DCA 2004); Soto v. State, 874 So. 2d 1215 (Fla. 3d DCA 2004); Lyons v. State, 730 So. 2d 833 (Fla. 4th DCA 1999); Peters v. State, 485 So. 2d 30 (Fla. 3d DCA 1986); Hubler v. State, 458 So. 2d 350 (Fla. 1st DCA 1984); see also, Holton v. State, 573 So. 2d 284 (Fla. 1990).

728 Johnson v. State, 948 So. 2d 1014 (Fla. 3d DCA 2007).

729 Johnson v. State, 948 So. 2d 1014 (Fla. 3d DCA 2007).

730 K.N.M. v. State, 793 So. 2d 1195 (Fla. 5th DCA 2001); A.S. v. State, 667 So. 2d 994 (Fla. 3d DCA 1996).
sentencing scheme in effect during the time frame alleged in the information, where there is no admission by the defendant or jury finding as to the specific offense dates such as to fix the applicable version of the offense or sentencing scheme with specificity.\textsuperscript{731} The rule of lenity is also applicable to direct and collateral consequences and special sanctions, \textit{e.g.}, the rule precludes the sentencing court from imposing the sexual predator designation on a defendant when the record is unclear as to whether the qualifying offense or offenses occurred before or after the effective date of the Sexual Predators Act.\textsuperscript{732} The rule does not apply, however, to sentences that are the result of a negotiated plea.\textsuperscript{733}

\textbf{§ 20.12. Cruel and unusual punishments}

In 2002, the Florida Constitution was amended to provide that Florida’s interpretation of the cruel and unusual punishment clause is be construed in conformity with the United States Supreme Court’s decisions. The amendment specifically provides:

The death penalty is an authorized punishment for capital crimes designated by the legislature. \textit{The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution.} Any method of execution shall be allowed, unless prohibited by the United States Constitution. Methods of execution may be designated by the legislature, and a change in any method of execution may be applied retroactively. [emphasis added]\textsuperscript{734}

Accordingly, Florida courts must evaluate whether or not a punishment is cruel and unusual, and hence unconstitutional, “in conformity with decisions of the United States Supreme Court.”\textsuperscript{735} The Eighth Amendment forbids the infliction of “cruel and unusual punishments.”\textsuperscript{736} This amendment has been applied to claims regarding (1) the method and type of punishment (\textit{e.g.}, death by electrocution), (2) claims involving a particular class of individuals (such as minors or those who are mentally retarded), (3) claims of excessive punishment (such as the death penalty per se), and (4) claims involving prison conditions.

\textsuperscript{731} \textit{Cairl v. State}, 833 So. 2d 312 (Fla. 2d DCA 2003).

\textsuperscript{732} \textit{Dennis v. State}, 32 So. 3d 79 (Fla. 2d DCA 2009).

\textsuperscript{733} \textit{McDonald v. State}, 15 So. 3d 695 (Fla. 5th DCA 2009).

\textsuperscript{734} Art. I, § 17, Fla. Const. (emphasis added).

\textsuperscript{735} Art. I, § 17, Fla. Const.

\textsuperscript{736} The Eighth Amendment to the United States Constitution provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.” U.S. Const. Amend. VIII.
Historically, the Eighth Amendment has protected individuals with respect to the method of punishment (e.g., the method of execution to be employed), not the length of a period of incarceration.\footnote{Hall v. State, 823 So. 2d 757, 760 (Fla. 2002); see, Harmelin v. Michigan, 501 U.S. 957, 979, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991); Wilkerson v. State of Utah, 99 U.S. 130, 136, 25 L. Ed. 345, 1878 WL 18292 (1878) (holding that the sentence of being shot until the inmate was dead did not violate the Eighth Amendment).} Neither the United States Supreme Court nor the Supreme Court of Florida has, for example, held that a sentence of life imprisonment without possibility of parole violates Article I, Section 17 of the Florida Constitution and the Eighth Amendment of the United States Constitution when applied to a person who committed his or her crime while under the age of 18 years.\footnote{See, e.g., Tate v. State, 864 So. 2d 44 (Fla. 4th DCA 2003) (life sentence without possibility of parole for 12-year-old child who commits premeditated murder is not cruel or unusual punishment); Phillips v. State, 807 So. 2d 713 (Fla. 2d DCA 2002) (defendant who was 14 years old at time he murdered an eight year old child convicted of first-degree murder and sentenced to life imprisonment without the possibility of parole); Blackshear v. State, 771 So. 2d 1199 (Fla. 4th DCA 2000) (three consecutive life sentences imposed for three robberies committed when Blackshear was thirteen not cruel or unusual punishment).}

The Eighth Amendment also addresses whether a particular type of punishment is excessive for the crime.\footnote{Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) (death penalty).} A punishment is excessive if: (1) the punishment involves the “unnecessary and wanton infliction of pain”; or (2) the punishment is grossly out of proportion to the severity of the crime.\footnote{Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).}

The role of the judicial branch is limited; courts cannot require the legislature to select the least severe penalty so long as the penalty is not inhumane or disproportionate to the crime, and courts must presume validity when assessing a punishment that was selected by a democratically elected legislature.\footnote{Gregg v. Georgia, 428 U.S. 153, 175, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).}

§ 20.13. Unusual punishments

The power to create crimes and punishments in derogation of the common law inhere solely in the democratic processes of the legislative branch.\footnote{Perkins v. State, 576 So. 2d 1310 (Fla. 1991).} The legislature has determined by statute that the common law of England in relation to crimes remains in effect except (a) with regard to the modes and degrees of punishment, and (b) where there is an existing statute on the same subject.\footnote{§ 775.01, Fla. Stat.}

In effect, very little if any of the common law of crimes remains in force, because Florida’s extensive criminal code has largely displaced it.\footnote{Perkins v. State, 576 So. 2d 1310 (Fla. 1991).} Thus, the power to define criminal offenses and to prescribe

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the punishments to be imposed upon those found guilty of them resides wholly with the legislature.\textsuperscript{745}

Criminal offenses, and the penalties that accompany them, nearly always cause shame and embarrassment.\textsuperscript{746} The mere fact of conviction, without which state-sponsored rehabilitation efforts commence, is stigmatic. The fact that a condition causes shame or embarrassment does not automatically render a condition objectionable; rather, such feelings generally signal the defendant’s acknowledgment of his or her wrongdoing.\textsuperscript{747} The societal consequences that flow from a criminal conviction are virtually unlimited, and the tendency to cause shame is insufficient to extinguish a condition’s rehabilitative promise, at least insofar as required for the flexible reasonable relation test.\textsuperscript{748} The mere fact that a sentence may make the defendant feel uncomfortable or embarrassed in public does not by itself establish that it cannot be rehabilitative. Sentencing provisions involving an element of shaming have been upheld.\textsuperscript{749} This means that punishments that incidentally subject the defendant to public humiliation or ridicule are not per se unauthorized under the law, but punishments imposed solely for the purpose of subjecting the defendant to humiliation or ridicule are.\textsuperscript{750}

So long as they do not provide cruel and unusual punishments, such as disgraced the civilization of former ages, and make one shudder with horror to read of them, as drawing, quartering, hanging in chains, burning, and the like, the United States Constitution does not put any limit upon legislative discretion.\textsuperscript{751} The constitutional ban on cruel and usual punishments further precludes judges from sentencing defendants to the formerly available punishments of placement in stocks, public whipping, mutilation, or the like. Sentencing judges are still afforded considerable creative latitude, however, as long as the punishment imposed on the defendant is reasonable in the circumstances and related to rehabilitation or the protection of the public. Generally, a punishment is invalid if it (1) has no relationship to the crime of which the defendant was convicted, (2) relates


\textsuperscript{746}U.S. v. Gementera, 379 F.3d 596 (9th Cir. 2004).

\textsuperscript{747}U.S. v. Gementera, 379 F.3d 596 (9th Cir. 2004).

\textsuperscript{748}U.S. v. Gementera, 379 F.3d 596 (9th Cir. 2004).

\textsuperscript{749}See, e.g., U.S. v. Clark, 918 F.2d 843, 846 (9th Cir. 1990) (“a public apology may serve a rehabilitative purpose”); Ballenger v. State, 210 Ga. App. 627, 436 S.E.2d 793, 794–95 (1993) (“[W]e cannot say that the stigmatizing effect of wearing the bracelet may not have a rehabilitative, deterrent effect on [the defendant]”).

\textsuperscript{750}See, Bienz v. State, 343 So. 2d 913 (Fla. 4th DCA 1977) (command from therapist that adult male probationer wear diapers in public is demeaning and unreasonable).

\textsuperscript{751}See, Ex parte Wilson, 114 U.S. 417, 5 S. Ct. 935, 29 L. Ed. 89 (1885) (discussion of “infamous” crimes and attendant punishments); see also, Whitten v. State, 47 Ga. 297, 1872 WL 2821 (1872).
to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality. Examples of a few unusual punishments subject to this test include:

**Banishment.** The punishment of exile or banishment from the court’s jurisdiction is generally disfavored by courts, as where the court imposes a sentence or a special condition of probation that the defendant leave and remain outside his or her city of residence, the county, the state, or the United States for the duration of his or her probation or suspended sentence. More narrowly drawn injunctions against being within certain well-defined geographical areas or locations for specific periods or durations as part of a sentence may be imposed, however, against defendants who have committed crimes such as retail theft, domestic violence, stalking, prostitution and serious

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753 See, *State ex rel. Baldwin v. Alsbury*, 223 So. 2d 546 (Fla. 1969) (court may not indefinitely suspend a defendant’s sentence in return for the defendant’s promise to stay out of town); see also, *State v. Khamjoi*, 671 N.W.2d 531 (Iowa Ct. App. 2003) (probation term banning defendant from city of residence was unduly restrictive); *People v. Bauer*, 211 Cal. App. 3d 937; *People v. Bauer*, 211 Cal. App. 3d 937, 260 Cal. Rptr. 62 (1st Dist. 1989) (requirement that the defendant vacate his family residence and reside at a location subject to his probation officer’s approval is unlawful); *People v. Beach*, 147 Cal. App. 3d 612, 195 Cal. Rptr. 381 (2d Dist. 1983) (condition of probation that defendant relocate herself from the community where she had lived for 24 years was unreasonable and unconstitutional).

754 *Jacobsen v. State*, 536 So. 2d 373 (Fla. 2d DCA 1988); see also, *Crabtree v. State*, 112 P. 3d 618, 2005 WY 62 (Wy. 2005) (banishment from an entire county will incite dissension and provoke retaliation among counties); but see, *Cobb v. State*, 437 So. 2d 1218 (Miss. 1983) (condition of probation requiring defendant to stay 125 miles from county for period of five years not unreasonable or arbitrary).

755 See, *Alhusainy v. Superior Court*, 143 Cal. App. 4th 385, 48 Cal. Rptr. 3d 914 (4th Dist. 2006) (banishment from state in lieu of sentencing, as condition of plea agreement, was constitutionally improper and against public policy); *Com. v. Pike*, 428 Mass. 393, 701 N.E.2d 951 (1998) (probation condition banishing defendant from a state is invalid and unenforceable because it infringes on constitutional right to interstate travel and is not reasonably related to goals of probation); *State v. Charlton*, 115 N.M. 35, 846 P.2d 341 (Ct. App. 1992) (banishment from state is contrary to public policy); *McCreary v. State*, 582 So. 2d 425, 428 (Miss. 1991) (banishment from entire state implicates serious public policy questions against the dumping of convicts on another jurisdiction); *Henry v. State*, 276 S.C. 515, 280 S.E.2d 536 (1981) (trial court was without authority to impose banishment from state as condition of probation, even if defendant agreed to the sentence); *State v. Gitchel*, 5 Wash. App. 93, 486 P.2d 328 (Div. 2 1971) (suspended 10–year maximum sentence on dual conditions that defendant spend one year in solitary confinement in the county jail and upon his release absent himself from the state forever was an illegal and unconstitutional sentence).

756 See, *Madrigal v. State*, 683 So. 2d 1093 (Fla. 4th DCA 1996); *Martinez v. State*, 627 So. 2d 542 (Fla. 2d DCA 1993); see also, In re Babak S., 18 Cal. App. 4th 1077, 22 Cal. Rptr. 2d 893 (6th Dist. 1993) (condition of probation that juvenile live in Iran with his parents for two years is invalid).

sexual offenses, even if this means that the defendant has to move from his or her residence.\footnote{758} Also, while banishment beyond the borders of the state where sentence is imposed violates the defendant’s constitutional rights, banished from all but one county of the state as a condition of probation does not if related to a legitimate goal of punishment or rehabilitation.\footnote{759}

\textit{Restrictions on Marriage and Procreation.} Absent a compelling state interest, a court may not impose special conditions of probation or community control that the defendant not become pregnant and not marry without the court’s consent.\footnote{760} Similarly, surgical castration or sterilization for offenses that are not sex crimes or as a condition precedent to suspension of sentence and probation, has been held to be void as against public policy, even if the defendant voluntarily agrees to it.\footnote{761}

\textit{Posting Signs on Privately Owned Property.} A defendant may be ordered to post a sign on his or her property as a rehabilitative or punitive measure where such a condition of sentence is “reasonable” in the circumstances of the case. Courts have generally disfavored signs on real property in the absence of legislative authorization, however, as being overbroad.\footnote{762} Courts have been somewhat more supportive of requirements that a defendant post a sign on any motor vehicle he or she is operating.\footnote{763}

\footnote{758}See, § 948.30(1)(b) & (f), Fla. Stat.; \textit{Kalinowski v. State}, 948 So. 2d 962 (Fla. 5th DCA 2007) (sex offender on probation forced to move on orders of probation officer from residence he had occupied for over 30 years to comply with standard condition of sex offender probation that defendant not live within 1,000 feet of any school, day care center, park or playground, or any other place prescribed by the court where children regularly congregate); see also, \textit{Doe v. Miller}, 405 F.3d 700 (8th Cir. 2005) (Iowa statute prohibiting persons who had committed criminal sex offense against minor from residing within 2,000 feet of school or child care facility did not violate constitution).


\footnote{760}\textit{Rodriguez v. State}, 378 So. 2d 7 (Fla. 2d DCA 1979).


\footnote{763}See, \textit{Goldschmitt v. State}, 490 So. 2d 123 (Fla. 2d DCA 1986) (requirement that defendant convicted of driving under the influence affix bumper sticker to his motor vehicle reading “CONVICTED D.U.I.—RESTRICTED LICENSE” did not infringe on defendant’s First Amendment rights and was not cruel and
Carrying Signs. A sentencing court may also require the defendant to publicize his or her offense by carrying a sign in public, notwithstanding the shaming effect of such punishment. An example of this is the case of Shawn Gementera: On May 21, 2001, Gementera and an associate were caught by the police stealing letters from residential mailboxes. At the time of his arrest, Gementera had 42 pieces of mail in his possession, including a United States Treasury check in the amount of $1,525. On February 25, 2003, the United States District Court for the Northern District of California accepted Gementera’s plea of guilty to mail theft and sentenced him to two months of imprisonment, to be followed by three years of supervised release. As a condition of supervised release, the court required Gementera to perform 100 hours of community service consisting of standing in front of a postal facility with a signboard stating, “I stole mail. This is my punishment.” On March 3, 2003, the district court modified these conditions of supervised release and required Gementera to (1) spend four eight-hour days at a post office observing postal patrons inquire about lost or stolen mail at the facility’s lost-and-found window; (2) write letters of apology to identifiable victims of his crime; (3) deliver three lectures at San Francisco high schools explaining his crime and the effects it had on him and others; and (4) spend one eight-hour day in front of a post office in San Francisco wearing or carrying a large two-sided sign with the inscription “I stole mail. This is my punishment.” Gementera appealed the legality of the signboard requirement, and the 9th Circuit Court of Appeals affirmed. Such punishments must, however, be reasonable as to time, manner, and place, and must not subject the defendant to a risk of danger.

Wearing Certain Attire. A sentencing court may also reasonably require the defendant to wear certain articles of clothing while in public.


764 U.S. v. Gementera, 379 F.3d 596 (9th Cir. 2004).


766 See, Ballenger v. State, 210 Ga. App. 627, 436 S.E.2d 793 (1993) (court had authority to impose as condition of probation that defendant wear fluorescent pink plastic bracelet imprinted with the words “D.U.I. CONVICT”); People v. Hackler, 13 Cal. App. 4th 1049, 16 Cal. Rptr. 2d 681 (5th Dist. 1993) (probation condition requiring probationer to wear T-shirt bearing bold, printed statement of his status as felony theft probationer whenever he was outside his actual living quarters was unreasonably overbroad and invalid); People v. McDowell, 59 Cal. App. 3d 807, 130 Cal. Rptr. 839 (2d Dist. 1976) (disapproved of by, People v. Welch, 5 Cal. 4th 228, 19 Cal. Rptr. 2d 520, 851 P.2d 802 (1993)) (order requiring convicted purse snatcher on probation wear leather shoes with metal taps on heels and toes anytime he left his residence did not impose cruel and unusual punishment but needed to be more precise).
Advertisement in the media. A sentencing court can properly require that a defendant publicize his or her crimes, and/or an apology for committing such, in the mass media.\textsuperscript{767}

Prohibition on profit or remuneration from crime. A sentencing court can prevent a defendant from profiting from his or her criminal conduct,\textsuperscript{768} or from receiving remuneration as a result of the sentence.\textsuperscript{769} Under Florida’s “Son of Sam” law, section 944.512, Fla. Stat.,\textsuperscript{770} the court may also impose a lien in favor of the State upon proceeds payable to a convicted felon from any literary, cinematic, or other account of the crime for which the defendant has been convicted. A “conviction” in this sense means a guilty verdict by a jury or judge, or a guilty or \textit{nolo contendere} plea by the defendant, regardless of adjudication of guilt.\textsuperscript{771}

Prohibition on driving above a certain speed. While a court can order a defendant to obey and observe all traffic laws, a condition of probation restricting the defendant’s driving speed to a maximum limit for an offense unrelated to violation of any traffic law is improper, particularly where it would cause the defendant to drive at a speed below posted limits.\textsuperscript{772}

\textsuperscript{767}\textit{Lindsay v. State}, 606 So. 2d 652 (Fla. 4th DCA 1992) (condition of probation requiring probationer to place and pay for ad in newspaper consisting of defendant’s mug shot, name and caption “DUI—Convicted” did not violate primary purpose of probation, had relationship to crime of driving under the influence, and was not arbitrary and capricious); see also, \textit{U.S. v. Clark}, 918 F.2d 843 (9th Cir. 1990) (condition of probation that each police officer convicted of perjury, attempted perjury, and making a false statement to a government agency was reasonably related to the permissible end of rehabilitation); but see, \textit{People v. Johnson}, 174 Ill. App. 3d 812, 124 Ill. Dec. 252, 528 N.E.2d 1360 (4th Dist. 1988) (condition of supervision that first-time drunk driving defendant with no prior criminal record and having been evaluated as not having a drug or alcohol problem place advertisement in daily newspaper featuring her booking photograph and an apology for her conduct was improper and inconsistent with statute authorizing imposition of supervision).


\textsuperscript{769}See, \textit{U.S. v. Terrigno}, 838 F.2d 371 (9th Cir. 1988) (condition of probation that defendant not receive any remuneration for speaking engagements regarding her crime was not unreasonable).

\textsuperscript{770}The name of the law is derived from the term used in the media to describe the legislation enacted by the State of New York in 1977 to prevent serial killer David Berkowitz, who called himself “Son of Sam,” from profiting financially by publication of his crimes.

\textsuperscript{771}\textsection 944.512(1), Fla. Stat.; see also, \textit{Rolling v. State ex rel. Butterworth}, 630 So. 2d 635 (Fla. 1st DCA 1994) (no temporary injunction prior to conviction is allowed under “Son of Sam” law imposing lien in favor of state upon proceeds payable to convicted felon from any literary, cinematic, or other account of the crime).

\textsuperscript{772}\textit{Kominsky v. State}, 330 So. 2d 800 (Fla. 1st DCA 1976).


§ 21. Structured sentencing, guidelines, and the Criminal Punishment Code

Prior to October 1, 1983, courts were permitted a wide range of judicial discretion in the imposition of sanctions at sentencing. These sanctions ranged from a fine to prison incarceration up to the statutory maximum for the class of offense a defendant was convicted of. Prior to October 1, 1983, the statutory maximum penalties of incarceration in state prison were five years for a third-degree felony, 15 years for a second-degree felony, 30 years for a first-degree felony, and life for a life felony.

In 1957, for example, the legislature authorized the courts to impose indeterminate sentences upon conviction for noncapital felonies. Pursuant to section 921.18, the court in its discretion could sentence a defendant convicted of a noncapital felony to the custody of the Department of Corrections for an indeterminate period of six months to a maximum period of imprisonment. The maximum sentence could be less than the maximum prescribed by law, but could not be less than the minimum period of imprisonment, if any, prescribed for the offense. After July 1, 1990, the court could consider sentencing a defendant to serve his or her sentence in a county residential probation center facility as described in section 951.23 for the county residential probation program as provided in section 951.231 only if the defendant had not been previously convicted of a felony or twice convicted of a misdemeanor and the local facility had available capacity. Section 921.18 did not apply, however, to sentences imposed under section 775.084 or any other statute providing for punishment of habitual criminals, or to misdemeanors. Upon the recommendation of the Department of Corrections, the Parole Commission had the authority to determine the exact period of imprisonment to be served by defendants sentenced under the provisions of section 921.18, but a prisoner could not be held in custody longer than the maximum sentence provided for the offense for which he or she was sentenced. In 1960, the Florida Supreme Court upheld the validity of section 921.18 as being absolutely consistent with the requirements of the Florida Constitution and “in line with the recommendations of present-day penologists and criminologists regarding the objectives to be accomplished as punishment for crime.

In any event, indeterminate sentencing was the policy of the State of Florida as most offenders sentenced to prison were, by law, parole eligible. Parole was a discretionary early release mechanism that influenced both the percentage of time offenders served and the actual amount of time served. As a result, the system produced wide variations in the length of sentences imposed for

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774 § 921.18, Fla. Stat.; Butler v. State, 412 So. 2d 917 (Fla. 5th DCA 1982) (imposition of indeterminate sentences upon misdemeanor convictions constituted fundamental error because this type of sentence was not authorized by any statutory authority to be imposed as punishment for a misdemeanor).


776 Carnley v. Cochran, 118 So. 2d 629 (Fla. 1960).
the same offense under similar circumstances, as well as in the length of time actually served for those defendants who were sent to prison.\textsuperscript{777}

In 1977, the Chief Justice of the Supreme Court appointed a committee to explore alternatives to reduce unreasonable disparities in sentencing. This committee recommended the development and implementation of structured sentencing guidelines. Pursuant to chapter 79–362, Laws of Florida, and with the aid of a federal grant, the Office of the State Courts Administrator conducted a pilot program in four judicial circuits for the purpose of testing the feasibility of developing and implementing sentencing guidelines.\textsuperscript{778}

Due to concerns by the legislature regarding actual and percent of time served as well as concerns regarding a lack of uniformity in sentencing, the 1982 Legislature, pursuant to chapter 82–145, Laws of Florida, created a Sentencing Commission responsible for the initial development of a statewide system of sentencing guidelines for felony offenders.\textsuperscript{779} Additionally, the Sentencing Commission was charged to evaluate these guidelines annually, and recommend to the Legislature on a continuing basis changes necessary to ensure incarceration of:

- violent criminal offenders; and
- nonviolent criminal offenders who commit repeated acts of criminal behavior and who have demonstrated an inability to comply with less restrictive penalties previously imposed for nonviolent criminal acts.

The 1983 Legislature enacted the Florida Sentencing Guidelines effective October 1, 1983. Parole eligibility was abolished for almost all offenses committed after that date. The sentencing guidelines established a uniform set of standards to guide the sentencing judge in the decision-making process. Sentencing guidelines were intended to eliminate unwarranted variation in the sentencing process by reducing the subjectivity in interpreting specific offense-related and offender-related criteria and in defining the relative importance of those criteria in the sentencing decision.

The initial reaction of some courts was to minimize the effect of the new guidelines on the traditional range of judicial discretion in sentencing. The view of the First District, for example, was that trial judges could continue to enjoy the same broad sentencing discretion conferred upon them under general law, subject only to certain limitations or conditions imposed by the guidelines: The sentencing guidelines were to be narrowly construed so as to encroach as little as possible on the


sentencing judge’s discretion. When, however, the First District applied this viewpoint to uphold a sentence imposed under section 921.18 as a guidelines departure, the Florida Supreme Court reversed.

Between 1983 and 1998, there were three distinct versions of sentencing guidelines established by the legislature, known generally as the 1983 Guidelines, the 1994 Guidelines, and the 1995 Guidelines (not to be confused with the present-day Criminal Punishment Code which became effective October 1, 1998). The Florida Sentencing Guidelines represented the state’s structured policy with respect to the sentencing of non-capital felony offenders. Each version of the sentencing guidelines was an attempt to systematically:

- provide for a uniform set of standards to guide the sentencing court in sentencing decisions;
- evaluate relevant factors present at sentencing relating to the offense(s) and the defendant’s prior criminal behavior;
- attempt to provide for “truth in sentencing” and eliminate unwarranted disparity in sentencing decisions;
- ensure that the punishment is commensurate with the offense(s) before the court for sentencing; and
- ensure that sentences are mathematically based, with every assessment of points reflecting a policy statement regarding the relative severity of specific criminal behavior.

These three distinct versions of sentencing guidelines remain in effect for offenders sentenced under them as well as individuals yet to be sentenced for crimes committed during the effective dates of these guidelines.

Sentencing guidelines do not apply to capital felonies either as primary offenses or as additional offenses, but scoresheets must be prepared and utilized for all offenses subject to guideline sentences that are pending before the court at the same time as the capital felony. When a defendant commits a crime prior to the effective date of the sentencing guidelines and then elects to be sentenced under the guidelines, the guidelines in effect at the time of election are controlling.

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780 Garcia v. State, 454 So. 2d 714 (Fla. 1st DCA 1984).


783 Connell v. Wade, 538 So. 2d 854 (Fla. 1989).
Note that neither the guidelines nor the Criminal Punishment Code establish the illegality of any conduct. Rather, they are “directives to judges for their guidance in sentencing convicted criminals, not to citizens at large.” They are designed to assist and limit the discretion of the sentencing judge. It is settled that, with the exception of capital cases, a defendant has no constitutional right to such directives. As such, the Guidelines and the Criminal Punishment Code are not susceptible to attack under the vagueness doctrine.

§ 22. Costs, assessments, surcharges, and fines

In all criminal and violation-of-probation or community-control cases, convicted persons are liable for payment of the costs of prosecution, including investigative costs incurred by law enforcement agencies, by fire departments for arson investigations, and by investigations of the Department of Financial Services or the Office of Financial Regulation of the Financial Services Commission, if requested by such agencies. The court must include these costs in every judgment rendered against the convicted person. For purposes of section 938.27, “convicted” means a determination of guilt, or of violation of probation or community control, which is a result of a plea, trial, or violation proceeding, regardless of whether adjudication is withheld.

The court must impose the costs of prosecution and investigation notwithstanding the defendant’s present ability to pay. The court must require the defendant to pay the costs within a specified period or pursuant to a payment plan under section 28.246(4). The end of such period or the last such installment must not be later than: (1) The end of the period of probation or community control, if probation or community control is ordered; (2) Five years after the end of the term of imprisonment imposed, if the court does not order probation or community control; or (3) Five years after the date of sentencing in any other case. However, the obligation to pay any unpaid amounts does not expire if not paid in full within the period specified in section 938.27(2)(b). If not otherwise provided by the court under section 938.27, costs must be paid

786 Lockett v. Ohio, 438 U.S. 586, 603, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978) (finding that “legislatures remain free to decide how much discretion in sentencing should be reposed in the judge or jury in noncapital cases”).
787 § 938.27(1), Fla. Stat.
788 § 938.27(2)(a), Fla. Stat.
789 § 938.27(2)(b) 1, Fla. Stat.
790 § 938.27(2)(b) 2, Fla. Stat.
791 § 938.27(2)(b) 3, Fla. Stat.
792 § 938.27(2), Fla. Stat.
immediately.\textsuperscript{793} If a defendant is placed on probation or community control, payment of any costs under section 938.27 must be a condition of such probation or community control. The court may revoke probation or community control if the defendant fails to pay these costs.\textsuperscript{794}

Any dispute as to the proper amount or type of costs must be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of costs incurred is on the state attorney. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant is on the defendant. The burden of demonstrating such other matters as the court deems appropriate is upon the party designated by the court as justice requires.\textsuperscript{795} Any default in payment of costs may be collected by any means authorized by law for enforcement of a judgment.\textsuperscript{796} The clerk of the court is required to collect and dispense cost payments in any case.\textsuperscript{797}

Investigative costs that are recovered must be returned to the appropriate investigative agency that incurred the expense. Such costs include actual expenses incurred in conducting the investigation and prosecution of the criminal case; however, costs may also include the salaries of permanent employees. Any investigative costs recovered on behalf of a state agency must be remitted to the Department of Revenue for deposit in the agency operating trust fund, and a report of the payment must be sent to the agency, except that any investigative costs recovered on behalf of the Department of Law Enforcement must be deposited in the department’s Forfeiture and Investigative Support Trust Fund under section 943.362.\textsuperscript{798}

Costs for the state attorney must be set in all cases at no less than $50 per case when a misdemeanor or criminal traffic offense is charged and no less than $100 per case when a felony offense is charged, including a proceeding in which the underlying offense is a violation of probation or community control. The court may set a higher amount upon a showing of sufficient proof of higher costs incurred. Costs recovered on behalf of the state attorney under section 938.27 must be deposited into the State Attorneys Revenue Trust Fund to be used during the fiscal year in which the funds are collected, or in any subsequent fiscal year, for actual expenses incurred in investigating and prosecuting criminal cases, which may include the salaries of permanent employees, or for any other purpose authorized by the Legislature.\textsuperscript{799}

\textsuperscript{793}§ 938.27(2)(c), Fla. Stat.
\textsuperscript{794}§ 938.27(3), Fla. Stat.
\textsuperscript{795}§ 938.27(4), Fla. Stat.
\textsuperscript{796}§ 938.27(5), Fla. Stat.
\textsuperscript{797}§ 938.27(6), Fla. Stat.
\textsuperscript{798}§ 938.27(7), Fla. Stat.
\textsuperscript{799}§ 938.27(8), Fla. Stat.
A defendant in a criminal prosecution who is acquitted or discharged is not liable for any costs or fees of the court or any ministerial office, or for any charge of subsistence while detained in custody. If the defendant has paid any taxable costs, or fees required under section 27.52(1)(b), in the case, the clerk or judge must give him or her a certificate of the payment of such costs, with the items thereof, which, when audited and approved according to law, must be refunded to the defendant. To receive a refund under section 939.06, a defendant must submit a request for the refund to the Justice Administrative Commission on a form and in a manner prescribed by the commission. The defendant must attach to the form an order from the court demonstrating the defendant’s right to the refund and the amount of the refund.

The civil costs of prosecution incurred in establishing guilt, along with punitive fines, surcharges and other monetary and non-monetary assessments, are imposed during sentencing for charges that are proven or admitted to. They are not imposed for a charge that is disproved or withdrawn. A defendant convicted on fewer than all the counts of an indictment, information, or other charging document cannot be properly taxed with the costs of the counts on which he or she was acquitted or otherwise discharged. Trial courts lack the authority to impose costs and fines in criminal cases unless such imposition is specifically authorized by statute and the statutory authority is cited in the defendant’s written disposition order.

While costs are not imposed against losing defendants as punishment, assessments, fines, and surcharges are, and all must meet constitutional safeguards against cruel and unusual, or cruel or unusual, punishments and excessive fines. In particular, the Florida Constitution’s Article I, Section 17 prohibition against “Excessive fines, cruel and unusual punishment,” and the Eighth Amendment to the United States Constitution’s prohibition that “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted,” limit the state’s power to extract payments, whether in cash or in kind, “as punishment for some offense.” In Southern Union Co. v. United States, the Supreme Court extended to criminal fines the principle, first articulated in Apprendi v. New Jersey, that the Sixth Amendment reserves to juries the determination of any fact, other than the fact of a prior conviction, that increases a criminal defendant’s maximum potential sentence. Under the Apprendi line of case law, the statutory

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800 § 939.06(1), Fla. Stat.
801 § 939.06(2), Fla. Stat.
802 See, Leyritz v. State, 93 So. 3d 1156 (Fla. 4th DCA 2012).
803 V.D. v. State, 922 So. 2d 1037 (Fla. 5th DCA 2006); Lawley v. State, 680 So. 2d 472 (Fla. 1st DCA 1996).
maximum is the maximum sentence a judge may impose solely on the basis of the facts reflected in
the jury verdict or admitted by the defendant. The Court limited its ruling to those cases in which
the right to trial by jury was implicated, holding that where a fine is so insubstantial that the
underlying offense is considered “petty,” the Sixth Amendment right of jury trial is not triggered,
and no Apprendi issue arises.

A defendant must be sentenced based on the law in effect at the time of the commission of
his or her offenses, including the statutes pertaining to costs, assessments, surcharges and fines. Generally, costs may be imposed per case and not per count. In instances where multiple offenses are assigned separate case numbers, but are consolidated for prosecution, the costs are assessed for prosecution of the single consolidated case and may not be imposed for each separate case number.

§ 22.1. Fines

A “fine” is a pecuniary punishment imposed by a lawful tribunal upon a person convicted
of a crime. When the law authorizes the placing of a defendant on probation, and when the
defendant’s offense is punishable by both fine and imprisonment, the trial court may, in its
discretion, impose a fine upon him or her and place him or her on probation or into community
control as an alternative to imprisonment. Fines are part of the potential sentence for particular
offenses of which defendants are inherently on notice, and so the trial court generally does not have
to give a defendant prior notice or an opportunity to be heard prior to assessing fines that are part of
the potential sentence for particular crimes, as opposed to the notice and hearing requirements prior
to the assessment of costs. Note, however, that the imposition of fines for offenses for which
sentencing is imposed outside the former guidelines or the Criminal Punishment Code requires
explicit statutory authority, e.g., a court cannot impose the discretionary fines under section 775.083
if a habitual offender sentence is imposed.


809 Swift v. State, 53 So. 3d 394 (Fla. 2d DCA 2011); Torres v. State, 42 So. 3d 914 (Fla. 2d DCA 2010).

810 Christie v. State, 95 So. 3d 1027 (Fla. 5th DCA 2012); Stickles v. State, 44 So. 3d 653 (Fla. 1st DCA 2010).

811 Black’s L. Dict. 759 (Rev. 4th Ed. 1968).


813 Long v. State, 540 So. 2d 903 (Fla. 2d DCA 1989).

814 See, Orona v. State, 968 So. 2d 1060 (Fla. 2d DCA 2007); Baker v. State, 941 So. 2d 419 (Fla. 2d DCA 2006); Webster v. State, 705 So. 2d 970 (Fla. 2d DCA 1998).
A person who has been convicted of an offense other than a capital felony may be sentenced to pay a fine in addition to any punishment described in section 775.082; when specifically authorized by statute, he or she may be sentenced to pay a fine in lieu of any punishment described in section 775.082. A person who has been convicted of a noncriminal violation may be sentenced to pay a fine. Fines for designated crimes and for noncriminal violations are subject to the following uniform statutory limits: $15,000, when the conviction is of a life felony; $10,000, when the conviction is of a felony of the first or second degree; $5,000, when the conviction is of a felony of the third degree; $1,000, when the conviction is of a misdemeanor of the first degree; $500, when the conviction is of a misdemeanor of the second degree or a noncriminal violation; any higher amount equal to double the pecuniary gain derived from the offense by the offender or double the pecuniary loss suffered by the victim; and any higher amount specifically authorized by statute. If a defendant is unable to pay a fine, the court may defer payment of the fine to a date certain. Note that, in the context of offenses involving construction contracts, the statute authorizing imposition of a fine based on pecuniary gain derived from the offense requires proof that there has been some profit. This does not require proof that the defendant personally received any gain, so long as there is proof that the defendant directed some gain to a third person or entity. Fines under section 775.083 are discretionary and must be orally pronounced at sentencing.

In addition to the fines set forth in section 775.083(1), court costs are assessed and collected in each instance a defendant pleads nolo contendere to, or is convicted of, or adjudicated delinquent for, a felony, a misdemeanor, or a criminal traffic offense under state law, or a violation of any municipal or county ordinance if the violation constitutes a misdemeanor under state law. The court costs so imposed are $50 for a felony and $20 for any other offense. Note, however, that this cost

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815 § 775.083(1)(a), Fla. Stat.
816 § 775.083(1)(b), Fla. Stat.
817 § 775.083(1)(c), Fla. Stat.
818 § 775.083(1)(d), Fla. Stat.
819 § 775.083(1)(e), Fla. Stat.
820 § 775.083(1)(f), Fla. Stat.
821 § 775.083(1)(g), Fla. Stat.
822 § 775.083(1), Fla. Stat.
823 Quinn v. State, 662 So. 2d 947 (Fla. 5th DCA 1995), clarified, rehearing denied.
824 See, Pullam v. State, 55 So. 3d 674 (Fla. 1st DCA 2011); Dadds v. State, 946 So. 2d 1129, 1130 (Fla. 2d DCA 2006).
825 § 775.083(2), Fla. Stat.
may not be assessed against a juvenile where the court has found the juvenile to be delinquent but has withheld adjudication. 826

Payment of a fine renders a case moot so as to preclude any review of an attack upon such a conviction. 827

§ 22.2. Assessment of costs

“Costs” generally refers to charges fixed for litigation, usually payable by the losing party, and in the civil context normally includes attorney’s fees. 828 Costs in criminal cases are assessed on a per case basis, and not separately by count, except where a special cost is associated with a specific count. 829 In the criminal context, court costs are mandatory, non-punitive civil remedies. Costs taxed in a criminal proceeding must bear a true relation to the expenses of the prosecution. 830 Costs may be applied retroactively where the defendant’s criminal offense predates the enactment of the cost, without violating ex post facto prohibitions. 831 Assessment of costs violates ex post facto prohibitions only when the length of an inmate’s sentence can be increased for failure to pay the costs. 832

Statutory costs that are truly “mandatory” must be imposed in every judgment against every defendant convicted of a similar offense. The trial judge has no discretion to dispense with these

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826 See, S.F. v. State, 56 So. 3d 116 (Fla. 3d DCA 2011); J.Z. v. State, 46 So. 3d 1218 (Fla. 4th DCA 2010); J.S. v. State, 19 So. 3d 380 (Fla. 2d DCA 2009); T.L.S. v. State, 949 So. 2d 290, 292 (Fla. 5th DCA 2007).

827 Curtis v. State, 350 So. 2d 1142 (Fla. 1st DCA 1977).


829 See, Rafael v. State, 679 So. 2d 314 (Fla. 1st DCA 1996).


831 Griffin v. State, 980 So. 2d 1035 (Fla. 2008), approving Ridgeway v. State, 892 So. 2d 538 (Fla. 1st DCA 2005).

832 See, State v. Yost, 507 So. 2d 1099 (Fla. 1987) (noting denial of gain-time to prisoners who have not paid fees and court costs and imposing community service on indigents unable to pay the fees and costs disadvantage prisoners whose crimes were committed prior to the effective date of the statute, in violation of ex post facto prohibitions); Johnson v. State, 502 So. 2d 1291 (Fla. 1st DCA 1987) (holding imposition of costs of probation, without any increase in jail or prison time, is not an impermissible enhancement of punishment); but see, Hayden v. State, 753 So. 2d 720 (Fla. 2d DCA 2000) (holding cost assessment for juvenile assessment center and teen court program could not be imposed where statutes authorizing such costs were enacted after date of defendant’s offenses).
costs, and the defendant’s circumstances and his or her ability to pay are not relevant to the decision. Publication of these costs in the Florida Statutes provides every defendant with adequate notice.\footnote{Sutton v. State, 635 So. 2d 1032 (Fla. 2d DCA 1994) (a sentencing court may impose mandatory costs without notice).}

Statutory costs that are “discretionary” are costs that the trial court may decide to impose or not to impose, depending upon the defendant’s ability to pay and other circumstances involved in the case. The statutes place the defendant on notice that these costs are a possibility, but not a certainty. As such, the trial court must give the defendant notice of these costs at sentencing. Discretionary costs must be individually announced in a manner sufficient for the defendant to know the legal basis for the cost imposed. If the statute does not specify a dollar amount for the discretionary cost, the trial court must make certain that the defendant is on notice of the dollar amount assessed. Typically, notice to the defendant will require an oral description of the statute authorizing the cost and an oral announcement of the dollar amount. The defendant must have an opportunity in open court to object to the imposition of these discretionary costs. If these costs are not separately identified in the cost order, the clerk of court cannot determine where to deposit payments as they are collected.\footnote{See, Reyes v. State, 655 So. 2d 111 (Fla. 2d DCA 1995).}

Before a court can impose an order on costs, it must have competent evidence of those costs. The burden of demonstrating the amount of costs incurred is on the state attorney.\footnote{See, Phillips v. State, 942 So. 2d 1042 (Fla. 2d DCA 2006).}

In the course of sentencing, the trial court may assess costs against the defendant even if the defendant is indigent. As a general proposition, the State must, however, provide adequate notice of such assessment to the defendant with full opportunity to object to the assessment of those costs. In addition, any enforcement of the collection of those costs must occur only after a judicial finding that the indigent defendant has the ability to pay.\footnote{Jenkins v. State, 444 So. 2d 947 (Fla. 1984).} A trial court is not, however, required to determine a convicted criminal defendant’s ability to pay statutorily mandated costs prior to assessing costs unless the applicable statute specifically requires such a determination. It is only when the state seeks to enforce the collection of costs that a court must determine if the defendant has the ability to pay.\footnote{Cook v. State, 896 So. 2d 870 (Fla. 2d DCA 2005); State v. Beasley, 580 So. 2d 139 (Fla. 1991); Stallworth v. State, 640 So. 2d 218 (Fla. 2d DCA 1994).} The need to pay costs cannot form the basis for a downward departure.\footnote{State v. Tyrrell, 807 So. 2d 122 (Fla. 5th DCA 2002).}
The court may impose only those costs against the defendant as are statutorily authorized. A sentencing court may not, for example, impose the costs of competency evaluations.\textsuperscript{839}

\textbf{§ 22.3. Costs of supervision and rehabilitation}

Any person ordered by the court, the Department of Corrections, or the parole commission to be placed on probation, drug offender probation, community control, parole, control release, provisional release supervision, addiction-recovery supervision, or conditional release supervision under chapters 944, 945, 947, 948, or 958, or in a pretrial intervention program, must, as a condition of any placement, pay the Department of Corrections a total sum of money equal to the total month or portion of a month of supervision times the court-ordered amount, but not to exceed the actual per diem cost of the supervision. Department of Corrections rules allow a defendant who pays in full and in advance of regular termination of supervision to receive a reduction in the amount due, and the rules incorporate provisions by which the defendant’s ability to pay is linked to an established written payment plan. Funds collected from felony defendants may be used to offset costs of the Department of Corrections associated with community supervision programs, subject to appropriation by the legislature.\textsuperscript{840}

In addition to any other contribution or surcharge imposed by section 948.09, each felony defendant assessed such costs of rehabilitation and supervision is required to pay a $2–per-month surcharge to the Department of Corrections. The surcharge is deemed to be paid only after the full amount of any monthly payment required by the established written payment plan has been collected by the Department of Corrections. These funds are to be used by the Department of Corrections to pay for correctional probation officers’ training and equipment.\textsuperscript{841} Any defendant placed on misdemeanor probation by a county court must contribute not less than $40 per month, as decided by the sentencing court, to the court-approved public or private entity providing misdemeanor supervision.\textsuperscript{842}

Any person being electronically monitored by the Department of Corrections as a result of being placed on supervision must pay the department for electronic monitoring services at a rate that may not exceed the full cost of the monitoring service in addition to the cost of supervision fee as directed by the sentencing court. The funds collected under this provision of section 948.09 must be deposited in the General Revenue Fund.\textsuperscript{843}

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\textsuperscript{839}§ 916.115, Fla. Stat.; see, \textit{Madison v. State}, 58 So. 3d 384 (Fla. 5th DCA 2011); \textit{W.Z. v. State}, 35 So. 3d 51 (Fla. 5th DCA 2010).
\textsuperscript{840}§ 948.09(1)(a) 1, Fla. Stat.
\textsuperscript{841}§ 948.09(1)(a) 2, Fla. Stat.
\textsuperscript{842}§ 948.09(1)(b), Fla. Stat.
\textsuperscript{843}§ 948.09(2), Fla. Stat.
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Any failure to pay contribution as required under section 948.09 may constitute a ground for the revocation of probation by the court, the revocation of parole or conditional release by the Parole Commission, the revocation of control release by the Control Release Authority, or removal from the pretrial intervention program by the state attorney. The Department of Corrections has the authority to exempt a person from the payment of all or any part of the contribution if it finds any of the following factors to exist:

—The defendant has diligently attempted, but has been unable, to obtain employment which provides him or her sufficient income to make such payments. 844

—The defendant is a student in a school, college, university, or course of career training designed to fit the student for gainful employment. Certification of such student status must be supplied to the Secretary of Corrections by the educational institution in which the defendant is enrolled. 845

—The defendant has an employment handicap, as determined by a physical, psychological, or psychiatric examination acceptable to, or ordered by, the Secretary of Corrections. 846

—The defendant’s age prevents him or her from obtaining employment. 847

—The defendant is responsible for the support of dependents, and the payment of such contribution constitutes an undue hardship on the defendant. 848

—The defendant has been transferred outside the state under an interstate compact adopted pursuant to chapter 949. 849

—There are other extenuating circumstances, as determined by the Secretary of Corrections. 850

In addition to the contribution required under section 948.09(1), the Department of Corrections may provide a maximum payment of $10 per month for each misdemeanor probationer

844§ 948.09(3)(a), Fla. Stat.
845§ 948.09(3)(b), Fla. Stat.
846§ 948.09(3)(c), Fla. Stat.
847§ 948.09(3)(d), Fla. Stat.
848§ 948.09(3)(e), Fla. Stat.
849§ 948.09(3)(f), Fla. Stat.
850§ 948.09(3)(g), Fla. Stat.
who is contributing $10 per month to the court-approved public or private entity which is providing him or her with misdemeanor supervision or rehabilitation. This $10 payment is only for first-degree misdemeanors, petty theft, and worthless checks. The Department of Corrections is required to make such payment to the court-approved public or private entity which is providing supervision to the defendant under section 948.09.851

As a condition of an interstate compact adopted pursuant to chapter 949, the Department of Corrections must require each out-of-state probationer or parolee transferred to Florida to contribute not less than $30 or more than the cost of supervision, certified by the Department of Corrections, per month to defray the cost incurred by Florida as a result of providing supervision and rehabilitation during the period of supervision.852

In addition to any other required contributions, the Department of Corrections, at its discretion, may require defendants under any form of supervision to submit to and pay for urinalysis testing to identify drug usage as part of the rehabilitation program. Any failure to make such payment, or participate, may be considered a ground for revocation by the court, the Parole Commission, or the Control Release Authority, or for removal from the pretrial intervention program by the state attorney. The Department of Corrections may exempt a person from such payment if it determines that any of the factors specified in section 948.09(3)(a)-(g) exist.853 Note that Rule 3.720(d)(1) provides that the defendant must be advised at sentencing of his right to a hearing to contest the amount of the public defender’s lien.

§ 22.4. Medical expenses

A common issue with sentencing is the assessment of costs for medical expenses incurred for treatment of the defendant either at the time of arrest or during incarceration pending disposition of the defendant’s case.

Notwithstanding any other provision of law, the responsibility for paying the expenses of medical care, treatment, hospitalization, and transportation for any person ill, wounded, or otherwise injured during or at the time of arrest for any violation of a state law or a county or municipal ordinance is the responsibility of the person receiving such care, treatment, hospitalization, and transportation. The provider of such services is required to seek reimbursement for the expenses incurred in providing medical care, treatment, hospitalization, and transportation from the following sources in the following order:

851 § 948.09(4), Fla. Stat.
853 § 948.09(6), Fla. Stat.
(a) From an insurance company, health care corporation, or other source, if the prisoner is covered by an insurance policy or subscribes to a health care corporation or other source for those expenses.\textsuperscript{854}

(b) From the person receiving the medical care, treatment, hospitalization, or transportation.\textsuperscript{855}

(c) From a financial settlement for the medical care, treatment, hospitalization, or transportation payable or accruing to the injured party.\textsuperscript{856}

Upon a showing that reimbursement from the sources listed in subsection 901.35(1) is not available, the costs of medical care, treatment, hospitalization, and transportation must be paid:

(a) From the general fund of the county in which the person was arrested, if the arrest was for violation of a state law or county ordinance;\textsuperscript{857} or

(b) From the municipal general fund, if the arrest was for violation of a municipal ordinance.\textsuperscript{858}

The responsibility for payment of such medical costs exists until such time as an arrested person is released from the custody of the arresting agency.\textsuperscript{859} An arrested person who has health insurance, subscribes to a health care corporation, or receives health care benefits from any other source is required to assign such benefits to the health care provider.\textsuperscript{860}

A county detention facility or municipal detention facility incurring expenses for providing medical care, treatment, hospitalization, or transportation may seek reimbursement for the expenses incurred in the following order:

(a) From the prisoner or person receiving medical care, treatment, hospitalization, or transportation by deducting the cost from the prisoner’s cash account on deposit with the detention facility. If the prisoner’s cash account does not contain sufficient funds to cover

\textsuperscript{854}§ 901.35(1)(a), Fla. Stat.

\textsuperscript{855}§ 901.35(1)(b), Fla. Stat.

\textsuperscript{856}§ 901.35(1)(c), Fla. Stat.

\textsuperscript{857}§ 901.35(2)(a), Fla. Stat.

\textsuperscript{858}§ 901.35(2)(b), Fla. Stat.

\textsuperscript{859}§ 901.35(2), Fla. Stat.

\textsuperscript{860}§ 901.35(3), Fla. Stat.
medical care, treatment, hospitalization, or transportation, then the detention facility may place a lien against the prisoner’s cash account or other personal property, to provide payment in the event sufficient funds become available at a later time. Any existing lien may be carried over to future incarceration of the same prisoner as long as the future incarceration takes place within the county originating the lien and the future incarceration takes place within three years of the date the lien was placed against the prisoner’s account or other personal property.\(^{861}\)

(b) From an insurance company, health care corporation, or other source if the prisoner or person is covered by an insurance policy or subscribes to a health care corporation or other source for those expenses.\(^{862}\)

A prisoner who receives medical care, treatment, hospitalization, or transportation is required to cooperate with the county detention facility or municipal detention facility in seeking reimbursement under section 952.032(1)(a) and (b) for expenses incurred by the facility for the prisoner. A prisoner who willfully refuses to cooperate with the reimbursement efforts of the detention facility may have a lien placed against the prisoner’s cash account or other personal property and may not receive gain-time as provided by section 951.21.\(^{863}\)

Reimbursement for medical expenses may be sought by the providing agency under either section 901.35 or section 951.032 and, absent some nexus to the criminal charge or charges the defendant is ultimately convicted of, medical expenses incurred on behalf of an arrested or incarcerated defendant are not chargeable as restitution and such payment may not be made a condition of probation or community control.\(^{864}\)

§ 22.5. Imposition of costs against the State

The trial court does not have inherent, regulatory, or statutory authority to assess attorney’s fees or costs against the State Attorney’s Office or Office of Statewide Prosecution in criminal cases.\(^{865}\)

\(^{861}\)§ 951.032(1)(a), Fla. Stat.

\(^{862}\)§ 951.032(1)(b), Fla. Stat.

\(^{863}\)§ 951.032(2), Fla. Stat.

\(^{864}\)Cherry v. State, 15 So. 3d 774 (Fla. 2d DCA 2009); cf. Morran v. State, 662 So. 2d 1339, 1340 (Fla. 2d DCA 1995) (holding that the trial court may not impose the payment of the cost of medical expenses incurred while the defendant was in custody as a condition of probation); Comeau v. State, 611 So. 2d 68, 69 (Fla. 1st DCA 1992) (same).

\(^{865}\)State v. Nelson, 27 So. 3d 758 (Fla. 3d DCA 2010); State v. Shelton, 584 So. 2d 1118 (Fla. 5th DCA 1991); State v. Harwood, 488 So. 2d 901 (Fla. 5th DCA 1986); State v. J.L.P., 435 So. 2d 392 (Fla. 5th DCA 1983).
§ 22.6. Summary

Section 28.246(3), Fla. Stat., requires the court’s enforcement of court costs, fines, and other assessments by court order. Except as otherwise provided by law, a monetary assessment mandated by statute must be imposed and included in the judgment without regard to whether the assessment is announced in open court. When an assessment mandated by statute prescribes a minimum assessment and a maximum assessment, or prescribes solely a minimum assessment, the minimum assessment is presumed and must be imposed and included in the judgment, unless the court specifies a greater amount. As used in section 28.2457, “monetary assessment” or “assessment” includes, but is not limited to, a fine or other monetary penalty, fee, service charge, or cost. While the sentencing court has some discretion in the imposition of some monetary obligations, the court has no discretion where imposition is mandatory.

Publication of mandatory levies in the Florida Statutes provides every defendant with adequate notice such that these monetary obligations are not required to be orally announced by the trial court. Various chapters of the Florida Statutes provide for the imposition of such monetary charges in criminal cases, and such levies must be imposed in every judgment against every defendant convicted of a similar offense such that the trial court has no discretion to dispense with these costs, and the defendant’s circumstances and his or her ability to pay are not relevant considerations. Notice to defendants is not required where statutorily mandated fines are part of the potential sentence for particular crimes of which defendants are inherently on notice. Statutorily mandated fines are not required to be orally announced by the trial court. Statutorily mandated fines must also be imposed absent a stipulation by the state attorney.

In determining the applicability of various assessments, it is important to note that they do not apply to juveniles unless the authorizing statute provides so. Section 938.27(1), for example, provides for imposition of costs of prosecution in all criminal cases upon convicted persons. As a juvenile who has been adjudicated delinquent has not been “convicted” and is not a “criminal,” this provision of the law does not apply to juveniles who have been adjudicated delinquent, but for

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869 See, Reyes v. State, 655 So. 2d 111, 116 (Fla. 2d DCA 1995).
870 See, Reyes v. State, 655 So. 2d 111, 116 (Fla. 2d DCA 1995).
871 Angel v. State, 769 So. 2d 494, 496 (Fla. 4th DCA 2000).
872 See, State v. Delgado, 717 So. 2d 1053 (Fla. 4th DCA 1998).
873 D.A. v. State, 11 So. 3d 423 (Fla. 4th DCA 2009).
section 985.032, Fla. Stat., providing that a juvenile who has been adjudicated delinquent or has adjudication of delinquency withheld shall be assessed costs of prosecution as provided in section 938.27, Fla. Stat.\textsuperscript{874} Section 939.185(1)(a), for another example, provides that the board of county commissioners may adopt an additional court cost, not to exceed $65, to be imposed by the court when a person pleads guilty or \textit{nolo contendere} to, or is found guilty of, any felony, misdemeanor, or criminal traffic offense under the laws of Florida. A plain reading of the statute indicates, however, that this subsection is not intended to apply to juveniles, as there is no mention of delinquency in the statutory provision.\textsuperscript{875}

An order for costs must cite the correct statutory authority for imposing those costs; if it does not, it is a nullity.\textsuperscript{876}

A summary of mandatory and discretionary costs, assessments, surcharges and fines is depicted in the following table:

\textbf{Table 1. Summary of Costs, Assessments, Surcharges and Fines}

<table>
<thead>
<tr>
<th>Mandatory In All Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Amount</td>
</tr>
<tr>
<td>--------</td>
</tr>
<tr>
<td>$50</td>
</tr>
<tr>
<td>$20</td>
</tr>
<tr>
<td>$3</td>
</tr>
<tr>
<td>$50</td>
</tr>
<tr>
<td>$225</td>
</tr>
</tbody>
</table>

\textsuperscript{874}§ 985.032(2), Fla. Stat.

\textsuperscript{875}T.L.S. v. State, 949 So. 2d 290 (Fla. 5th DCA 2007).

\textsuperscript{876}De La Fuente v. State, 58 So. 3d 394 (Fla. 2d DCA 2011).
### Mandatory in Specific Types of Cases

<table>
<thead>
<tr>
<th>Amount</th>
<th>Description</th>
<th>Statute</th>
</tr>
</thead>
<tbody>
<tr>
<td>$50</td>
<td>Public Defender appointment application fee</td>
<td>27.52 (only if fee not paid by disposition)</td>
</tr>
<tr>
<td>$40</td>
<td>County or municipality ordinance violations</td>
<td>34.045 (against nonprevailing party)</td>
</tr>
<tr>
<td>$3</td>
<td>Traffic surcharge</td>
<td>318.18(17) (criminal violations listed in 318.17 and all noncriminal moving traffic violations under chapter 316)</td>
</tr>
<tr>
<td>$5,000</td>
<td>Solicitation for Prostitution civil penalty</td>
<td>796.07(6) (solicitation for prostitution cases)</td>
</tr>
<tr>
<td>Amount</td>
<td>Description</td>
<td>Statute</td>
</tr>
<tr>
<td>---------</td>
<td>--------------------------------------------------</td>
<td>--------------------------------------------------</td>
</tr>
<tr>
<td>$500–1,000</td>
<td>Racing on Highway</td>
<td>316.191(2)(a)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Amount</th>
<th>Description</th>
<th>Statute</th>
</tr>
</thead>
<tbody>
<tr>
<td>$500–1,000</td>
<td>Racing on Highway — 2nd conviction within 5 years</td>
<td>316.191(2)(b)</td>
</tr>
<tr>
<td>$500–1,000</td>
<td>DUI — 1st conviction</td>
<td>316.193(2)(a)1.a.</td>
</tr>
<tr>
<td>$1,000–2,000</td>
<td>DUI — 2nd conviction</td>
<td>316.193(2)(a)1.b.</td>
</tr>
<tr>
<td>$2,000–5,000</td>
<td>DUI — 3rd conviction outside of 10 years</td>
<td>316.193(2)(b)2.</td>
</tr>
<tr>
<td>$2,000</td>
<td>DUI — 4th conviction (mandatory felony)</td>
<td>316.193(2)(b)3.</td>
</tr>
<tr>
<td>$1,000–2,000</td>
<td>DUI — BAL 0.15 or higher or accompanied in vehicle by person under 18 years of age — 1st conviction</td>
<td>316.193(4)(a)1.</td>
</tr>
<tr>
<td>$2,000–4,000</td>
<td>DUI — BAL 0.15 or higher or accompanied in vehicle by person under 18 years of age — 2nd conviction</td>
<td>316.193(4)(a)2.</td>
</tr>
<tr>
<td>$4,000</td>
<td>DUI — BAL 0.15 or higher or accompanied in vehicle by person under 18 years of age — 3rd or subsequent conviction</td>
<td>316.193(4)(a)3.</td>
</tr>
<tr>
<td>$5,000</td>
<td>Third violation of section 316.1926 pertaining to riding on motorcycles or mopeds</td>
<td>318.14(13)(c)</td>
</tr>
<tr>
<td>$500–1,000</td>
<td>BUI — 1st conviction</td>
<td>327.35(2)(a)</td>
</tr>
<tr>
<td>$1,000–2,000</td>
<td>BUI — 2nd conviction</td>
<td>327.35(2)(a)</td>
</tr>
<tr>
<td>$2,000–5,000</td>
<td>BUI — 3rd conviction outside of 10 years</td>
<td>327.35(2)(b)</td>
</tr>
<tr>
<td>$4,000</td>
<td>BUI — 4th or subsequent conviction</td>
<td>327.35(2)(b)</td>
</tr>
<tr>
<td>$1,000–2,000</td>
<td>BUI — BAL over 0.20 — 1st conviction</td>
<td>327.35(4)</td>
</tr>
<tr>
<td>$2,000–4,000</td>
<td>BUI — BAL over 0.20 — 2nd conviction</td>
<td>327.35(4)</td>
</tr>
<tr>
<td>$4,000</td>
<td>BUI — BAL over 0.20 — 3rd or subsequent conviction</td>
<td>327.35(4)</td>
</tr>
<tr>
<td>$60</td>
<td>BUI — additional fine</td>
<td>327.35(9)</td>
</tr>
</tbody>
</table>

### Animal Cruelty

<table>
<thead>
<tr>
<th>Amount</th>
<th>Description</th>
<th>Statute</th>
</tr>
</thead>
<tbody>
<tr>
<td>$250</td>
<td>Illegal Killing of Wildlife</td>
<td>372.7015</td>
</tr>
<tr>
<td>Amount</td>
<td>Description</td>
<td>Statute</td>
</tr>
<tr>
<td>---------</td>
<td>------------------------------------------------------------------------------</td>
<td>--------------------------------------------</td>
</tr>
<tr>
<td>$2,500</td>
<td>Cruelty to Animals — knowing and intentional torture or torment — 1st conviction</td>
<td>828.12(2)(a)</td>
</tr>
<tr>
<td>$5,000</td>
<td>Cruelty to Animals — knowing and intentional torture or torment — 2nd or subsequent conviction</td>
<td>828.12(2)(b)</td>
</tr>
</tbody>
</table>

### Petty Theft

<table>
<thead>
<tr>
<th>Amount $50–1,000</th>
<th>Description</th>
<th>Statute</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Petit Theft — 2nd or subsequent conviction</td>
<td>812.015(2)</td>
</tr>
</tbody>
</table>

### Drug Offenses

<table>
<thead>
<tr>
<th>Amount $500</th>
<th>Description</th>
<th>Statute</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Certain drugs within 1,000 feet of a school, child care facility, park, community center, college, university, place of worship, or public housing facility</td>
<td>893.13(1)(c), (d), (e), and (f)</td>
</tr>
<tr>
<td>$25,000</td>
<td>Trafficking in Cannabis — greater than 25 pounds but less than 2,000 pounds</td>
<td>893.135(1)(a)1.</td>
</tr>
<tr>
<td>$50,000</td>
<td>Trafficking in Cannabis — 2,000 pounds or more but less than 10,000 pounds</td>
<td>893.135(1)(a)2.</td>
</tr>
<tr>
<td>$200,000</td>
<td>Trafficking in Cannabis — greater than 10,000 pounds</td>
<td>893.135(1)(a)3.</td>
</tr>
<tr>
<td>$50,000</td>
<td>Trafficking in Cocaine — 28 grams or more but less than 200 grams</td>
<td>893.135(1)(b)1.a.</td>
</tr>
<tr>
<td>$100,000</td>
<td>Trafficking in Cocaine — 200 grams or more but less than 400 grams</td>
<td>893.135(1)(b)1.b.</td>
</tr>
<tr>
<td>$250,000</td>
<td>Trafficking in Cocaine — 400 grams or more but less than 150 kilograms</td>
<td>893.135(1)(b)1.c.</td>
</tr>
<tr>
<td>$50,000</td>
<td>Trafficking in Illegal Drugs — 4 grams or more but less than 14 grams</td>
<td>893.135(1)(c)1.a.</td>
</tr>
<tr>
<td>$100,000</td>
<td>Trafficking in Illegal Drugs — 14 grams or more but less than 28 grams</td>
<td>893.135(1)(c)1.b.</td>
</tr>
<tr>
<td>$500,000</td>
<td>Trafficking in Illegal Drugs — 28 grams or more but less than 30 grams</td>
<td>893.135(1)(c)1.c.</td>
</tr>
<tr>
<td>Amount</td>
<td>Description</td>
<td>Code</td>
</tr>
<tr>
<td>-----------</td>
<td>-----------------------------------------------------------------------------</td>
<td>-----------------------</td>
</tr>
<tr>
<td>$50,000</td>
<td>Trafficking in Phencyclidine — 28 grams or more but less than 200 grams</td>
<td>893.135(1)(d)1.a.</td>
</tr>
<tr>
<td>$100,000</td>
<td>Trafficking in Phencyclidine — 200 grams or more but less than 400 grams</td>
<td>893.135(1)(d)1.b.</td>
</tr>
<tr>
<td>$250,000</td>
<td>Trafficking in Phencyclidine — 400 grams or more</td>
<td>893.135(1)(d)1.c.</td>
</tr>
<tr>
<td>$50,000</td>
<td>Trafficking in Methaqualone — 200 grams or more but less than 5 kilograms</td>
<td>893.135(1)(e)1.a.</td>
</tr>
<tr>
<td>$100,000</td>
<td>Trafficking in Methaqualone — 5 kilograms or more but less than 25 kilograms</td>
<td>893.135(1)(e)1.b.</td>
</tr>
<tr>
<td>$250,000</td>
<td>Trafficking in Methaqualone — 25 kilograms or more</td>
<td>893.135(1)(e)1.c.</td>
</tr>
<tr>
<td>$50,000</td>
<td>Trafficking in Amphetamine — 14 grams or more but less than 28 grams</td>
<td>893.135(1)(f)1.a.</td>
</tr>
<tr>
<td>$100,000</td>
<td>Trafficking in Amphetamine — 28 grams or more but less than 200 grams</td>
<td>893.135(1)(f)1.b.</td>
</tr>
<tr>
<td>$250,000</td>
<td>Trafficking in Amphetamine — 200 grams or more</td>
<td>893.135(1)(f)1.c.</td>
</tr>
<tr>
<td>$50,000</td>
<td>Trafficking in Flunitrazepam — 4 grams or more but less than 14 grams</td>
<td>893.135(1)(g)1.a.</td>
</tr>
<tr>
<td>$100,000</td>
<td>Trafficking in Flunitrazepam — 14 grams or more but less than 28 grams</td>
<td>893.135(1)(g)1.b.</td>
</tr>
<tr>
<td>$500,000</td>
<td>Trafficking in Flunitrazepam — 28 grams or more but less than 30 kilograms</td>
<td>893.135(1)(g)1.c.</td>
</tr>
<tr>
<td>$50,000</td>
<td>Trafficking in GHB or GBL — 1 kilogram or more but less than 5 kilograms</td>
<td>893.135(1)(h)&amp;(i)1.a.</td>
</tr>
<tr>
<td>$100,000</td>
<td>Trafficking in GHB or GBL — 5 kilograms or more but less than 10 kilograms</td>
<td>893.135(1)(h)&amp;(i)1.b.</td>
</tr>
<tr>
<td>$250,000</td>
<td>Trafficking in GHB or GBL — 10 kilograms or more</td>
<td>893.135(1)(h)&amp;(i)1.c.</td>
</tr>
<tr>
<td>$50,000</td>
<td>Trafficking in 1,4-Butanediol — 1 kilogram or more but less than 5 kilograms</td>
<td>893.135(1)(j)1.a.</td>
</tr>
<tr>
<td>Amount</td>
<td>Description</td>
<td>Statute</td>
</tr>
<tr>
<td>--------------</td>
<td>-------------------------------------------------------</td>
<td>-------------------------------</td>
</tr>
<tr>
<td>$100,000</td>
<td>Trafficking in 1,4-Butanediol — 5 kilograms or more but less than 10 kilograms</td>
<td>893.135(1)(j)1.b.</td>
</tr>
<tr>
<td>$250,000</td>
<td>Trafficking in 1,4-Butanediol — 10 kilograms or more</td>
<td>893.135(1)(j)1.c.</td>
</tr>
<tr>
<td>$50,000</td>
<td>Trafficking in Phenethylamines — 10 grams or more but less than 200 grams</td>
<td>893.135(1)(k)2.a.</td>
</tr>
<tr>
<td>$100,000</td>
<td>Trafficking in Phenethylamines — 200 grams or more but less than 400 grams</td>
<td>893.135(1)(k)2.b.</td>
</tr>
<tr>
<td>$250,000</td>
<td>Trafficking in Phenethylamines — 400 grams or more</td>
<td>893.135(1)(k)2.c.</td>
</tr>
<tr>
<td>$50,000</td>
<td>Sell, purchase, manufacture, bring into state lysergic acid diethylamide — 1 gram or more but less than 5 grams</td>
<td>893.135(1)(l)1.a.</td>
</tr>
<tr>
<td>$100,000</td>
<td>Sell, purchase, manufacture, bring into state lysergic acid diethylamide — 5 grams or more but less than 5 grams</td>
<td>893.135(1)(l)1.b.</td>
</tr>
<tr>
<td>$500,000</td>
<td>Sell, purchase, manufacture, bring into state lysergic acid diethylamide — 7 grams or more</td>
<td>893.135(1)(l)1.c.</td>
</tr>
<tr>
<td>$500,000</td>
<td>Continuing Criminal Enterprise</td>
<td>893.20</td>
</tr>
</tbody>
</table>

Discretionary Costs in Specific Types of Cases

<table>
<thead>
<tr>
<th>Amount</th>
<th>Description</th>
<th>Statute</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not more than $15,000</td>
<td>Fine for conviction of a life felony</td>
<td>775.083(1)(a)</td>
</tr>
<tr>
<td>Not more than $10,000</td>
<td>Fine for conviction of a felony of the first or second degree</td>
<td>775.083(1)(b)</td>
</tr>
<tr>
<td>Not more than $5,000</td>
<td>Fine for conviction of a felony of the third degree</td>
<td>775.083(1)(c)</td>
</tr>
<tr>
<td>Not more than $1,000</td>
<td>Fine for conviction of a misdemeanor of the first degree</td>
<td>775.083(1)(d)</td>
</tr>
<tr>
<td>Not more than $500</td>
<td>Fine for conviction of a misdemeanor of the second degree</td>
<td>775.083(10)(e)</td>
</tr>
<tr>
<td>Amount</td>
<td>Description</td>
<td>Section</td>
</tr>
<tr>
<td>--------</td>
<td>-------------------------------------------------</td>
<td>------------------------------------------</td>
</tr>
<tr>
<td>$_____</td>
<td>Alcohol and Drug Abuse Programs</td>
<td>938.21 (all violations 316.193, 856.011, or 856.015, or chapters 562, 568, or 893)</td>
</tr>
<tr>
<td>$_____</td>
<td>Assistance Grants for Alcohol and Other Drug Abuse Programs</td>
<td>938.23 (all violations 316.193, 856.011, or 856.015, or chapters 562, 568, or 893)</td>
</tr>
<tr>
<td>$100</td>
<td>Operating Trust Fund of the Department of Law Enforcement</td>
<td>938.055 (all violations of chapters 775–896 where criminal laboratory services used)</td>
</tr>
<tr>
<td>$50/100</td>
<td>Legal Assistance (Public Defender or Conflict Counsel) Not less than $50 where charged with misdemeanor or criminal traffic offense and not less than $100 when charged with a felony.</td>
<td>938.29 (all criminal and violation of probation or community control cases in which defendant determined to be guilty or in violation of probation or community control)</td>
</tr>
</tbody>
</table>

§ 22.7. Collection of fines, fees, and costs

In all criminal and violation-of-probation or community-control cases, convicted persons are liable for payment of the costs of prosecution, including investigative costs incurred by law enforcement agencies, by fire departments for arson investigations, and by investigations of the Department of Financial Services or the Office of Financial Regulation of the Financial Services Commission, if requested by such agencies. The court must include these costs in every judgment rendered against the convicted person. For purposes of this section, “convicted” means a determination of guilt, or of violation of probation or community control, which is a result of a plea, trial, or violation proceeding, regardless of whether adjudication is withheld.878

The court must impose the costs of prosecution and investigation notwithstanding the defendant’s present ability to pay. The court must require the defendant to pay the costs within a specified period or pursuant to a payment plan under section 28.246(4).879 The end of such period or the last such installment must not be later than: (1) The end of the period of probation or community control; (2) The end of the period of probation or community control that would have existed if the defendant had been convicted of the offense; (3) The end of the period of probation or community control that would have existed if the defendant had been convicted of the offense and the defendant had been adjudicated guilty or in violation of probation or community control; or (4) The end of the period of probation or community control that would have existed if the defendant had been convicted of the offense and the defendant had been adjudicated guilty or in violation of probation or community control and the defendant had been adjudicated guilty or in violation of probation or community control.

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878 § 938.27(1), Fla. Stat.
879 § 938.27(2)(a), Fla. Stat.
community control, if probation or community control is ordered;\(^{880}\) (2) Five years after the end of the term of imprisonment imposed, if the court does not order probation or community control;\(^{881}\) or (3) Five years after the date of sentencing in any other case.\(^{882}\) However, the obligation to pay any unpaid amounts does not expire if not paid in full within the period specified in section 938.27(2)(b).\(^{883}\) If not otherwise provided by the court under section 938.27, costs must be paid immediately.\(^{884}\)

If a defendant is placed on probation or community control, payment of any costs under section 938.27 must be a condition of such probation or community control. The court may revoke probation or community control if the defendant fails to pay these costs.\(^{885}\)

Any dispute as to the proper amount or type of costs must be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of costs incurred is on the state attorney. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant is on the defendant. The burden of demonstrating such other matters as the court deems appropriate is upon the party designated by the court as justice requires.\(^{886}\)

Any default in payment of costs may be collected by any means authorized by law for enforcement of a judgment.\(^{887}\)

The clerk of the court must collect and dispense cost payments in any case, regardless of whether the disposition of the case takes place before the judge in open court or in any other manner provided by law.\(^{888}\)

Investigative costs that are recovered must be returned to the appropriate investigative agency that incurred the expense. Such costs include actual expenses incurred in conducting the investigation and prosecution of the criminal case; however, costs may also include the salaries of

\(^{880}\) § 938.27(2)(b) 1, Fla. Stat.

\(^{881}\) § 938.27(2)(b) 2, Fla. Stat.

\(^{882}\) § 938.27(2)(b) 3, Fla. Stat.

\(^{883}\) § 938.27(2)(b), Fla. Stat.

\(^{884}\) § 938.27(2)(c), Fla. Stat.

\(^{885}\) § 938.27(3), Fla. Stat.

\(^{886}\) § 938.27(4), Fla. Stat.

\(^{887}\) § 938.27(5), Fla. Stat.

\(^{888}\) § 938.27(6), Fla. Stat.
permanent employees. Any investigative costs recovered on behalf of a state agency must be remitted to the Department of Revenue for deposit in the agency operating trust fund, and a report of the payment must be sent to the agency, except that any investigative costs recovered on behalf of the Department of Law Enforcement must be deposited in the department’s Forfeiture and Investigative Support Trust Fund under section 943.362.\textsuperscript{889}

Costs for the state attorney must be set in all cases at no less than $50 per case when a misdemeanor or criminal traffic offense is charged and no less than $100 per case when a felony offense is charged, including a proceeding in which the underlying offense is a violation of probation or community control. The court may set a higher amount upon a showing of sufficient proof of higher costs incurred. Costs recovered on behalf of the state attorney under section 938.27 must be deposited into the State Attorneys Revenue Trust Fund to be used during the fiscal year in which the funds are collected, or in any subsequent fiscal year, for actual expenses incurred in investigating and prosecuting criminal cases, which may include the salaries of permanent employees, or for any other purpose authorized by the Legislature.\textsuperscript{890}

Section 938.30 authorizes supplemental proceedings for the collection of fines, fees, and costs in all criminal cases. It provides that any person liable for payment of any financial obligation in any criminal case is subject to the collection proceedings authorized by the statute. The statute permits courts operating under its provisions to require individuals liable for payment to appear and be examined under oath regarding their financial ability to pay the obligation. If the court determines that an individual is unable to pay, it may convert the statutory financial obligation into a court-ordered obligation to perform community service. If an individual fails to appear at the hearing, the statute authorizes the arrest of the defendant on a warrant or capias that may be issued by the clerk upon order of the court.\textsuperscript{891}

The state has a legitimate interest in collecting the money it is owed and is not powerless to enforce its judgments against those financially unable to pay.\textsuperscript{892} Execution on a sentence imposing a fine may be issued in the same manner as execution on a judgment in a civil action, whether or not the sentence also imposes imprisonment.\textsuperscript{893} The statute provides that any person failing to comply with an order under the statute, including an order to comply with a payment schedule established by the clerk of the court, may be held in civil contempt.\textsuperscript{894}

\begin{itemize}
  \item \textsuperscript{889} § 938.27(7), Fla. Stat.
  \item \textsuperscript{890} § 938.27(8), Fla. Stat.
  \item \textsuperscript{891} § 938.30(9), Fla. Stat.
  \item \textsuperscript{893} § 922.02, Fla. Stat.
  \item \textsuperscript{894} § 938.30, Fla. Stat.
\end{itemize}
The primary purpose of a civil contempt proceeding is to compel compliance with a court order, not to punish.\textsuperscript{895} Incarceration of defendants who are unable to pay as a means of collecting fines and costs is unconstitutional.\textsuperscript{896} When the court determines on the written application of a prisoner that he or she has been imprisoned for 60 days solely for failure to pay a fine or costs which total not more than $300 and that the prisoner is indigent and unable to pay the fine or costs, the court must order the prisoner discharged from custody.\textsuperscript{897}

Before incarceration can be used to compel compliance with a court order, the court must determine whether the contemnor has the present ability to pay.\textsuperscript{898} The key safeguard in civil contempt proceedings is a finding by the trial court that the contemnor has the ability to purge the contempt.\textsuperscript{899} Accordingly, the state may use alternatives to incarceration to obtain satisfaction of the debt, e.g., section 938.30 authorizes court-ordered community service where a defendant is unable to pay.\textsuperscript{900}

§ 22.8. Imposition of civil fines in connection with criminal penalties

A defendant can be subject to criminal sanctions that include fines as well as separate civil fines for the same conduct, as where a defendant is civilly fined under a county ordinance for littering and criminally prosecuted under Florida’s Litter Law,\textsuperscript{901} without a violation of the constitutional right of the defendant not to be twice put in jeopardy for a crime.\textsuperscript{902} The constitutional prohibition against double jeopardy prevents a second prosecution for the same criminal offense after acquittal or after conviction, and it prevents multiple criminal punishments for the same criminal offense. Double jeopardy under both the Florida and the United States Constitutions apply to criminal proceedings, not to civil proceedings. Imposition of a civil fine in connection with a criminal penalty does not implicate double jeopardy violations unless there is a clear showing the statutory scheme is so punitive in purpose or effect as to negate the state’s intent to deem it “civil.”\textsuperscript{903}

\textsuperscript{895}Bowen v. Bowen, 471 So. 2d 1274 (Fla. 1985).

\textsuperscript{896}Tate v. Short, 401 U.S. 395, 91 S. Ct. 668, 28 L. Ed. 2d 130 (1971) (imprisonment of an indigent solely because of inability to pay a fine contravenes the equal protection clause by discriminating on the basis of economic status); see also, V.H. v. State, 498 So. 2d 1011 (Fla. 2d DCA 1986).

\textsuperscript{897}§ 922.04, Fla. Stat.

\textsuperscript{898}Parisi v. Broward County, 769 So. 2d 359 (Fla. 2000).

\textsuperscript{899}Pompey v. Cochran, 685 So. 2d 1007 (Fla. 4th DCA 1997).

\textsuperscript{900}§ 938.30(2), Fla. Stat.

\textsuperscript{901}§ 403.413, Fla. Stat.

\textsuperscript{902}See, Davis v. State, 928 So. 2d 442 (Fla. 5th DCA 2006).

§ 23. Credit for time served

An area of significant complexity in criminal sentencing occurs in the calculation of the impact of the time served by the defendant prior to the imposition of sentence on the total length of the defendant’s sentence. Gain time credit earned in the course of serving a sentence, where the defendant is entitled to earn gain time, will also have an impact on total sentence length. While this is an area of sentencing law where mistakes are often made, many of the errors that can occur in the determination and award of credit can be avoided through proper and adequate evidentiary documentation of credit, and attention to detail in the composition and issuance of sentencing orders.

This is also an area of abuse of judicial discretion by some sentencing courts who use the award of exaggerated or unearned credit to effect *de facto*—and unlawful—downward departure sentences, usually as an incentive to get the defendant to enter a plea. The problem of such abuse is made worse where the defendant is being sent to prison, because the Department of Corrections does not have the authority to reject credit specifically ordered by a trial court as part of a sentence.\(^{904}\)

Note that the trial court has no discretion to award post-sentence credit. The department of Corrections is responsible for calculating and awarding credit for time served after imposition of a sentence. If the post-sentence credit is incorrect, the defendant should pursue his or her administrative remedies, and then seek a writ of mandamus against the department in the circuit court, if dissatisfied with the outcome.\(^{905}\)

§ 23.1. Jail credit

*Generally*

The trial court, not the Department of Corrections, is responsible for determining presentencing jail time credit.\(^{906}\) Generally, a defendant is entitled to credit against each sentence for the time spent in jail for the charge which led to the sentence, and not for unrelated charges.\(^{907}\) Section 921.161(1) provides that a sentence of imprisonment cannot begin to run before the date it is imposed, but the court imposing a sentence must allow a defendant credit for all of the time spent in the county jail before sentencing and that, in addition to other credits, a person sentenced to imprisonment in custody of the Department of Corrections must receive credit on her or his sentence.

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\(^{904}\) See, *Rood v. State*, 790 So. 2d 1192 (Fla. 1st DCA 2001); *Hall v. Moore*, 777 So. 2d 1105 (Fla. 1st DCA 2001); *Wilson v. State*, 603 So. 2d 93, 94 (Fla. 5th DCA 1992) (holding that “the award of the credit is a judicial task to be accomplished at sentencing rather than an administrative function to be accomplished post-sentencing”).

\(^{905}\) *Buelow v. State*, 994 So. 2d 1214 (Fla. 5th DCA 2008); *Hines v. State*, 842 So. 2d 999 (Fla. 2d DCA 2003); *Washington v. State*, 662 So. 2d 1027 (Fla. 5th DCA 1995).

\(^{906}\) *Monroe v. State*, 842 So. 2d 265 (Fla. 2d DCA 2003).

\(^{907}\) *Blake v. State*, 807 So. 2d 772 (Fla. 2d DCA 2002).
for all time spent between sentencing and being placed in custody of the department. The precise legal consequences of spending time in jail before initial sentencing can remain unclear until acquittal or sentencing. If a defendant is acquitted of all charges, his or her prosecution will result in no sentence against which time spent in jail must be credited under Section 921.161(1). If convicted of a single offense, the defendant is entitled to credit for time spent in jail before any incarcerative sentence is imposed. 908 This provision, moreover, however, has several exceptions and qualifications. 909

The procedures for determining presentence jail credit are governed by Fla. R. Crim. P. 3.801. That Rule allows that a court may correct a sentence that fails to allow a defendant credit for all of the time he or she spent in the county jail before sentencing as provided in section 921.161, Florida Statutes. 910 No motion can be filed or considered pursuant to Rule 3.801 if filed more than 1 year after the sentence becomes final. 911 The motion must be under oath and include: (1) a brief statement of the facts relied on in support of the motion; (2) the dates, location of incarceration and total time for credit already provided; (3) the dates, location of incarceration and total time for credit the defendant contends was not properly awarded; (4) whether any other criminal charges were pending at the time of the incarceration noted in Rule 3.801(c)(3), and if so, the location, case number and resolution of the charges; and (5) whether the defendant waived any county jail credit at the time of sentencing, and if so, the number of days waived. 912 No successive motions for jail credit can be considered. 913 Proceedings under Rule 3.801 incorporate Fla. R. Crim. P. 3.850 subdivisions (e), (f), (j), (k), and (n). 914

Time Spent in Another State

The term “county jail” in section 921.161, Fla. Stat., is applicable only to Florida jails and was not intended by the legislature to apply to various other places of incarceration in other jurisdictions. 915 When a prisoner is incarcerated in another state on charges unrelated to a Florida

908 *Barnishin v. State*, 927 So. 2d 68 (Fla. 1st DCA 2006).

909 § 921.161(1) and (2), Fla. Stat.


911 Fla. R. Crim. P. 3.801(b).

912 Fla. R. Crim. P. 3.801(c).

913 Fla. R. Crim. P. 3.801(d).

914 Fla. R. Crim. P. 3.801(e).

charge, that prisoner is not entitled to credit for time served in the other state. A trial court, nonetheless, has discretionary authority to award credit for the time a defendant was incarcerated outside the state while awaiting transfer to Florida. When deciding whether to award credit, a trial court should consider the appropriateness of an award of credit for time served when the defendant was incarcerated in another state solely because of the Florida offense for which he or she is being sentenced. The exercise of a trial court’s discretion in awarding credits is not unbridled but is subject to the test of reasonableness, and when a trial court denies credit, the trial court must attach documentation or state the reasons for denying the credit.

**Executed Warrant**

A defendant is entitled to receive jail credit on an offense for which a warrant is duly executed, including time spent in a county jail when the defendant has been arrested pursuant to a warrant from another county. A warrant is a “writ directing or authorizing someone to do an act, esp. [sic] one directing a law enforcer to make an arrest, a search, or a seizure.” An arrest warrant must be signed by a magistrate and conform to specific content requirements. A warrant may be executed merely by a peace officer informing the person to be arrested of the cause for arrest and that a warrant has been issued. The officer does not have to have physical possession of a copy of the warrant, and Section 901.16 requires no paperwork to effect an arrest pursuant to the warrant. The State, by delaying execution of an arrest warrant on a detainee in a local jail, cannot avoid providing jail credit to the detainee on a sentence imposed for a violation of probation based on a new offense in the narrow context of when the detainee is at all relevant times in jail pending disposition of the same new offense and the sentence on the new offense and the offense on violation of probation are imposed to run concurrently.

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916 *Perkowski v. State*, 920 So. 2d 836 (Fla. 4th DCA 2006).

917 *McRae v. State*, 820 So. 2d 1048 (Fla. 2d DCA 2002).

918 *Gethers v. State*, 838 So. 2d 504 (Fla. 2003); *Daniels v. State*, 491 So. 2d 543 (Fla. 1986); see also, *Bedford v. State*, 880 So. 2d 1265, 1266 (Fla. 2d DCA 2004) (concluding that Gethers does not apply where the record shows that the defendant was held in another county “not on a detainer but pursuant to his arrest for the pertinent offenses” and holding that the defendant was entitled to credit for time served in the other county); *Thomas v. State*, 863 So. 2d 1277, 1278 (Fla. 2d DCA 2004) (stating that a defendant arrested in another county at least partially on the original county’s warrant is entitled to jail credit for the time served in the other county).

919 Black’s L. Dict. 1579 (7th Ed. 1999).

920 See, Fla. R. Crim. P. 3.121; see also, *Robbins v. State*, 370 So. 2d 420 (Fla. 1st DCA 1979) (holding that a document designated an “Out of Town Arrest and Booking Report” could not be considered an arrest warrant because it did not meet the requirements of the rule).

921 *Trout v. State*, 927 So. 2d 1052 (Fla. 4th DCA 2006).

922 *Martinez v. State*, 965 So. 2d 1244 (Fla. 2d DCA 2007).
Detainer

A detainer, on the other hand, “is a request filed by a criminal justice agency with the institution in which a prisoner is incarcerated, asking the institution either to hold the prisoner for the agency or to notify the agency when release of the prisoner is imminent.”\footnote{Carchman v. Nash, 473 U.S. 716, 719, 105 S. Ct. 3401, 87 L. Ed. 2d 516 (1985); see also, Bogue v. Fennelly, 705 So. 2d 575 (Fla. 4th DCA 1997).} A detainer may be lodged by a prosecutor or law enforcement officer and can last indefinitely.\footnote{See, \textit{U.S. v. Mauro}, 436 U.S. 340, 358, 98 S. Ct. 1834, 56 L. Ed. 2d 329 (1978).} Detainers informally put officials on notice that the defendant is wanted in another jurisdiction; however, “further action must be taken by the receiving [jurisdiction] in order to obtain the prisoner.”\footnote{Price v. State, 598 So. 2d 215, 217 (Fla. 5th DCA 1992) (quoting \textit{U.S. v. Mauro}, 436 U.S. 340, 358, 98 S. Ct. 1834, 56 L. Ed. 2d 329 (1978)).} An arrest warrant is a formal, definitive, and mandatory document, whereas the detainer is the transmission of information and a request to hold a person or notify the requesting authority of the prisoner’s imminent release. Therefore, when a defendant is serving time in jail on one charge and a separate jurisdiction issues a detainer for another charge, there is no formal, definitive mandate to hold the defendant in relation to the detainer. Generally, under such circumstances, a prisoner is not in custody pursuant to the detainer. Only if the prisoner is subject to release but is being held because a detainer has been lodged can it be said that the prisoner is in custody pursuant to the detainer.\footnote{Bonilla v. State, 884 So. 2d 1072 (Fla. 5th DCA 2004).} The filing of a detainer or a hold does not have the same effect as executing or transmitting an arrest warrant. When a county issues a detainer or hold to another county, it is merely requesting either to hold the defendant for the second county or to notify the second county when release is imminent so that the second county can act. In that case, no jail credit need be awarded by the second county for time served in the first county for the period during which the detainer or hold is lodged.\footnote{Gethers v. State, 838 So. 2d 504 (Fla. 2003).} An exception to this rule occurs in cases in which the defendant was subject to release from jail but was being held because a detainer from a different county had been lodged against him or her.\footnote{Solomon v. State, 69 So. 3d 396 (Fla. 2d DCA 2011).}
Posted Bond

A defendant who has previously posted bond is not entitled to credit for time spent in jail subsequent to the posting of that bond, however, unless the defendant’s bondsman has “surrendered” the defendant to authorities and has had the bond discharged as to that charge.929

Civil Detention

A detainee must be granted credit for time served prior to conviction in any institution serving as the functional equivalent of a county jail so long as such coercive deprivation of liberty is in furtherance of pending charges.930 This means that while a defendant formerly incompetent to stand trial is entitled to credit under section 921.161(1) for forensic commitments intended to hold the defendant until such time as he or she is competent to stand trial, such a defendant is not entitled to jail credit for time during which he or she is in civil detention and his or her charges are mandatorily dismissed pursuant to Fla. R. Crim. P. 3.213(b) if the defendant subsequently regains competency to stand trial on the charges, is found guilty and is sentenced pursuant to those charges.931 The defendant is also not entitled to jail credit for periods after the trial court dismisses the charges and orders the defendant civilly committed for treatment pursuant to chapters 394.451 to 394.4789, commonly known as the Baker Act, but for practical reasons relating to transportation and logistics the defendant is not transported.932 A defendant is not entitled to jail credit for pre-arrest hospitalization due to self-inflicted injuries, even where a police guard has been posted at the door of the facility where the defendant is being treated,933 nor for a voluntary pretrial stay in a mental hospital.934 A defendant is not entitled to time served in a drug treatment program or other facility that was a condition of probation, regardless of whether the facility may be characterized as the “functional equivalent of jail.”935 A defendant who violates the conditions of probation or community control cannot be given credit against a subsequent term of incarceration for the time

929 Hawks v. State, 885 So. 2d 1020 (Fla. 5th DCA 2004).

930 See, Tal-Mason v. State, 515 So. 2d 738 (Fla. 1987) (involuntary detention in a mental institution); Haveard v. State, 520 So. 2d 636 (Fla. 1st DCA 1988).

931 Sanchez v. State, 949 So. 2d 1059 (Fla. 3d DCA 2007).

932 Sanchez v. State, 949 So. 2d 1059 (Fla. 3d DCA 2007).

933 Morgan v. State, 557 So. 2d 605 (Fla. 1st DCA 1990).

934 Roberts v. State, 622 So. 2d 628 (Fla. 1st DCA 1993).

935 Comer v. State, 909 So. 2d 460 (Fla. 4th DCA 2005) (post-conviction treatment in a drug rehabilitation facility as a condition of probation is contractual in nature, not a coercive deprivation of liberty).
spent in probation or community control, including time spent in a drug rehabilitation facility as a condition of probation or community control.\textsuperscript{936}

\textbf{Drug or Alcohol Treatment}

An exception to the general prohibition on granting jail or prison credit for time spent in drug or alcohol treatment may arise where the defendant is sentenced for driving under the influence (DUI). A defendant convicted of DUI pursuant to section 316.193(1), in the court’s discretion, may be required to serve all or any portion of a term of imprisonment to which the defendant has been sentenced pursuant to that section in a residential alcoholism treatment program or a residential drug abuse treatment program. Any time spent in such a program must be credited by the court toward the term of imprisonment.\textsuperscript{937} Note that the provisions of section 316.193(6)(k) apply only to violations of subsection (1) and do not apply to subsection (3), dealing with DUI with property damage, DUI with serious bodily injury, or DUI manslaughter.\textsuperscript{938} The legislature has, in this way, established a statutory mechanism within which the sentencing court may order a term of imprisonment that meets or exceeds the defendant’s presumptive minimum under the Criminal Punishment Code or former guidelines and allow a portion or all of that sentence to be served in a residential drug or alcohol treatment program without such a sentence being a downward departure. The fundamental problem with this option, however, is that the legislature has made no provision for state agency oversight of a defendant serving his or her confinement in such a residential program, or for other enforcement of the terms of the defendant’s sentence. When such a sentence is imposed, the Department of Corrections terminates its responsibility for the defendant at the point where the defendant enters residential treatment and does not monitor the defendant’s activities. This means that if a defendant who is granted such an option by the court voluntarily decides to leave residential treatment, or if his or her residency is terminated by the treatment facility, before the end of the defendant’s term of confinement, the sentencing court may never find out. The legislature also has not made any provision for calculation of credit for time served in a residential treatment facility for purposes of determining the date a sentence has concluded under this scheme.

\textbf{Probationary Split Sentence}

A defendant who violates the probationary period of a split sentence is entitled to receive credit for time served on the incarcerative portion of the sentence before being placed on probation, ...

\textsuperscript{936}State v. Cregan, 908 So. 2d 387 (Fla. 2005); Carrier v. State, 925 So. 2d 386 (Fla. 4th DCA 2006) (defendant’s voluntary entrance into sheriff’s drug farm program was not a court-ordered deprivation of liberty); Toney v. State, 817 So. 2d 924 (Fla. 2d DCA 2002); Williams v. State, 780 So. 2d 244, 246–47 (Fla. 2d DCA 2001); Nowell v. State, 742 So. 2d 345 (Fla. 5th DCA 1999) (defendant’s stay at an inpatient drug treatment program while on probation was neither coercive nor custodial); Pennington v. State, 398 So. 2d 815, 817 (Fla. 1981) (halfway houses, rehabilitation centers and state hospitals are not jails; their purpose is standard rehabilitation and treatment, not incarceration).

\textsuperscript{937}\$ 316.193(6)(k), Fla. Stat.

\textsuperscript{938}See, McGhee v. State, 847 So. 2d 498 (Fla. 4th DCA 2003).
unless a waiver of such credit is clearly shown on the record. Effective for offenses committed on or after January 1, 1994, if a defendant’s probation or community control is revoked and the defendant is serving a split sentence pursuant to section 948.012, upon recommitment to the Department of Corrections, the court must order credit for time served in state prison or county jail only, without considering any type of gain-time earned before release to supervision, or any type of sentence reduction granted to avoid prison overcrowding, including, but not limited to, any sentence reduction resulting from administrative gain-time, provisional credits, or control release. The court must determine the amount of jail-time credit to be awarded for time served between the date of arrest as a violator and the date of recommitment, and is required to direct the Department of Corrections to compute and apply credit for all other time served previously on the prior sentence for the offense for which the defendant is being recommitted. This provision, contained in section 921.0017, does not affect or limit the department’s authority to forfeit gain-time under sections 944.28(1) and 948.06(7).

Violation of Probation

A defendant is entitled to credit for time served in jail from the date of his or her arrest for the new offenses if the new offenses constituted the basis for the revocation of probation in the instant case. A defendant is not entitled to credit for time served if the defendant is found to have violated probation based on his or her arrest for new offenses, as well as other violations of the conditions of his or her probation.

Consecutive Sentences

If convicted of multiple offenses, the defendant must be given credit only on the first of consecutive sentences. When consecutive sentences are imposed, the defendant is not entitled to have his or her jail time credit pyramided by being given credit on each sentence for the full time he or she spends in jail awaiting disposition. In other words, jail time credit need not be applied to all consecutive sentences. On the other hand, when a defendant is entitled to presentence jail time credit against concurrent sentences, jail time must be credited against each concurrent sentence.

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939 Robinson v. State, 850 So. 2d 658 (Fla. 1st DCA 2003); Wells v. State, 751 So. 2d 703 (Fla. 1st DCA 2000).
941 Kendrigan v. State, 941 So. 2d 529 (Fla. 4th DCA 2006).
942 Cooper v. State, 967 So. 2d 928 (Fla. 1st DCA 2007).
943 Daniels v. State, 491 So. 2d 543 (Fla. 1986).
944 See, Bell v. State, 573 So. 2d 10 (Fla. 5th DCA 1990).
945 Daniels v. State, 491 So. 2d 543 (Fla. 1986).
When sentences are imposed concurrently, the defendant receives credit on each sentence for time spent in jail before sentencing. A defendant is not entitled to credit against his or her prison sentence for time previously spent on probation or community control.

Awaiting Transport to the Department of Corrections

Note that the award of credit for the period spent in county jail after sentencing awaiting transportation to the Department of Corrections is a matter for the Department. That is not the case, however, where the defendant is not awaiting transportation to prison. Where a defendant was being held pending placement in a drug treatment facility, credit for this time is properly awarded by the trial court.

Resentencing

An issue of jail credit can arise when a defendant serving a Department of Corrections sentence is remanded to the trial court for resentencing after appeal and spends time in a county jail prior to that resentencing. In those situations, the prisoner is entitled to credit for jail time spent prior to that resentencing.

Reversed Conviction

Time served on a reversed conviction in an unrelated criminal case cannot be credited toward the sentence for a future conviction. The language of section 921.161, Fla. Stat. necessarily presupposes that the credit to which the defendant is entitled is the time spent incarcerated for the same case in which the defendant was tried and convicted, not from an unrelated case.

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946 Barnishin v. State, 927 So. 2d 68 (Fla. 1st DCA 2006).

947 Fisher v. State, 852 So. 2d 424 (Fla. 5th DCA 2003); see, Young v. State, 697 So. 2d 75 (Fla. 1997); Toomajan v. State, 785 So. 2d 1275 (Fla. 5th DCA 2001).

948 Reynolds v. State, 590 So. 2d 1043 (Fla. 1st DCA 1991).

949 Brazell v. State, 770 So. 2d 189 (Fla. 2d DCA 2000); Riddle v. State, 686 So. 2d 16 (Fla. 2d DCA 1996); Fulton v. State, 659 So. 2d 491 (Fla. 5th DCA 1995).

950 Medina v. State, 88 So. 3d 187 (Fla. 3d DCA 2011); Kitchen v. State, 20 So. 3d 975 (Fla. 4th DCA 2009).

951 State v. Stanton, 781 So. 2d 1129 (Fla. 3d DCA 2001).

952 State v. Mancino, 714 So. 2d 429, 432 (Fla. 1998) (“If the record reflects that a defendant has served time prior to sentencing on the charge for which he was tried and convicted, and a sentence that does not properly credit the defendant with time served, then that sentence may be challenged under rule 3.800 …”); Travis v. State, 724 So. 2d 119, 120–01 (Fla. 1st DCA 1998).
Pretrial Release

Time spent on community control is expressly prohibited from being credited towards a prison sentence. Therefore, it follows that a person who remains free while on pretrial release, despite some restrictions, is not entitled to credit this time towards his prison sentence. 

§ 23.2. Tripp credit

Under the former sentencing guidelines, if a trial court imposed a term of probation on one offense consecutive to a sentence of incarceration on another offense while using the same scoresheet, credit for time served on the first offense had to be awarded on the sentence imposed after revocation of probation on the second offense. “Credit for time served” included jail time actually served and gain time granted pursuant to section 944.275. It did not include “provisional credits” or “administrative gain time” which is used to alleviate prison overcrowding. The granting of provisional credits is not related to satisfactory behavior while in prison and, therefore, is not “the functional equivalent of time spent in prison.”

When an appellant is entitled to Tripp credit and receives concurrent sentences upon violation of probation, such an appellant is entitled to concurrent Tripp credit on such concurrent sentences. When an appellant is entitled to Tripp credit and receives consecutive sentences upon violation or probation, the appellant is not entitled to Tripp credit on each consecutive count and must only receive such credit once as to any consecutive sentences. Defendants who originally

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953 § 948.06(3), Fla. Stat. (“No part of the time that the defendant is on probation or in community control shall be considered as any part of the time that he or she shall be sentenced to serve.”); see State v. Cregan, 908 So. 2d 387, 391 (Fla. 2005); Young v. State, 697 So. 2d 75, 77 (Fla. 1997); Walton v. State, 989 So. 2d 729 (Fla. 4th DCA 2008).

954 Sweitzer v. State, 46 So. 3d 1132 (Fla. 1st DCA 2010).

955 State v. Green, 547 So. 2d 925, 927 (Fla. 1989).


957 State v. Green, 547 So. 2d at 926 (Fla. 1989); Tripp v. State, 622 So. 2d 941 (Fla. 1993).

958 See, Tripp v. State, 622 So. 2d 941 (Fla. 1993).


960 See, Hodgdon v. State, 789 So. 2d 958, 963 (Fla. 2001).
served concurrent probationary split sentences are entitled to prison credit earned on each count when resentenced even if the new incarcerative terms are run consecutively to each other.\textsuperscript{961}

\textit{Tripp} credit applies only to sentences imposed under the former guidelines and is not applicable to habitual offender sentences. Under the habitual offender statute, the offenses at the original sentencing proceeding are not factors considered together to establish a sentencing range. Notwithstanding the use of a single scoresheet, the offenses sentenced pursuant to the habitual offender statute are treated as separate offenses and not as an interrelated unit with the guideline offenses. There is, therefore, no justification to treat the habitualized offenses as though they are the same as the guidelines offenses in the award of credit.\textsuperscript{962}

\textit{Tripp} credit also does not apply to sentencing under the Criminal Punishment Code. When sentencing pursuant to the Criminal Punishment Code for a violation of a probationary term originally imposed to run consecutively to a prison term imposed for a different offense, the defendant is not entitled to credit for the prison time previously served for the first offense against a newly imposed prison sentence on the second offense following a revocation of probation. Because there is no longer a sentencing range as there was under the former guidelines, just a minimum permissible sentence and a statutory maximum, the sentences cannot be considered an interrelated unit and to grant such credit would provide a windfall to the defendant in contravention of the intent of the Criminal Punishment Code.\textsuperscript{963}

\section*{§ 23.3. Probation and community control credit}

Upon revocation of probation, the time a probationer has already served on probation for a given offense must be credited toward any new term of probation imposed for that offense, when necessary to ensure that the total term of probation does not exceed the statutory maximum for that offense.\textsuperscript{964} Probation will not be extended beyond the statutory maximum.\textsuperscript{965} In calculating the amount of credit, the court must consider the time served from the date probation was imposed to the date of revocation.\textsuperscript{966} The legal principles which authorize a defendant to receive credit for time served on probation are equally applicable to a defendant who seeks credit for time served on

\textsuperscript{961}See, \textit{Jones v. State}, 633 So. 2d 482, 482–83 (Fla. 1st DCA 1994); \textit{Tillman v. State}, 693 So. 2d 626, 628 (Fla. 2d DCA 1997).

\textsuperscript{962}\textit{State v. Matthews}, 891 So. 2d 479 (Fla. 2004).

\textsuperscript{963}\textit{Moore v. State}, 882 So. 2d 977 (Fla. 2004) (\textit{Tripp} does not apply to the Criminal Punishment Code because the Criminal Punishment Code scoresheet, unlike its guidelines predecessor, is relevant only to determining the lowest possible sentence).

\textsuperscript{964}\textit{State v. Summers}, 642 So. 2d 742 (Fla. 1994).

\textsuperscript{965}\textit{Teasley v. State}, 610 So. 2d 26 (Fla. 2d DCA 1992).

\textsuperscript{966}\textit{Marchessault v. State}, 659 So. 2d 1315 (Fla. 4th DCA 1995).
community control. Upon revocation of community control, credit for time served on community control must be applied against any post-revocation period of community control or probation to ensure that the defendant’s total sentence does not exceed the statutory maximum, although time served on community control may not be applied to a post-revocation sentence of incarceration.

With respect to a term of incarceration imposed upon revocation of probation or community control, a defendant who violates the probationary portion of a split sentence of incarceration is not entitled to receive credit for time spent on probation or community control against a newly imposed period of incarceration, even when the newly imposed period of incarceration, when combined with the probation and/or community control previously served exceeds the statutory maximum for the crime charged. The Court is authorized at the time of the revocation hearing to impose upon the probationer any sentence which it might have originally imposed before placing the probationer on probation. This means, for example, a defendant who is placed on five years probation for a third-degree felony, and who violates probation after four years, can be sentenced to five years in prison and cannot receive credit for the time he or she spent on probation toward his or her prison sentence. A defendant who violates the probationary period of a split sentence and is sentenced to jail or prison is entitled to receive credit for time served on the incarcerative portion of the sentence before being placed on probation, unless a waiver of such credit is clearly shown on the record.

§ 23.4. Prison credit

Section 921.161 does not apply to prison credit at resentencing, because it addresses the requirement for county jail credit incurred while a defendant awaits sentencing and does not address the application of state prison time served prior to a resentencing de novo. When a consecutive sentence is pronounced, the defendant is not entitled to credit for time served on an antecedent sentence. When, however, a resentencing hearing imposes a new sentence, the state prison time served becomes tantamount to county jail time served awaiting sentencing. This equivalent to jail time credit must therefore be given at sentencing. A defendant, on resentencing, is entitled to credit

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967. See, Cozza v. State, 756 So. 2d 272, 273 (Fla. 3d DCA 2000), citing Wells v. State, 751 So. 2d 703 (Fla. 1st DCA 2000).

968. See, § 948.06(3), Fla. Stat.; Rivera v. State, 913 So. 2d 738 (Fla. 3d DCA 2005); Young v. State, 697 So. 2d 75, 76–77 (Fla. 1997), citing State v. Summers, 642 So. 2d 742 (Fla. 1994); State v. Roundtree, 644 So. 2d 1358, 1359 (Fla. 1994).

969. Fisher v. State, 852 So. 2d 424 (Fla. 5th DCA 2003); Toomajan v. State, 785 So. 2d 1275 (Fla. 5th DCA 2001); Young v. State, 697 So. 2d 75 (Fla. 1997); Phillips v. State, 651 So. 2d 203 (Fla. 5th DCA 1995).

970. Carroll v. Cochran, 140 So. 2d 300 (Fla. 1962); § 948.06, Fla. Stat.

971. Robinson v. State, 850 So. 2d 658 (Fla. 1st DCA 2003); Wells v. State, 751 So. 2d 703 (Fla. 1st DCA 2000).

on each newly imposed consecutive sentence for prison time already served on the original concurrent sentences.\textsuperscript{973} Once the sentencing judge has awarded a defendant who is serving a split sentence prior prison credit after violation of probation or community control following prison the Department of Corrections has primary responsibility for calculating the credit.\textsuperscript{974} If the Department of Corrections fails to give the full credit ordered by the trial court, the prisoner must first seek relief from the Department.\textsuperscript{975} On “unsuspending” the suspended portion of a defendant’s true split sentence following his or her violation of probation, however, the defendant is not entitled to prison credit toward his or her remaining incarceration for the prior period of incarceration.\textsuperscript{976}

Regardless, under the Criminal Punishment Code, a defendant is not entitled for the time served in prison for one offense imposed upon revocation of probation for another, as where the defendant is sentenced to prison for a term of years on one count of an Information and to probation for a term of years on a second count.\textsuperscript{977} Where a defendant is in prison for one offense, is served with a warrant for a subsequent offense, and is sentenced on the subsequent offense after he or she has completed his or her sentence on the original offense, the sentences are in fact consecutive and the defendant is entitled to credit on the second sentence only for those days he or she was incarcerated after his or her original sentence expired, unless the sentencing judge for the subsequent offense orders that the sentence is to run concurrently with the sentence on the original sentence.\textsuperscript{978}

Where, however, the trial court is not confronted with a situation in which a defendant has transgressed and is therefore rightly facing an increased punishment, or with a defendant who has reaped an undeserved windfall, and the defendant has not breached the trust placed in him or her by the trial court, it is unfair and inequitable to penalize the defendant for the mistake of a judge or clerk for which the defendant was not responsible upon realization of the mistake. A defendant sentenced to prison upon determination that his or her community control or probation sentence had been illegally imposed is thus entitled to credit at resentencing against his or her prison sentence for time served on community control or probation in such unusual circumstances.\textsuperscript{979}

\begin{itemize}
\item \textsuperscript{973}Gisi v. State, 4 So. 3d 613 (Fla. 2009).
\item \textsuperscript{974}See, § 921.0017, Fla. Stat.; Gerald v. State, 879 So. 2d 657, 657 (Fla. 3d DCA 2004).
\item \textsuperscript{975}See, Binkley v. State, 900 So. 2d 650, 651 (Fla. 5th DCA 2005).
\item \textsuperscript{976}McDonough v. Durrah, 976 So. 2d 11 (Fla. 5th DCA 2008).
\item \textsuperscript{977}Williams v. State, 51 So. 3d 598 (Fla. 2d DCA 2011).
\item \textsuperscript{978}Cregg v. State, 43 So. 3d 818 (Fla. 1st DCA 2010).
\item \textsuperscript{979}McKnight v. State, 95 So. 3d 1026 (Fla. 5th DCA 2012); Fraser v. State, 602 So. 2d 1299 (Fla. 1992).
\end{itemize}
§ 23.5. Gain time credit

Prospectively, the authority to regulate gain time resides with the Department of Corrections. If, in sentencing, a court attempts to bar or grant gain time, such language has been treated as surplusage or stricken. However, a court has the authority and jurisdiction to effect a fair sentence by awarding credit for time served, to ensure that a defendant is accorded due process where, due to circumstances beyond the defendant’s control, the right to accrue gain time has been denied, e.g., where a Department of Corrections prisoner is transported to a county facility and through circumstances beyond the prisoner’s control remains at the county facility for six months and is thereby denied the opportunity for gain time. In such instances the trial court may award credit against the original sentence without any reduction in the sentence imposed by the court. Thus, only incidentally does such an award encompass gain time, because once a court orders credit for time served, the defendant becomes entitled to an allowance of gain time by operation of law, but the award of gain time is entirely a matter for the determination of the Department of Corrections.

The situation is different upon violation of probation or community control. Any provision of law to the contrary notwithstanding, whenever probation, community control, or control release, including the probationary, community control portion of a split sentence, is violated and the probation or community control is revoked, the defendant, by reason of his or her misconduct, forfeits all gain-time or commutation of time for good conduct, as provided by law, earned up to the date of his or her release on probation, community control, or control release. This does not deprive the prisoner of his or her right to gain-time or commutation of time for good conduct, as provided by law, from the date on which the defendant is returned to prison. However, if a defendant is sentenced to incarceration following termination from a drug treatment program imposed as a condition of probation, the sentence may include incarceration without the possibility of gain-time or early release for the period of time remaining in his or her treatment program placement term.

The strictures of section 948.06(7) are mollified, however, in situations in which the defendant is sentenced pursuant to a negotiated plea bargain. A defendant who is on probation following a term in prison and who violates his or her probation is entitled to enforcement of a plea agreement entered into with the State, under the terms of which the defendant admits to the violation of probation in exchange for a set term of imprisonment, as against the reinstatement of gain time originally credited to the defendant by the Department of Corrections because the defendant returned

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980 Moore v. Pearson, 789 So. 2d 316 (Fla. 2001).

981 See, Singletary v. Coronado, 673 So. 2d 924 (Fla. 2d DCA 1996); Shupe v. State, 516 So. 2d 73 (Fla. 5th DCA 1987).

982 See, Miller v. State, 882 So. 2d 480 (Fla. 5th DCA 2004); see also, Curtis v. State, 915 So. 2d 733 (Fla. 2d DCA 2005) (“Defendants need to understand that one of the risks associated with filing post conviction motions is a possible loss of gain time while housed in jails to attend evidentiary hearings.”).

983 § 948.06(7), Fla. Stat.
to prison following the judgment and sentence for the probation or community control violation:
The Department of Corrections may not thwart the intention of a negotiated plea agreement by
reinstating time originally credited as gain time when a defendant returns to prison following a
judgment and sentence for a violation of probation.\footnote{State v. Jackson, 842 So. 2d 1040 (Fla. 3d DCA 2003); see also, Dellahoy v. State, 816 So. 2d 1253 (Fla. 5th DCA 2002); Wallace v. State, 793 So. 2d 78 (Fla. 2d DCA 2001); Williams v. Department of Corrections, 734 So. 2d 1132, 1133 (Fla. 3d DCA 1999).}

\section*{§ 23.6. Waiver of credit}

A sentence that does not mandate credit for time served is illegal because a sentencing court
has no discretion to impose a sentence without crediting a defendant with time served.\footnote{State v. Mancino, 714 So. 2d 429 (Fla. 1998).} A defendant can waive credit for time served as part of a plea agreement, but such waiver must be voluntary, specific, and clearly shown on the record.\footnote{Young v. State, 15 So. 3d 819 (Fla. 3d DCA 2009); King v. State, 974 So. 2d 632 (Fla. 4th DCA 2008); Render v. State, 802 So. 2d 512 (Fla. 3d DCA 2001); White v. State, 656 So. 2d 255, 256 (Fla. 3d DCA 1995); Prangler v. State, 470 So. 2d 105, 106 (Fla. 2d DCA 1985); Epler v. Judges of Thirteenth Judicial Circuit, Hillsborough County, 308 So. 2d 134 (Fla. 2d DCA 1975).} Where a defendant’s waiver of credit for
time served is not clearly shown on the record, it will not be presumed.\footnote{Silverstein v. State, 654 So. 2d 1040, 1041 (Fla. 4th DCA 1995).} A stipulation to a specific
amount of credit in a written plea agreement, for example, is not in and of itself sufficient to show
a waiver of credit in the absence of evidence that the defendant knew of his entitlement to additional
credit and voluntarily relinquished that right.\footnote{Velasquez v. State, 11 So. 3d 979 (Fla. 1st DCA 2009); Davis v. State, 968 So. 2d 1051 (Fla. 5th DCA 2007).} A defendant cannot, however, as part of a plea
agreement waive such an amount of jail credit as results in the defendant serving a term of
imprisonment that exceeds the statutory maximum for the offense committed as such would
constitute an illegal sentence.\footnote{McLeod v. State, 58 So. 3d 931 (Fla. 5th DCA 2011).}

\section*{§ 23.7. Recision of credit}

There is presently conflict between the positions of the First and Second District Courts of
Appeal and the Fifth District Court of Appeal on the matter of recision of credit.

The rule in of the First and Second Districts is as follows: A trial court may not \textit{sua sponte}
rescind jail, probation, or community control credit previously awarded once the defendant
commences serving a legal sentence, even if the award was improper or result is not what the court
originally intended. The award of improper credits does not, in and of itself, make a defendant’s
sentence illegal and, therefore, subject to modification at any time pursuant to Rule 3.800(a). Notwithstanding the 60-day period for modifying a sentence provided in Fla. R. Crim. P. 3.800(c), there is no provision in the Rules of Criminal Procedure for the subsequent enhancement of a legal sentence after the conclusion of the initial sentencing hearing. Any attempt to rescind credits already awarded constitutes an enhancement of a defendant’s sentence that violates the constitutional prohibition against double jeopardy. Implicit in this rule, however, is that the State can appeal the award of too much credit where the effect of such ruling is the imposition of a downward departure sentence not otherwise supported by lawful grounds.

The rule in the Fifth District is that where the only understanding is that the defendant will serve the entire imposed sentence, and will be credited for whatever time he or she is legally entitled to, a later correction of the time served calculation reflected in the sentencing documents does not increase the sentence for double jeopardy purposes.

The Fifth District cites four bases for this view. The first is that, in a typical case, the time served calculation is simply reported by the judge, if at all, for the benefit of the institution to which the defendant will be sent to serve the remainder of his or her sentence, and is not a result of judicial decision-making. Sentencing courts are not, in fact, required to specify the precise amount of credit a defendant is to receive at the original sentencing hearing. Where, for example, the trial court has sentenced a defendant to a certain term in state prison and reports an erroneous amount of time served because the court clerk read the time served calculation incorrectly or from the wrong file, the judge has not exercised his or her discretion to reduce the sentence by accepting an amount of time stipulated to by the parties or by granting discretionary time served to which the defendant is not legally entitled. Subsequent correction of the time served to reflect that historical fact thus does not increase the defendant’s sentence, but simply ensures that the defendant will served the judicially imposed sentence. Second, the United States Supreme Court has cautioned that the constitutional prohibition against double jeopardy should not be used to turn sentencing into “a game in which the wrong move by the judge means immunity for the prisoner,” which is exactly what would happen if a judge could never correct a time-served calculation in a typical case. Third, in addressing double jeopardy claims in the sentencing context, the United States Supreme Court has focused on

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990 Wheeler v. State, 880 So. 2d 1260 (Fla. 1st DCA 2004); Lebron v. State, 870 So. 2d 165 (Fla. 2d DCA 2004); King v. State, 913 So. 2d 758 (Fla. 2d DCA 2005); Platt v. State, 827 So. 2d 1064 (Fla. 2d DCA 2002); Bailey v. State, 777 So. 2d 995 (Fla. 2d DCA 2000); Linton v. State, 702 So. 2d 236 (Fla. 2d DCA 1997); Gilmore v. State, 523 So. 2d 1244 (Fla. 2d DCA 1988); see also, Troupe v. Rowe, 283 So. 2d 857 (Fla. 1973).

991 Gallinat v. State, 941 So. 2d 1237 (Fla. 5th DCA 2006), receding from Syverson v. State, 659 So. 2d 1344 (Fla. 5th DCA 1995), and certifying conflict with the opinions of the First and Second Districts.

992 Gallinat v. State, 941 So. 2d 1237 (Fla. 5th DCA 2006).


the “legitimate expectations” of the defendant. In the typical case, the defendant’s only legitimate expectation is that he or she will serve the full sentence, and no more. Consequently, the defendant has a right to expect that any time spent in custody on an offense prior to sentencing will be accurately communicated to the facility at which the remainder of the sentence will be served, so that he or she is given full credit for all time actually served on an offense. Because correcting a time-served reporting error does not defeat a defendant’s legitimate expectations, it should not be held to violate double jeopardy. Finally, it is appropriate to consider the legitimate expectations of a crime victim, or victims, where jail credit is erroneously overstated, and of society in general. Both should be able to legitimately expect that the crime, or crimes, will be punished, which includes a right to expect that a lawfully-imposed sentence will be fully served: A judicially-created rule that shortens a lawfully-imposed sentence by barring anyone from correcting a mistake that credits the defendant with time against his or her sentence that he or she has never actually served clearly thwarts society’s interest in extracting a full and just punishment for crime.

The Fifth District has found only two exceptions to the rule where this general prohibition should apply. The first is where the State and the defendant negotiate an overall sentence structure that includes a stipulated amount of time served, and the number of days credit to be given are part of the bargained-for sentence. If the trial court exercises its discretion to accept the plea and imposed the negotiated sentence, the court should not be allowed to later lower the agreed-upon jail credit figure. The second is where the trial court exercises its discretion in the award of jail credit. For example, a court may award credit for time served when the defendant was incarcerated in another state solely because of the Florida offense for which he or she is being sentenced, but is not required to do so. The Fifth District has also previously held that where the State fails to apprise the court of the correct amount of credit due or fails to object to the court’s calculation of credit, resulting in an undue windfall for the defendant, does not raise the issue in a motion for rehearing or on appeal, the issue is waived.

§ 23.8. Forfeiture of credit

The Florida Supreme Court held in 1989 that a defendant who violates probation following incarceration is entitled to credit against his or her new sentence not only for the time actually served

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996 Gallinat v. State, 941 So. 2d 1237 (Fla. 5th DCA 2006).
997 Gallinat v. State, 941 So. 2d 1237 (Fla. 5th DCA 2006).
998 Gallinat v. State, 941 So. 2d 1237 (Fla. 5th DCA 2006).
999 Kronz v. State, 462 So. 2d 450, 451 (Fla. 1985).
1000 See, Thomas v. State, 648 So. 2d 298 (Fla. 5th DCA 1995).
but also for earned gain time.\textsuperscript{1001} This meant, for example, that a defendant who was originally given a split sentence of three years incarceration followed by two years probation who successfully completed the incarcerative portion of the sentence in less than three years due to the accumulation of gain time, and who violated the probationary portion of his or her split sentence would be entitled to a full three years credit toward any incarcerative sentence imposed upon revocation. In 1989 the Florida Legislature overruled the Supreme Court’s decision with the enactment of chapter 89–531, effective October 1, 1989, creating what is now section 948.06(7), which forfeited gain time in cases of probation and community control violations, and chapter 89–526, effective September 1, 1990, which added control release to the application of the statute.\textsuperscript{1002}

A defendant who was sentenced for multiple offenses in separate cases pursuant to a single scoresheet (single unit sentencing) and who received a split sentence of incarceration for one or more of those offenses followed by a term of probation for the remaining offense or offenses is subject to the statutory penalty of forfeiture of the gain time from the defendant’s fully-served sentences of incarceration upon revocation of the defendant’s probation in the remaining case or cases even where this counteracts the award of \textit{Tripp} credit. As long as each sentence remains within statutory and guidelines/Criminal Punishment Code maximums, application of the gain-time for forfeiture does not turn separate sentences into an unauthorized general sentence, and does not violate the prohibition against double jeopardy.\textsuperscript{1003}

Section 944.279(1) provides that disciplinary proceedings can be initiated by the Department of Corrections against a prisoner who has filed a frivolous or malicious proceeding. The statute further states that the court, upon concluding that a prisoner has filed a frivolous or malicious pleading, shall issue a written finding and direct that a certified copy be forwarded to the appropriate Department of Corrections installation or facility for disciplinary action.\textsuperscript{1004} When a prisoner institutes a frivolous or malicious proceeding, the court which makes that finding can recommend a sanction, but lacks authority to direct the Department of Corrections to discipline a prisoner by forfeiting gain time or imposing some other sanction.\textsuperscript{1005}

\begin{enumerate}
\item \textsuperscript{1001} State v. Green, 547 So. 2d 925 (Fla. 1989).
\item \textsuperscript{1002} § 948.06(7), Fla. Stat.; see also, Bradley v. State, 631 So. 2d 1096 (Fla. 1994); Moultrie v. State, 618 So. 2d 789 (Fla. 1st DCA 1993).
\item \textsuperscript{1003} Gibson v. Florida Dept. of Corrections, 885 So. 2d 376 (Fla. 2004); § 944.28(1), Fla. Stat.
\item \textsuperscript{1004} § 944.279(1), Fla. Stat.; see also, Miller v. State, 917 So. 2d 261 (Fla. 5th DCA 2005) (false and materially altered psychological expert’s report submitted as part of motion to withdraw plea warranted referral to Department of Corrections institution to consider disciplinary proceedings against inmate).
\item \textsuperscript{1005} Hall v. State, 752 So. 2d 575 (Fla. 2000); Cole v. State, 913 So. 2d 709 (Fla. 5th DCA 2005) (post-conviction motion court lacked authority to order the Department of Corrections to forfeit specific amount of movant’s gain time as sanction for filing third or fourth motions for post-conviction relief).
\end{enumerate}
Generally, the Department of Corrections may revoke gain time without being countermanded by the court.\textsuperscript{1006} However, such a forfeiture cannot thwart the terms contemplated in a plea agreement.\textsuperscript{1007} Where the forfeiture of gain time does frustrate the terms of a plea agreement, the court should grant a Rule 3.850 motion and resentence the defendant.\textsuperscript{1008} The Department of Corrections has, however, taken administrative steps to avoid such situations altogether. Citing the unintended consequence of the Department of Correction’s past practice that it “may thwart the intention of the judge in fashioning an appropriate sentence upon revocation,”\textsuperscript{1009} and in order to “promote greater clarity in executing the sentencing orders,” on November 15, 2010, the department announced that it has elected to change its policy on violation of probation sentences imposed on or after December 1, 2010, in that the probation violator will serve only the VOP sentence less any court-awarded credit for time served in jail or prison.\textsuperscript{1010}

\textbf{§ 23.9. Credit for mistaken release}

The general rule is that a sentence of incarceration in jail or prison is executed only when the convict has actually suffered the imprisonment unless relieved by some competent authority. When a prisoner is released or discharged from jail or prison by mistake, however, he or she may be recommitted if his or her sentence would not have expired had he or she remained in confinement. Unless interrupted by a violation of parole or some fault of the prisoner, the sentence continues to run while the prisoner is at liberty, and the prisoner’s sentence must be credited with that time.\textsuperscript{1011}

Two theories have been recognized to limit the rule of actual sufferance and permit a prisoner who was mistakenly released through no fault of his own to receive credit against his or her sentence for the time he or she was at liberty. Both theories are grounded in the due process requirement that

\begin{itemize}
\item[1006]\textsuperscript{See, Dellofano v. State, 946 So. 2d 127 (Fla. 5th DCA 2007); Barnett v. State, 933 So. 2d 1269 (Fla. 5th DCA 2006); Dellahoy v. State, 816 So. 2d 1253 (Fla. 5th DCA 2002); Jones v. State, 782 So. 2d 552 (Fla. 5th DCA 2001).}
\item[1007]\textsuperscript{See, Dellofano v. State, 946 So. 2d 127 (Fla. 5th DCA 2007); Barnett v. State, 933 So. 2d 1269 (Fla. 5th DCA 2006); Dellahoy v. State, 816 So. 2d 1253 (Fla. 5th DCA 2002).}
\item[1008]\textsuperscript{See, Chase v. State, 57 So. 3d 898 (Fla. 1st DCA 2011).}
\item[1009]\textsuperscript{See, e.g., Brown v. State, 28 So. 3d 120 (Fla. 2d DCA 2010); Kinsy v. State, 23 So. 3d 847 (Fla. 5th DCA 2009); Adams v. State, 16 So. 3d 260 (Fla. 4th DCA 2009); Etienne v. State, 994 So. 2d 450 (Fla. 3d DCA 2008).}
\item[1010]\textsuperscript{Letter dated November 15, 2010, from R. Lee Adams, Acting Chief, Bureau of Admission and Release, Florida Department of Corrections, to Hon. J. Thomas McGrady, Chief Judge, Sixth Judicial Circuit.}
\item[1011]\textsuperscript{State v. Mendiola, 919 So. 2d 471 (Fla. 3d DCA 2005); Waite v. Singletary, 632 So. 2d 192 (Fla. 3d DCA 1994); Carson v. State, 489 So. 2d 1236 (Fla. 2d DCA 1986).}
\end{itemize}
state action must be consistent with “fundamental principles of liberty and justice." The first theory is that the convict has a right to pay his or her debt to society by one continuous period of imprisonment and a prisoner should not be required to serve his or her sentence in installments. The second theory is that a failure to attempt to regain custody of the prisoner within a reasonable time constitutes a waiver of jurisdiction over the prisoner. These limitations do not extend, however, to situations in which the convict had agreed or acquiesced in the interruption of the sentence. Stated otherwise, a convicted person will not be excused from serving his or her sentence merely because someone in a ministerial capacity makes a mistake. Several factors must be present before credit or other relief will be granted: The result must not be attributable to the defendant himself or herself; the action of the authorities must amount to more than simple neglect; and the situation brought about by the defendant’s release and his or her reincarceration must be unequivocally inconsistent with fundamental principles of liberty and justice. Examples of mistaken release where the defendant was not entitled for credit while at liberty include release by federal authorities despite an existing state detainer for a state sentence without notice to state officials and release from jail instead of transport to prison due to a clerical error.

§ 23.10. Credit for time spent on furlough

On occasion, a trial court judge will accept a plea from a defendant and then grant a leave, or furlough, for the defendant to remain out of custody pending sentencing at a later date. After a defendant has been sentenced, furloughs for work, vocational training, medical attention, 

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1013 State ex rel. Libtz v. Coleman, 149 Fla. 28, 5 So. 2d 60 (1941).

1014 See, Brown v. Brittain, 773 P. 2d 570 (Colo. 1989); White v. Pearlman, 42 F.2d 788, 789 (C.C.A. 10th Cir. 1930); see also, Watson v. Enslow, 183 Colo. 435, 440, 517 P.2d 1346 (1974) (Colorado had no authority under Uniform Criminal Extradition Act to order extradition to California of prisoner paroled from Colorado prison eight years previously).

1015 See, Brown v. Brittain, 773 P. 2d 570 (Colo. 1989); Shields v. Beto, 370 F.2d 1003, 1004 (5th Cir. 1967) (28 year delay in executing sentence after prisoner was extradited back to original state); see also, Lanier v. Williams, 361 F. Supp. 944, 947 (E.D. N.C. 1973) (five year delay in executing sentence while prisoner was at liberty).

1016 See, State v. Campbell, 2007 WI App 34, 299 Wis. 2d 782, 728 N.W.2d 373 ( Ct. App. 2006) (defendant who knew that his release from jail was in error not entitled to credit for time he was at liberty before being reincarcerated).


1018 Andreu v. State, 509 So. 2d 1324 (Fla. 5th DCA 1987).

psychological therapy, to relieve jail or prison overcrowding, or other reasons may be available to modify an initial sentence of incarceration.

Whether or not a defendant is entitled to credit for time spent on furlough is, in the usual case, dependent upon the degree of “confinement” or “custody” the defendant is subject to during the furlough, that is, the degree to which the fundamental liberties of the defendant are curtailed while on furlough. It would appear, thus, that a defendant who is subject to being charged with escape for failing to return from a furlough would be entitled to credit against the sentence he or she is serving for the time spent on furlough. Stated otherwise, supervised release constitutes a continuation, rather than a termination, of sentence.\(^{1020}\)

For a conviction under section 944.02, Fla. Stat., for escape, the State need show only (1) the right to legal custody and (2) a conscious and intentional act of the defendant in leaving the established area of such custody. Where, for example, a defendant enters a plea to an offense, is granted a furlough prior to sentencing with a date certain to appear before the court for sentencing, and willfully fails to return on the date and at the time set for sentencing, the defendant can be charged with failure to appear but cannot be charged with escape because the defendant has not escaped the physical presence of a law enforcement officer, or the confines of a restricted environment, or from a sentence that had to be served.\(^{1021}\) As such, it would appear that a defendant in such a pre-sentencing situation would not logically be entitled to credit against his or her sentence for the authorized furlough time.

Sections 945.091 and 951.24, Fla. Stat., statutorily extend the definition of confinement to cover furloughs and work release programs involving prisoners who have been sentenced and are serving their sentences in county jail and Department of Corrections facilities. The willful failure of such prisoners to return from furlough is chargeable with escape.\(^{1022}\) As such, it would appear that prisoners in such situations would be entitled to receive credit for the time spent on such furloughs against the length of the sentences they are serving.

It has been held that a prisoner from a county jail is still “in custody” of the county for the purpose of assessing medical costs.\(^{1023}\) Furlough status has also been found to be basically the same as community control and a form of legal restraint sufficient to authorize the assessment of sentencing points for legal status, even though it is not specifically included among the categories


\(^{1021}\) Pumphrey v. State, 527 So. 2d 1382 (Fla. 1988).

\(^{1022}\) See, Early v. State, 678 So. 2d 901 (Fla. 5th DCA 1996); Laird v. State, 394 So. 2d 1121 (Fla. 5th DCA 1981); Price v. State, 333 So. 2d 84 (Fla. 1st DCA 1976).

\(^{1023}\) See, North Brevard County Hosp. Dist. v. Brevard County Bd. of County Com’rs., 899 So. 2d 1200 (Fla. 5th DCA 2005) (county liable for reasonable medical expenses incurred by prisoner during furlough if prisoner found to be indigent).
listed among the categories listed in the Rules of Criminal Procedure under which a defendant must fall for such points to be assessed.\textsuperscript{1024}

There are also situations in which a defendant is entitled to credit against his or her sentence for time spent on furlough where the defendant is not in custody to any degree. Such situations arise where the defendant has been sentenced but is not in custody through no fault of his or her own. One example is where the defendant has been released in error, as discussed supra. Another is where the defendant has been turned away, or released, from the incarceration due to facility overcrowding.\textsuperscript{1025} In such situations, however, the defendant is not entitled to continuing credit against the term of his or her sentence after he or she has been ordered to return to custody.\textsuperscript{1026}

\textbf{§ 23.11. Credit for deferred sentencing}

Generally, a deferred sentence is unlawful because of a defendant’s right to finality. A defendant can waive that right, however, and sentencing can be temporarily deferred to a definite date for procedural reasons or for any other lawful purpose whether or not the defendant is adjudicated guilty. A defendant who is in custody for the offense for which sentencing is deferred is entitled to credit against any subsequent sentence of incarceration imposed for that offense. A defendant is not entitled, however, to credit against his or her sentence for time spent on deferred status while out of custody, even if he or she is subject to conditions that would be the functional equivalent of probation.\textsuperscript{1027}

\textbf{§ 23.12. Credit on resentencing}

The constitutional guarantee against multiple punishments for the same offense requires that punishment already exacted must be fully credited in imposing sentence upon a new conviction for the same offense. Such credit must, of course, include the time credited during service of the first prison sentence for good behavior, etc. If, upon a new trial or a grant of collateral relief, the defendant is acquitted, there is no way the years he or she spent in prison can be returned to him or

\begin{itemize}
\item \textsuperscript{1024}State v. Young, 561 So. 2d 583 (Fla. 1990) (juvenile aftercare post commitment program constitutes legal restraint for assessing points under sentencing guidelines); Butler v. State, 543 So. 2d 432 (Fla. 2d DCA 1989) (juvenile furlough was legal constraint within meaning of sentencing guidelines, and so points could be added for commission of robbery while on juvenile furlough).
\item \textsuperscript{1025}For an overview of the various Department of Corrections overcrowding programs implemented by the department, see, Gomez v. Singletary, 733 So. 2d 499 (Fla. 1998); see also, Mayes v. Moore, 827 So. 2d 982 (Fla. 2002) (forfeiture of overcrowding credits).
\item \textsuperscript{1026}Although this precise issue has not been litigated in Florida, the decisions of other jurisdictions are instructive. See, e.g., State v. Dentici, 2002 WI App 77, 251 Wis. 2d 436, 643 N.W.2d 180 (Ct. App. 2002); State v. Riske, 152 Wis. 2d 260, 448 N.W.2d 260 (Ct. App. 1989).
\item \textsuperscript{1027}Mazza v. State, 948 So. 2d 872 (Fla. 4th DCA 2007).
\end{itemize}
her, but if he or she is reconvicted, those years can and must be returned-by subtracting them from whatever new sentence is imposed.\footnote{North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969) (overruled on other grounds by, Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989)).}

When a criminal defendant is sentenced after being convicted of a crime and serves some portion of that sentence, he or she is entitled to receive credit for the actual service of that sentence, or any portion thereof, in a resentencing for the same crime. Likewise, if multiple convictions result in concurrent sentences, credit must be awarded for time served on each sentence in any resentencing for the multiple convictions. The word “concurrently” simply means “at the same time,” and by imposing sentences to be served concurrently, a trial court is permitting a defendant to serve multiple sentences at the same time. Once concurrent sentences are imposed, and a defendant begins serving those sentences, his or her entitlement to credit for time served on each sentence is established in the same way that his or her entitlement would be established in a single case that was returned for resentencing. Once a defendant actually serves the time, credit naturally, and legally, follows. In other words, a defendant, on resentencing, is entitled to credit on each newly imposed consecutive sentence for prison time already served on the original concurrent sentences.\footnote{State v. Rabedeau, 2 So. 3d 191 (Fla. 2009).}

The same rule applies when a defendant is retried following appeal and is convicted of a lesser degree of crime for the same offense. Thus, for example, a defendant convicted of capital sexual battery and sentenced to life imprisonment, whose conviction is reversed and, after a new trial, is convicted of simple battery, is entitled to credit for time served on the original sentence for sexual battery against the subsequent sentence for simple battery.\footnote{Riley v. State, 103 So. 3d 274 (Fla. 1st DCA 2012).}

\section*{\S 23.13. Juvenile credit}

Juveniles are entitled to credit for time spent in secure detention, even though the goals of such restraint are rehabilitative and not punitive.\footnote{E.R. v. State, 584 So. 2d 158 (Fla. 2d DCA 1991).} With the exception of the six-month limit on the duration of a minimum-risk nonresidential commitment for an offense that is a misdemeanor of the second degree, or is the equivalent of a misdemeanor of the second degree, a juvenile commitment for any offense cannot extend beyond the duration of the punishment authorized for adults under the Criminal Punishment Code or the juvenile’s twenty-first birthday, whichever comes first. A juvenile who is committed to DJJ for a determinate sentence or sentenced to incarceration as an adult is entitled to receive credit for time served in detention toward the sentence for which the juvenile has been committed or incarcerated, so that the juvenile does not receive a sentence greater
than the statutory maximum for that offense.\textsuperscript{1032} Stated otherwise, in the case of a determinate commitment, that is, for a crime on which the maximum punishment will necessarily conclude before the department loses authority over the juvenile, the trial court must grant credit for time served in secure detention against the residential commitment. Where, however, the commitment is indeterminate and will necessarily extend up to the department’s age-based jurisdictional limits, such credit need not be granted, and such juveniles are not entitled to such credit.\textsuperscript{1033} Note also that a juvenile is not entitled to credit for time served in secure detention for contempt charges.\textsuperscript{1034}

Issues of jail credit often arise in cases where a child who was originally charged in juvenile court is sentenced as to adult sanctions that include imprisonment. In such situations, the rule of coercive deprivation of liberty enunciated in \textit{Tal-Mason}\textsuperscript{1035} applies. Where, for example, a defendant violates juvenile supervision and is sentenced to adult prison, he or she is entitled to credit against that sentence for all time spent as a juvenile in secure detention and in a maximum-risk facility on that charge.\textsuperscript{1036}

\section*{§ 24. Attachment of jeopardy}

Once a defendant has begun a lawfully-imposed sentence, the defendant may not thereafter be re-sentenced for an increased term of incarceration. However, “the Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner,”\textsuperscript{1037} and a trial court need not adhere to a sentence merely because it has been announced.\textsuperscript{1038} When a defendant has not been transferred from the court’s custody to a place of detention at the time his or her sentences are altered, service of the sentences has not actually commenced, and the defendant’s rights are not impinged by the court’s timely alteration of his or her

\begin{flushright}
\textsuperscript{1032}\textit{J.W. v. State}, 879 So. 2d 680 (Fla. 4th DCA 2004); \textit{C.C. v. State}, 841 So. 2d 657 (Fla. 4th DCA 2003); \textit{J.B. v. State}, 829 So. 2d 376 (Fla. 4th DCA 2002). \\
\textsuperscript{1033}\textit{J.I.S. v. State}, 930 So. 2d 587 (Fla. 2006). \\
\textsuperscript{1034}\textit{J.M.H. v. State}, 112 So. 3d 692 (Fla. 2d DCA 2013). \\
\textsuperscript{1035}\textit{Tal-Mason v. State}, 515 So. 2d 738, 740 (Fla. 1987). \\
\textsuperscript{1036}\textit{Odom v. State}, 39 So. 3d 366 (Fla. 2d DCA 2010); \textit{Smith v. State}, 664 So. 2d 1076 (Fla. 2d DCA 1995) (time spent in juvenile detention is credited like time spent in county jail). \\
\end{flushright}
sentences. Note also that, where the record does not show that a defendant has begun serving his sentence, double jeopardy is not implicated.

Jeopardy attaches when a court accepts a defendant’s plea. Thereafter, the court may not set the plea aside over the defendant’s objection without legal cause, and the defendant is protected from ever being tried for the offenses covered in the accepted plea. Jeopardy also attaches when a court imposes a sentence, after which the double jeopardy clauses protect the defendant from receiving a punishment greater than the sentence already imposed. Where, for example, a defendant is mistakenly sentenced to a certain minimum mandatory sentence that is less than the actual minimum mandatory and the sentencing is concluded with no further hearing on sentencing contemplated, the trial court may not thereafter correct the defendant’s sentence by imposing the correct minimum mandatory period of imprisonment.

When a court accepts a defendant’s plea, but postpones sentencing until the defendant returns on an appointed date, jeopardy attaches only to the plea if a valid Quarterman agreement exists.

A trial court may vacate an illegal sentence and impose a harsher sentence without violating the defendant’s double jeopardy rights, but it may not do so as to a legal sentence.

§ 25. Pronouncement of sentence

The pronouncement by the court of the penalty imposed upon the defendant, that is, the sentence, does not occur until the pronouncement is final. The pronouncement is final, at the earliest, when the sentencing hearing comes to an end. At least until that moment arrives, the trial

1039 Whitehead v. State, 21 So. 3d 157 (Fla. 4th DCA 2009) (defendant had not been fingerprinted, had not left the courtroom, and had not begun to serve his sentence when the trial court continued the sentencing hearing for a few minutes); Curtis v. State, 789 So. 2d 394 (Fla. 4th DCA 2001) (trial court pronounced a sentence, defendant left the courtroom, trial court resumed hearing other cases, State advised the court that it pronounced an illegal sentence, defendant was returned to courtroom and longer sentence imposed).

1040 See, Crisel v. State, 677 So. 2d 95 (Fla. 1st DCA 1996).

1041 Ingraham v. State, 842 So. 2d 954 (Fla. 4th DCA 2003); Pettis v. State, 803 So. 2d 903 (Fla. 1st DCA 2002); Zamora v. State, 737 So. 2d 1165 (Fla. 2d DCA 1999).

1042 See, Troupe v. Rowe, 283 So. 2d 857, 860 (Fla. 1973) (“Jeopardy had attached … and the sentence which had been imposed could not thereafter be increased ….”); Coll v. State, 629 So. 2d 1056 (Fla. 2d DCA 1993).

1043 See, Figueroa v. State, 3 So. 3d 428 (Fla. 2d DCA 2009).

1044 Quarterman v. State, 527 So. 2d 1380 (Fla. 1988).

1045 See, Wright v. State, 599 So. 2d 179, 180 (Fla. 2d DCA 1992).

1046 Fla. R. Crim. P. 3.700(a).
court has jurisdiction to modify, vacate, correct, change, amend, alter or vary, increase or decrease, any earlier, in effect inchoate pronouncement. The increase of sentence during the sentencing hearing is not an increase of an imposed sentence or a resentencing, and neither double jeopardy nor Fla. R. Crim. P. 3.800 is a bar to the increase.\footnote{Farber v. State, 409 So. 2d 71 (Fla. 3d DCA 1982).}

Note that Rule 3.700(c) requires that, in noncapital cases in which it is necessary that sentence be pronounced by a judge other than the judge who presided at trial or accepted the plea, the sentencing judge shall not pass sentence until the judge becomes acquainted with what transpired at the trial, or the facts, including any plea discussions, concerning the plea and the offense. It is error for a trial court to allow resentencing by a successor judge without a showing of necessity.\footnote{Snyder v. State, 870 So. 2d 140 (Fla. 2d DCA 2004); Persaud v. State, 821 So. 2d 411 (Fla. 2d DCA 2002); Clemons v. State, 816 So. 2d 1180 (Fla. 2d DCA 2002); Campbell v. State, 622 So. 2d 603 (Fla. 2d DCA 1993).}

§ 26. Imposition of sentence

An example of a situation in which a trial judge inadvertently “imposed a sentence” at a plea conference, and thereby triggered double jeopardy protection that precluded the court from enhancing the defendant’s sentence for breaching a furlough agreement, is found in\textit{Ingram v. State}:\footnote{Ingraham v. State, 842 So. 2d 954 (Fla. 4th DCA 2003).} Harold Ingram entered a guilty plea that contemplated a 36.45–month prison sentence. The State and the defendant agreed to a three-month furlough for medical reasons. Ingram signed a Guideline Sentence Waiver/Presentencing Release Agreement that provided, \textit{inter alia}, that if he failed to return to court on a specified date, then the court would have the “total and complete discretion” to sentence him to 72 months incarceration instead of the 36.45 months set forth in the plea agreement. At the end of the plea conference, the trial judge said: “Accept each plea, adjudge you to be guilty, and impose the agreed 36.45 months, to run concurrent on each count with agreed credit. I stay and suspend execution of those sentences until Friday, February 23rd, of the year 2001.” On the same day, the court entered a written judgment adjudicating appellant to be guilty; the court also entered a written sentence committing appellant to the Department of Corrections for a term of 36.45 months. Ultimately, Ingram failed to surrender as ordered and the trial court imposed enhanced concurrent sentences of 48 months incarceration. The Fourth District reversed the enhanced sentences and remanded for imposition of the concurrent 36.45 month sentences, finding that “the court’s oral pronouncement of the sentence at the plea conference necessitates the finding that sentence was imposed at the plea conference.”\footnote{Ingraham v. State, 842 So. 2d 954 (Fla. 4th DCA 2003).}
An example of a factually similar situation in which the trial court did not “impose sentence” is found in *Adams v. State*:\(^{1051}\) Cleveland Adams decided to plead to the charges with an agreed sentence of 15 years. His guideline scoresheet provided for a sentence of 18.8 years, with a range of 14.4 years to 23.5 years. At the plea hearing, he presented a request that the court allow him to start serving the sentence on December 30, 1998, in order to “put his personal affairs in order.” Pursuant to that request, he signed a written “guideline sentence waiver/presentencing release agreement.” In the written furlough agreement, he acknowledged his plea agreement, the prospective sentence of 15 years, the reporting deadline of 8:45 AM on December 30, 1998, and that if he failed to voluntarily return to court as ordered, he would not be allowed to withdraw his guilty plea and the court would have total and complete discretion to sentence him to 23.5 years incarceration, instead of the 15-year sentence agreed to. At the sentencing hearing on December 4, 1998, Adams agreed on the record that if he did not return to court at 8:45 AM on December 30, 1998, the court would have total discretion to sentence him to 23.5 years, instead of the 15-year sentence. The court accepted that agreement and again explained to Adams that an increase of the sentence would be made if Adams did not show up at the appointed time. The presiding judge thereafter stated, “I adjudicate you to be guilty, I stay and suspend the execution of the sentence until the 30th of December of this year, in this courtroom at 8:45.” The court never pronounced the sentence, but nevertheless, a written sentence of 15 years was entered that did not contain any provision for the stay of the sentence or of its conditional nature.

Adams failed to appear at the appointed time and, when he was finally apprehended and brought to court, the court resented him to 23.5 years in prison. An amended written sentence was filed to reflect the change. Adams thereafter challenged the increase in sentence as a violation of double jeopardy principles, contending that the agreement to increase the sentence as a result of the failure to appear was not part of the plea agreement. The Fourth District disagreed on the basis that (1) the written and oral agreement, including the condition that Adams could not withdraw his plea if he violated the return provisions, became part of the court’s acceptance of the plea, and (2) no sentence was imposed at the plea hearing because the court stayed the sentence.

The court’s reasoning was that Rule 3.700(b) requires the oral pronouncement of sentence, that the written sentence must comport with the oral pronouncement, that where no oral sentence was pronounced, a written sentence is invalid, and that the first written sentencing order was a nullity and, as a result, there is no double jeopardy violation because the court did not pronounce sentence until Adams missed his sentencing hearing.\(^{1052}\)

Note in this regard that a defendant’s appearance in court at the end of his or her furlough merely to report to custodial authorities to begin his or her sentence is not a sentencing hearing or considered to be a critical stage of the proceedings requiring representation of counsel.\(^{1053}\)

\(^{1051}\) *Adams v. State*, 780 So. 2d 955 (Fla. 4th DCA 2001).

\(^{1052}\) *Adams v. State*, 780 So. 2d 955 (Fla. 4th DCA 2001).

\(^{1053}\) *Searcy v. State*, 971 So. 2d 1008 (Fla. 3d DCA 2008).
§ 27. Vacating, setting aside, correcting, reducing, and modifying a sentence

Exceptions to the attachment of jeopardy at the imposition of sentence are found in the provisions of Fla. R. Crim. P. 3.800, which allows for the correction, reduction, and modification of sentences under certain circumstances, Fla. R. Crim. P. 3.850, which allows for the vacation, setting aside, or correcting of sentences under certain circumstances, and Fla. R. Crim. P. 3.801, which allows for the correction of errors regarding jail credit. A motion under Rule 3.800 can be filed at any time, even long after the sentence is final, but must address errors apparent on the record. Under Rule 3.850, a motion to vacate a sentence that exceeds the limits provided by law may be filed at any time, but all other motions under that Rule must be filed within two years after the judgment and sentence become final, unless certain conditions described in the Rule are present. Fla. R. Crim. P. 3.801 allows for the correction of credit for pre-sentence jail credit if the motion for correction is filed not more than 1 year after the sentence becomes final.

The three major categories of sentencing errors for the purposes of these rules are: (1) an “erroneous sentence” which is correctable on direct appeal; (2) an “unlawful sentence” which is correctable only after an evidentiary hearing under rule 3.850; and (3) an “illegal sentence” in which the error must be corrected as a matter of law in a rule 3.800 proceeding.¹⁰⁵⁴

§ 27.1. Correction, reduction and modification of sentences under Fla. R. Crim. P. 3.800

**Correction of sentence**

A court may at any time correct an illegal sentence imposed by it, or an incorrect calculation made by it in a sentencing scoresheet, or a sentence that does not grant proper credit for time served when it is affirmatively alleged that the court records demonstrate on their face an entitlement to that relief, provided that a party may not file a motion to correct an illegal sentence under Rule 3.800(a) during the time allowed for the filing of a motion under Rule 3.800(b)(1) or during the pendency of a direct appeal. A defendant may seek correction of an allegedly erroneous sexual predator designation under Rule 3.800(a), but only when it is apparent from the face of the record that the defendant did not meet the criteria for designation as a sexual predator. All orders denying motions under Rule 3.800(a) must include a statement that the movant has the right to appeal within 30 days of rendition of the order.¹⁰⁵⁵ Rule 3.800 also applies to fundamental sentencing errors occurring after November 12, 1999.¹⁰⁵⁶

For purposes of Rule 3.800, a “sentencing error” includes harmful errors in orders entered as a result of the sentencing process. This includes errors in orders of probation, orders of


¹⁰⁵⁵Fla. R. Crim. P. 3.800(a).

All involve errors relating to the ultimate sanctions imposed, whether involving incarceration, conditions of probation, or costs. Specific sentencing errors recognized as falling under the rule include, but are not limited to, claims that the defendant was improperly habitualized; that the sentence exceeded the statutory maximum; that the scoresheet was inaccurate; that the court improperly imposed a departure sentence; that the written order deviated from the oral pronouncement; that the trial court improperly assessed costs; that the trial court improperly sentenced the defendant to simultaneous incarceration and probation; that the trial court failed to award credit for time served; that the trial court failed to address in writing its decision to impose adult sanctions; and that a sentencing statute was unconstitutional.

**Illegal sentence**

The definition of “illegal sentence” as interpreted by case law has narrowed significantly since that term was used in the 1960s and 1970s. An illegal sentence is presently a sentence imposed contrary to law which exceeds the maximum punishment allowed by law, and includes a sentence that has been unconstitutionally enhanced or lengthened. Where, for example, a defendant commits his or her crime after 1970, a hard labor condition constitutes an illegal sentence. To be illegal within the meaning of Fla. R. Crim. P. 3.800(a), the sentence must impose a kind of...

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1057 Fla. R. Crim. P. 3.800 court comment.
1058 Jackson v. State, 983 So. 2d 562 (Fla. 2008).
1059 Brannon v. State, 850 So. 2d 452 (Fla. 2003).
1060 Terry v. State, 764 So. 2d 571 (Fla. 2000).
1061 State v. Anderson, 905 So. 2d 111 (Fla. 2005).
1062 Thogode v. State, 763 So. 2d 281 (Fla. 2000).
1063 State v. Cote, 913 So. 2d 544 (Fla. 2005).
1064 Maddox v. State, 760 So. 2d 89 (Fla. 2000).
1065 Spencer v. State, 764 So. 2d 576 (Fla. 2000).
1066 Charles v. State, 763 So. 2d 316 (Fla. 2000).
1067 Cargle v. State, 770 So. 2d 1151 (Fla. 2000).
1068 Salters v. State, 758 So. 2d 667 (Fla. 2000).
1069 See, Maddox v. State, 760 So. 2d 89, 96 n.6 (Fla. 2000).
1070 Shade v. State, 925 So. 2d 453 (Fla. 1st DCA 2006).
punishment that no judge under the entire body of sentencing statutes could possibly inflict under any set of factual circumstances; on the other hand, if it is possible under all the sentencing statutes—given a specific set of facts—to impose a particular sentence, then the sentence will not be illegal within Rule 3.800(a) even though the judge erred in imposing it. An example of this is in the situation of overlapping sentences of prison and probation, discussed supra.

A sentence is not illegal merely because it is unauthorized by statute. A court cannot impose an illegal sentence pursuant to a plea bargain, nor may a defendant agree to an illegal sentence as part of a plea bargain. The court cannot overlook inconsistencies in a negotiated plea and the charging document. Where a negotiated sentence would otherwise be illegal because of the language in the charging document in effect at sentencing, appellate courts are reluctant to find implicit amendment of the charging document to make the otherwise illegal sentence a legal one.

A written sentence that conflicts with the oral pronouncement of sentence imposed in open court is an illegal sentence. A sentence that does not impose the minimum punishment required by law is also regarded as an illegal sentence.

A “legally improper” sentence is not an illegal sentence. In Robinson v. State, the trial court failed to perform a sentencing act required by a statute. Robinson entered a plea of guilty to trafficking in cocaine in violation of section 893.135, F.S., which carries a mandatory minimum of 15 years imprisonment and a $250,000 fine. At the State’s request, the trial court sentenced Robinson to five years probation and withheld adjudication of guilt. The State then filed a Rule 3.800 motion to correct illegal sentence, pointing out that the trial court lacked jurisdiction to withhold adjudication under the drug trafficking statute. The trial court, agreeing with the State, adjudicated Robinson guilty and re-sentenced him to five years probation. The appellate court vacated the new sentencing order “because the sentence imposed, which included the withholding

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1071 Carter v. State, 786 So. 2d 1173 (Fla. 2001).


1073 Williams v. State, 500 So. 2d 501, 503 (Fla. 1986); see also, King v. State, 681 So. 2d 1136, 1140 (Fla. 1996). (“While a trial court cannot impose an illegal sentence pursuant to a plea bargain, it can impose a negotiated sentence that is not specifically authorized by statute.”).

1074 See, e.g., Thomas v. State, 595 So. 2d 287 (Fla. 4th DCA 1992).

1075 Williams v. State, 957 So. 2d 600, 603 (Fla. 2007); Ashley v. State, 850 So. 2d 1265, 1268 (Fla. 2003).

1076 State v. Fulton, 878 So. 2d 485 (Fla. 1st DCA 2004) (it is illegal sentence to not impose minimum mandatory sentence and to withhold adjudication of guilt and place defendant on probation for crime of trafficking in cocaine); see, Zimmerman v. State, 467 So. 2d 1119 (Fla. 1st DCA 1985); State v. Lopez, 408 So. 2d 744 (Fla. 3d DCA 1982); State v. Senich, 543 So. 2d 804 (Fla. 4th DCA 1989); State v. Row, 478 So. 2d 430 (Fla. 5th DCA 1985).

1077 Robinson v. State, 757 So. 2d 532 (Fla. 4th DCA 2000).
of adjudication, although legally improper based on the existing case law, was not an ‘illegal sentence.’ Because the sentence was not an illegal sentence, the trial court did not have jurisdiction to change the sentence in a manner unfavorable to Robinson.

When a sentence is illegal, and such a sentence was the product of a negotiated plea agreement, the State has the option of either agreeing to the defendant’s resentencing, or withdrawing from the plea agreement and proceeding to trial on the original charges. Note, however, that where a defendant has taken advantage of an illegal sentence to obtain an immediate release from incarceration, such as through placement on probation, conditional release, or a suspended sentence, that defendant will be estopped from challenging the invalidity of his or her original sentence when such release is revoked upon violation. Where a defendant has already served his sentence and he or she has reaped the benefit of an illegal sentence, he or she is estopped from challenging the sentence, especially in the context of a negotiated plea. It is not “illegal” to allow a defendant to agree to serve a special type of probation, e.g., because of a substance abuse problem, even though the trial court could not impose such a condition on an unwilling defendant convicted at trial. Similarly, a defendant can agree to being designated a sexual predator as part of a plea agreement where the sentencing court cannot impose such a designation. An exception to this rule is that when a defendant has already served an incarcerative or probationary term in excess of the statutory maximum, he or she has reaped no benefit from the illegal sentence and will not be estopped from challenging such sentence. The legality of a sentence is a question of law and is subject to de novo review.

1078 Robinson v. State, 757 So. 2d 532 (Fla. 4th DCA 2000).
1079 White v. State, 828 So. 2d 491 (Fla. 1st DCA 2002).
1080 See, Dupree v. State, 708 So. 2d 968, 968 (Fla. 1st DCA 1998); Stroble v. State, 689 So. 2d 1089, 1090 (Fla. 5th DCA 1997); Huff v. State, 672 So. 2d 634, 635 (Fla. 1st DCA 1996) (“[A]lthough his original suspended sentence may have been improper …, it is not reversible on this appeal because Appellant has already received the benefits of the improper sentence.”); Warrington v. State, 660 So. 2d 385, 387 (Fla. 5th DCA 1995); Gaskins v. State, 607 So. 2d 475, 476 (Fla. 1st DCA 1992); Bashlor v. State, 586 So. 2d 488, 489 (Fla. 1st DCA 1991) (“Absent some jurisdictional flaw, Florida courts have repeatedly held that sentences imposed in violation of statutory requirements, which are to the benefit of the defendant and to which he agreed, may not be challenged after the defendant has accepted the benefits flowing from the plea, but has failed to carry out the conditions imposed on him.”).
1081 State v. Ortiz, 79 So. 3d 177 (Fla. 3d DCA 2012).
1082 Carson v. State, 37 So. 3d 884 (Fla. 1st DCA 2010); Ackermann v. State, 962 So. 2d 407, 408 (Fla. 1st DCA 2007).
1083 See, Kingry v. State, 28 So. 3d 173 (Fla. 1st DCA 2010).
1084 See, White v. State, 828 So. 2d 491 (Fla. 1st DCA 2002); Gonzales v. State, 816 So. 2d 720, 722 (Fla. 5th DCA 2002); Rucker v. State, 626 So. 2d 276, 278 (Fla. 2d DCA 1993).
1085 See, e.g., Wardlaw v. State, 832 So. 2d 258 (Fla. 2d DCA 2002).
Incorrect scoresheet calculation

A scoresheet should accurately reflect the sentencing range for the defendant, and ultimately it is the judge’s responsibility to ensure that it is accurate in order to reach a fully informed sentencing decision. When a discrepancy concerning the scoresheet is brought to the sentencing court’s attention, the court should resolve the scoresheet to reflect the accurate numbers. Although the court is entitled to the opportunity to do so with deliberation, the court cannot ignore a discrepancy because it was not brought to the court’s attention in advance of the sentencing hearing date.

A frequent cause of resentencing occurs where the defendant receives a maximum permissible sentence and the maximum sentence calculated on the scoresheet used at sentencing is actually higher than it would be on a properly calculated scoresheet. While this problem is more common with “top of the guidelines” sentencings under the former guidelines, this can also occur in sentencings under the Criminal Punishment Code. The rule is that when a defendant is sentenced to the maximum guidelines or Criminal Punishment Code sentence, a scoresheet error that improperly adds sentencing points to the total requires resentencing using a corrected scoresheet.

A scoresheet error requires resentencing unless it can be shown conclusively that the same sentence would have been imposed if the corrected scoresheet had been used by the sentencing court. When a motion asserting a sentencing calculation error is brought before a successor judge, it must appear conclusive on the record that the same sentence would have been imposed in order for relief to be properly denied. It does not matter, in any event, that the error did not affect the sentencing range, just that it may have affected the sentencing decision. In the case of Brandon Stallings, for example, the defendant was charged with escape and highway racing, and the “prior record” section of the Criminal Punishment Code scoresheet included the offenses of aggravated fleeing and eluding for 1.6 points, leaving the scene of an accident for 0.2 points, and DUI for 0.2 points, for a total of 2.0 points, for a total of 42.2 sentence points, which allowed for a non-state

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86 See, Erickson v. State, 565 So. 2d 328 (Fla. 4th DCA 1990); Abbott v. State, 482 So. 2d 1391 (Fla. 1st DCA 1986).

87 Mitchell v. State, 507 So. 2d 686 (Fla. 1st DCA 1987); Erickson v. State, 565 So. 2d 328 (Fla. 4th DCA 1990).

88 State v. Wright, 574 So. 2d 321 (Fla. 4th DCA 1991).

89 See, Mitchell v. State, 880 So. 2d 1261 (Fla. 2d DCA 2004).

90 State v. Anderson, 905 So. 2d 111 (Fla. 2005); see also, Frazier v. State, 912 So. 2d 54 (Fla. 4th DCA 2005) (erroneous assessment of 12 points for community sanction violation before the court for sentencing).

91 Cruz v. State, 884 So. 2d 105 (Fla. 4th DCA 2004).

92 Stallings v. State, 876 So. 2d 686 (Fla. 5th DCA 2004).
prison sanction. Counsel for Stallings objected to the scoring of the prior offenses on the ground that the offenses were committed more than five years ago when Stallings was only 12 years old. The court determined that it was not error to include the prior offenses because the time under the statute was “five years from the date that his parole … was terminated.” The court adjudicated Stallings guilty and sentenced him to ten months’ imprisonment in the Brevard County jail on Count I and sixty days’ imprisonment in the Brevard County jail on Count II, to be served concurrently. Stallings appealed his sentence on the basis of the incorrect adding of the 2.0 points to his scoresheet, which the State conceded on appeal was improper. The Fifth District reversed and remanded for resentencing. The Fifth District found that, although there was no indication whether Stallings’ sentence would have been any different if the 2.0 points for prior record had not been included on the scoresheet, criminal defendants should be sentenced using a correct scoresheet, and “We are unwilling to say that any error in a score below 44 points would be harmless simply because the same sentencing range applies.” An erroneous scoresheet calculation, apparent on the face of the record, is reviewable on a motion to correct sentence, and a court is allowed to correct such an error at any time.

**Improper jail credit**

Inadequate jail credit results in an illegal sentence for purposes of Rule 3.800. While a detainee must be granted credit for time served prior to conviction in any institution serving as the functional equivalent of a county jail, the defendant may seek additional jail credit by filing a Rule 3.800(a) motion only when it is affirmatively alleged that the court records demonstrate on their face entitlement to that relief.

A conventional evidentiary hearing is not required where the issue involves credit for time served, and the sentencing court is only required to review appropriate records and make a determination whether the defendant has received proper credit for time served. Appropriate records for review include the court file and the jail’s records. The defendant’s jail record should be considered as a court record, even if it is not physically incorporated with the court file, so that the entitlement to such credit is not dependent on the vagaries of the local record-keeping system. After

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1093 *Stallings v. State*, 876 So. 2d 686 (Fla. 5th DCA 2004).

1094 *Tosco v. State*, 724 So. 2d 1223 (Fla. 3d DCA 1998).

1095 *Jean v. State*, 627 So. 2d 592 (Fla. 2d DCA 1993).


1097 *Wilkins v. State*, 932 So. 2d 1271 (Fla. 2d DCA 2006); *Alfonso v. State*, 901 So. 2d 939 (Fla. 4th DCA 2005).
review, the trial court should either attach those portions of the record that conclusively refute the defendant’s claim or award him or her the appropriate credit for time served.1098

Reduction or modification of a legal sentence

Fla. R. Crim. P. 3.800(c) provides that a court may reduce or modify to include any of the provisions of chapter 948, Fla. Stat., a legal sentence imposed by it, sua sponte, or upon motion filed, within 60 days after the imposition, or within 60 days after receipt by the court of a mandate issued by the appellate court on affirmance of the judgment and/or sentence on an original appeal, or within 60 days after receipt by the court of a certified copy of an order of the appellate court dismissing an original appeal from the judgment and/or sentence, or, if further appellate review is sought in a higher court or in successively higher courts, within 60 days after the highest state or federal court to which a timely appeal has been taken under authority of law, or in which a petition for certiorari has been timely filed under authority of law, has entered an order of affirmance or an order dismissing the appeal and/or denying certiorari. If review is upon motion, the trial court has 90 days from the date the motion is filed or such time as agreed by the parties or as extended by the trial court to enter an order ruling on the motion. If no order is entered on the motion within 90 days or such time as extended by the parties or the trial court, the motion must be deemed denied.1099 Outside of these periods, the trial court lacks jurisdiction.1100

Rule 3.800(c) is often used by the State or Department of Corrections to get the sentencing court to impose statutorily mandated sanctions, such as electronic monitoring for sexual offenders, that were not imposed at the sentencing hearing. The court is able to modify a defendant’s “incomplete” sentence in this way without violating double jeopardy prohibitions, but must do so within the 60-day window provided by the Rule.1101

The trial court loses jurisdiction pursuant to Fla. R. Crim. P. 3.800(c) when it fails to reduce or modify a defendant’s sentence within the 60 day period due solely to the defendant’s lack of diligence.1102 This is so even where a motion for mitigation of sentence was filed within the 60 day

1098 See, State v. Mancino, 714 So. 2d 429 (Fla. 1998); Galarza v. State, 962 So. 2d 985 (Fla. 3d DCA 2007); Hidalgo v. State, 729 So. 2d 984 (Fla. 3d DCA 1999).

1099 Fla. R. Crim. P. 3.800(c).

1100 See, Seward v. State, 912 So. 2d 389 (Fla. 2d DCA 2005); Syyverson v. State, 659 So. 2d 1344 (Fla. 5th DCA 1995); see also, State v. Sanderson, 625 So. 2d 471 (Fla. 1993).

1101 See, State v. Lacayo, 8 So. 3d 385 (Fla. 3d DCA 2009); Grosso v. State, 2 So. 3d 362 (Fla. 4th DCA 2008); Fields v. State, 968 So. 2d 1032, 1033-34 (Fla. 5th DCA 2007); Harroll v. State, 960 So. 2d 797, 798 (Fla. 3d DCA 2007).

1102 Hussey v. State, 739 So. 2d 123 (Fla. 4th DCA 1999).
time period and sat in the court’s file while the period expired.\textsuperscript{1103} It is, in fact, irrelevant that a motion to mitigate sentence was made within the 60 day period if the motion is not heard within that time period.\textsuperscript{1104} It is the sole responsibility of the movant to see that the motion was made within the 60 day period.\textsuperscript{1105} Note that the time of filing is that point in time at which a pro se prisoner entrusts his Rule 3.800(c) motion to prison officials for delivery.\textsuperscript{1106} An apparent exception to this is where the defendant timely files a motion for modification or reduction of sentence but, through no lack of diligence in obtaining a hearing date or no fault of the defendant, the hearing does not take place until after the expiration of the 60-day period as provided in Rule 3.800(c). In such cases, policy considerations outweigh technical defects in procedure and the court would retain jurisdiction to hear the motion.\textsuperscript{1107} The 60 day period of Rule 3.800 may also be extended pursuant to Fla. R. Crim. P. 3.050, dealing with enlargement of time, which grants the trial court discretion, for good cause shown, to order the period enlarged if a request therefore is made before the expiration of the 60 days or the end of the period of extension allowed by a previous order, providing the matter is resolved within a reasonable time.\textsuperscript{1108} The trial court is allowed to sua sponte extend the time for considering a defendant’s motion to mitigate or reduce a sentence without the need to file a motion for enlargement of time.\textsuperscript{1109} Repeated extensions of the 60 day time limit would, however, violate separation of powers principles by exceeding legislatively-imposed limits on judicial discretion in sentencing.\textsuperscript{1110} Rule 3.800(c), by its terms, does not, however, apply to cases “in which the death sentence is imposed or to those cases in which the trial judge has imposed the minimum mandatory sentence or has no sentencing discretion.”\textsuperscript{1111} This exclusion precludes modification of minimum mandatory sentences imposed pursuant to section 775.087(2).\textsuperscript{1112}

\begin{itemize}
\item \textsuperscript{1103} Grosse v. State, 511 So. 2d 688 (Fla. 4th DCA 1987).
\item \textsuperscript{1104} State v. Blue, 603 So. 2d 648 (Fla. 5th DCA 1992).
\item \textsuperscript{1105} Reile v. State, 901 So. 2d 196 (Fla. 4th DCA 2005); State v. Woodard, 866 So. 2d 120 (Fla. 4th DCA 2004); Syverson v. State, 659 So. 2d 1344 (Fla. 5th DCA 1995).
\item \textsuperscript{1106} Haag v. State, 591 So. 2d 614, 617 (Fla. 1992) (mailbox rule).
\item \textsuperscript{1107} State v. Grandstaff, 927 So. 2d 1035 (Fla. 4th DCA 2006).
\item \textsuperscript{1108} Fla. R. Crim. P. 3.050.
\item \textsuperscript{1109} See, McCormick v. State, 961 So. 2d 1099 (Fla. 2d DCA 2007).
\item \textsuperscript{1110} Abreu v. State, 660 So. 2d 703 (Fla. 1995).
\item \textsuperscript{1111} Fla. R. Crim. P. 3.800(c).
\item \textsuperscript{1112} See, § 775.087(2)(a), Fla. Stat. (a defendant convicted of an enumerated offense who possessed a firearm during commission of his crime “shall be sentenced to a minimum term of imprisonment of 3 calendar years”); State v. Paulino, 696 So. 2d 425 (Fla. 2d DCA 1997) (trial court had no authority to modify defendant’s
\end{itemize}
In *Music v. State*, the trial court’s failure to impose the special condition of probation agreed upon in the plea agreement was held uncorrectable after the expiration of the 60-day period provided in Rule 3.800(c). There, the defendant entered into a plea agreement which included the special condition prohibiting all contact with minors. The trial court did not orally state this special condition and the written judgment and sentences also failed to make any reference to this special condition. Five years after the defendant began serving his sentence, the State filed a Rule 3.800(a) motion to correct an illegal sentence. The trial court granted the motion and added the condition to the defendant’s sentence. On appeal, the appellate court held that the sentence was not illegal even though it did not comport with the plea agreement and thus any motion to correct the sentence to include the special condition of probation was required to be made within 60 days. The court reversed the order with directions that the trial court strike the special condition of probation.

In *Nichols v. State*, the trial court imposed the statutorily mandated fine of $50,000 for the defendant’s trafficking offense, but failed to state orally or to include in the written probation order the fact that payment of the fine was a condition of probation. After the defendant began serving his probation, the trial court modified the probation order to include the condition of payment of the fine. The appellate court reversed, holding that payment of the fine was never made a condition of probation and, absent proof that the defendant had violated the terms of his probation, a trial court cannot enhance the terms of probation.

An “incomplete” sentence is not an “illegal” sentence. In *Schutte v. State*, the trial court entered its order pursuant to its own motion almost three years after the initial probation order to add statutorily mandated conditions for probation that were not orally pronounced or made reference to at the time of the original sentencing. The First District determined that the failure to impose these conditions at the original sentence made the sentence “incomplete,” as opposed to “illegal,” and subject to timely modification within the 60-day window provided for in Rule 3.800(c).

A defendant cannot circumvent the terms of a specific sentence imposed pursuant to a plea agreement by filing a motion to reduce or mitigate sentence pursuant to Rule 3.800(c). A plea

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three-year minimum mandatory sentences imposed pursuant to section 775.087(2), F.S.; *State v. Sesler*, 386 So. 2d 293 (Fla. 2d DCA 1980) (trial court has no discretion in imposing minimum mandatory term under section 775.087(2)).


1114 *Music v. State*, 655 So. 2d 231 (Fla. 1st DCA 1995).

1115 *Nichols v. State*, 672 So. 2d 825 (Fla. 2d DCA 1995).

1116 *Nichols v. State*, 672 So. 2d 825 (Fla. 2d DCA 1995).

1117 *Schutte v. State*, 824 So. 2d 308 (Fla. 1st DCA 2002).

1118 *Schutte v. State*, 824 So. 2d 308 (Fla. 1st DCA 2002).
agreement is a contract and the rules of contract law are applicable to plea agreements. A sentence negotiated pursuant to a plea agreement is a quid pro quo and, therefore, a defendant cannot accept the benefit of a plea bargain without accepting its burden. The sentencing court also does not, in any event, have discretion over such a sentence once it has been imposed.  

A motion to correct any sentencing error, including an illegal sentence, may be filed as allowed by Rule 3.800(b). Rule 3.800(b) is not applicable to those cases in which the death sentence has been imposed and direct appeal jurisdiction is in the Supreme Court under article V, section 3(b)(1) of the Florida Constitution. The motion must identify the error with specificity and provide a proposed correction. A response to the motion may be filed within 15 days, either admitting or contesting the alleged error. Motions may be filed by the state under Rule 3.800(b) only if the correction of the sentencing error would benefit the defendant or to correct a scrivener’s error.  

During the time allowed for the filing of a notice of appeal of a sentence, a defendant or the state may file a motion to correct a sentencing error. This motion will stay rendition under Fla. R. App. P. 9.020(h).  

Unless the trial court determines that the motion can be resolved as a matter of law without a hearing, it must hold a calendar call no later than 20 days from the filing of the motion, with notice to all parties, for the express purpose of either ruling on the motion or determining the need for an evidentiary hearing. If an evidentiary hearing is needed, it must be set no more than 20 days from the date of the calendar call. Within 60 days from the filing of the motion, the trial court must file an order ruling on the motion. If no order is filed within 60 days, the motion must be considered denied. A party may file a motion for rehearing of any order entered under Rule 3.800(a) and (b) within 15 days of the date of service of the order or within 15 days of the expiration of the time period for filing an order if no order is filed. The trial court’s order disposing of the motion for rehearing must be filed within 15 days of the response but not later than 40 days from the date of the order of which rehearing is sought. If no order is filed within 40 days, the motion is deemed denied. A timely filed motion for rehearing will toll rendition of the order subject to appellate review and the order must be deemed rendered 40 days from the order of which rehearing is sought, or upon the filing of a written order denying the motion for rehearing, whichever is earlier. The trial court has jurisdiction under Fla. R. Crim. P. 3.050, however, to authorize extension of the 60-day time period in which to resolve a motion to correct sentencing error as long as the court acts within the

1119 State v. Gutierrez, 10 So. 3d 158 (Fla. 3d DCA 2009).

1120 Fla. R. Crim. P. 3.800(b).

1121 Fla. R. Crim. P. 3.800(b)(1).


60-day time period to enlarge such time period and good cause is shown. The time limit is jurisdictional, and so an out-of-time order granting a Rule 3.800 motion is a nullity.

If an appeal is pending, a defendant or the state may file in the trial court a motion to correct a sentencing error. The motion may be filed by appellate counsel and must be served before the party’s first brief is served. A notice of pending motion to correct sentencing error must be filed in the appellate court, which notice automatically shall extend the time for the filing of the brief until 10 days after the clerk of circuit court transmits the supplemental record under Florida Rule of Appellate Procedure 9.140(f)(6).

The motion must be served on the trial court and on all trial and appellate counsel of record. Unless the motion expressly states that appellate counsel will represent the movant in the trial court, trial counsel will represent the movant on the motion under Fla. R. App. P. 9.140(d). If the State is the movant, trial counsel must represent the defendant unless appellate counsel for the defendant notifies trial counsel and the trial court that he or she will represent the defendant on the state’s motion. The trial court must resolve this motion in accordance with the procedures in Rule 3.800(b)(1)(B). In accordance with Fla. R. App. P. 9.140(f)(6), the clerk of circuit court must supplement the appellate record with the motion, the order, any amended sentence, and, if designated, a transcript of any additional portion of the proceedings.

**Burden**

One seeking to “correct” a sentence bears the burden of demonstrating why that sentence requires such correction. A mere conclusory allegation that the answer lies in the record will not meet the pleading requirements under the Rule, and at a minimum the motion has to allege where in the record the information can be located and explain how the record demonstrates entitlement to the relief requested. If the defendant alleges that the length of sentence was affected by

1124 *Davis v. State*, 887 So. 2d 1286 (Fla. 2004); *McGuire v. State*, 779 So. 2d 571 (Fla. 2d DCA 2001).

1125 *Mapp v. State*, 18 So. 3d 33 (Fla. 2d DCA 2009); *Manning v. State*, 961 So. 2d 1135 (Fla. 2d DCA 2007).

1126 Fla. R. Crim. P. 3.800(b)(2).


1130 *Wilson v. State*, 531 So. 2d 1012 (Fla. 2d DCA 1988).

mistakes of fact contained within the presentence investigation, such as a misrepresentation of the defendant’s prior record, it is necessary for the defendant to have objected to those errors at the time of sentencing. Alternatively, a failure to clarify known factual errors at the time of sentencing could constitute ineffective assistance of counsel. However, any such claim requires a showing that, but for counsel’s omissions, a lesser sentence would have been imposed. If the defendant believes the sentence is solely the result of a computational error in the scoresheet, he or she is required to show where such error occurred and how it affected the length of sentence. Note that a Rule 3.800(a) motion is an improper vehicle to challenge the validity of an upward departure sentence imposed under the former sentencing guidelines.

A Rule 3.800(a) motion to correct sentencing error is not an appropriate remedy where the contention of the defendant raises fact issues which require an evidentiary hearing. Note also, a defendant who has already had a Rule 3.800(a) illegal sentence claim determined against him or her is collaterally estopped from relitigating the same claim except where the application of collateral estoppel would result in a manifest injustice.

Rule 3.800 is not intended to be a substitute for appeal, and cannot be used for the review of matters the defendant failed to appeal. Claims that attack a defendant’s convictions, rather than the defendant’s sentences, are not cognizable under Fla. R. Crim. P. 3.800(a). An example of this would be where a defendant makes a claim under Rule 3.800(a) challenging his or her sentences as being violative of double jeopardy principles: Double jeopardy challenges to convictions are not cognizable under Rule 3.800(a) because (1) a traditional double jeopardy challenge attacks both the conviction and, by default, the sentences, while Rule 3.800(a) is limited to claims that a sentence itself is illegal, without regard to the underlying conviction, and (2) permitting defendants to attack their convictions and sentences under Rule 3.800(a) would subsume Fla. R. Crim. P. 3.850 into Rule 3.800(a), thereby allowing defendants to circumvent Rule 3.850’s two-year time bar for attacking

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1132 Lomont v. State, 506 So. 2d 1141 (Fla. 2d DCA 1987).
1133 Pettway v. State, 502 So. 2d 1353 (Fla. 2d DCA 1987).
1134 See, e.g., Morris v. State, 493 So. 2d 19 (Fla. 5th DCA 1986).
1135 Cf. Brunson v. State, 489 So. 2d 1159 (Fla. 1st DCA 1986) (scoresheet errors which do not affect the length of sentence are deemed harmless).
1136 See, Concepcion v. State, 944 So. 2d 1069 (Fla. 3d DCA 2006).
1137 See, Acres v. State, 925 So. 2d 435 (Fla. 5th DCA 2006); Richardson v. State, 705 So. 2d 608 (Fla. 5th DCA 1997).
1138 Knight v. State, 6 So. 3d 783 (Fla. Dist. Ct. App. 2d Dist. 2009); Cillo v. State, 913 So. 2d 1233 (Fla. 2d DCA 2005).
their convictions and sentences. A motion to correct an illegal sentence also does not authorize the trial court to modify a legal sentence on another count.

§ 27.2. Vacation, setting aside and correction of sentences under Fla. R. Crim. P. 3.850

The following grounds may be claims for relief from judgment or release from custody by a person who has been tried and found guilty or has entered a plea of guilty or nolo contendere before a court established by the laws of Florida:

(1) The judgment was entered or sentence was imposed in violation of the Constitution or laws of the United States or the State of Florida.

(2) The court did not have jurisdiction to enter the judgment.

(3) The court did not have jurisdiction to impose the sentence.

(4) The sentence exceeded the maximum authorized by law.

(5) The plea was involuntary.

(6) The judgment or sentence is otherwise subject to collateral attack.

A motion to vacate a sentence that exceeds the limits provided by law may be filed at any time. No other motion shall be filed or considered pursuant to this rule if filed more than two years after the judgment and sentence become final unless it alleges that

(1) the facts on which the claim is predicated were unknown to the movant or the movant’s attorney and could not have been ascertained by the exercise of due diligence, and the claim

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1140 Coughlin v. State, 932 So. 2d 1224 (Fla. 2d DCA 2006).

1141 Pitts v. State, 935 So. 2d 634 (Fla. 2d DCA 2006); Seago v. State, 627 So. 2d 1316 (Fla. 2d DCA 1993); Wilhelm v. State, 543 So. 2d 434 (Fla. 2d DCA 1989).


is made within two years of the time the new facts were or could have been discovered with
the exercise of due diligence,\footnote{Fla. R. Crim. P. 3.850(b)(1).} or

(2) the fundamental constitutional right asserted was not established within the period
provided for herein and has been held to apply retroactively, and the claim is made within
two years of the date of the mandate of the decision announcing the retroactivity,\footnote{Fla. R. Crim. P. 3.850(b)(2).} or

(3) the defendant retained counsel to timely file a 3.850 motion and counsel, through neglect,
failed to file the motion. A claim based on this exception shall not be filed more than two
years after the expiration of the time for filing a motion for postconviction relief.\footnote{Fla. R. Crim. P. 3.850(b)(3).}

The motion must be under oath stating that the defendant has read the motion or that it has
been read to him or her, that the defendant understands its content, and that all of the facts therein
are true and correct. The motion must also include an explanation of:

(1) the judgment or sentence under attack and the court that rendered the same;\footnote{Fla. R. Crim. P. 3.850(c)(1).}

(2) whether the judgment resulted from a plea or trial;\footnote{Fla. R. Crim. P. 3.850(c)(2).}

(3) whether there was an appeal from the judgment or sentence and the disposition
thereof;\footnote{Fla. R. Crim. P. 3.850(c)(3).}

(4) whether a previous postconviction motion has been filed, and if so, how many;\footnote{Fla. R. Crim. P. 3.850(c)(4).}

(5) if a previous motion or motions have been filed, the reason or reasons the claim or claims
in the present motion were not raised in the former motion or motions;\footnote{Fla. R. Crim. P. 3.850(c)(5).}
(6) the nature of the relief sought;\textsuperscript{1156} and

(7) a brief statement of the facts (and other conditions) relied on in support of the motion.\textsuperscript{1157}

Rule 3.850 does not authorize relief based on grounds that could have or should have been raised at trial and, if properly preserved, on direct appeal of the judgment and sentence. If the defendant is filing a newly discovered evidence claim based on recanted trial testimony or on a newly discovered witness, the defendant must include an affidavit from that person as an attachment to his or her motion. For all other newly discovered evidence claims, the defendant must attach an affidavit from any person whose testimony is necessary to factually support the defendant’s claim for relief. If the affidavit is not attached to the motion, the defendant must provide an explanation why the required affidavit could not be obtained.\textsuperscript{1158}

Motions must be typewritten or hand-written in legible printed lettering, in blue or black ink, double-spaced, with margins no less than one inch on white 81/2-by-11 inch paper. No motion, including any memorandum of law, may exceed 50 pages without leave of the court upon a showing of good cause.\textsuperscript{1159}

When the court has entered an order under Rule 3.850(f)(2) or (f)(3), granting the defendant an opportunity to amend the motion, any amendment to the motion must be served within 60 days. A motion may otherwise be amended at any time prior to either the entry of an order disposing of the motion or the entry of an order pursuant to Rule 3.850(f)(5) or directing that an answer to the motion be filed pursuant to Rule 3.850(f)(6), whichever occurs first. Leave of court is required for the filing of an amendment after the entry of an order pursuant to Rule 3.850(f)(5) or (f)(6). Notwithstanding the timeliness of an amendment, the court need not consider new factual assertions contained in an amendment unless the amendment is under oath. New claims for relief contained in an amendment need not be considered by the court unless the amendment is filed within the time frame specified in Rule 3.850(b).\textsuperscript{1160}

On filing of a motion under Rule 3.850, the clerk must forward the motion and file to the court. Disposition of the motion must be in accordance with the following procedures, which are intended to result in a single, final, appealable order that disposes of all claims raised in the motion.\textsuperscript{1161}

\textsuperscript{1156}Fla. R. Crim. P. 3.850(c)(5).
\textsuperscript{1157}Fla. R. Crim. P. 3.850(c)(7).
\textsuperscript{1158}Fla. R. Crim. P. 3.850(c).
\textsuperscript{1159}Fla. R. Crim. P. 3.850(d).
\textsuperscript{1160}Fla. R. Crim. P. 3.850(e).
\textsuperscript{1161}Fla. R. Crim. P. 3.850(f).
If the motion is insufficient on its face, and the time to file a motion under Rule 3.850 has expired prior to the filing of the motion, the court must enter a final appealable order summarily denying the motion with prejudice.\textsuperscript{1162}

If the motion is insufficient on its face, and the motion is timely filed under Rule 3.850, the court must enter a nonfinal, nonappealable order allowing the defendant 60 days to amend the motion. If the amended motion is still insufficient or if the defendant fails to file an amended motion within the time allowed for such amendment, the court, in its discretion, may permit the defendant an additional opportunity to amend the motion or may enter a final, appealable order summarily denying the motion with prejudice.\textsuperscript{1163}

If the motion sufficiently states one or more claims for relief and it also attempts but fails to state additional claims, and the motion is timely filed under Rule 3.850, the court shall enter a nonappealable order granting the defendant 60 days to amend the motion to sufficiently state additional claims for relief. Any claim for which the insufficiency has not been cured within the time allowed for such amendment shall be summarily denied in an order that is a nonfinal, nonappealable order, which may be reviewed when a final, appealable order is entered.\textsuperscript{1164}

If the motion sufficiently states one or more claims for relief but the files and records in the case conclusively show that the defendant is not entitled to relief as to one or more claims, the claims that are conclusively refuted must be summarily denied on the merits without a hearing. A copy of that portion of the files and records in the case that conclusively shows that the defendant is not entitled to relief as to one or more claims must be attached to the order summarily denying these claims. The files and records in the case are the documents and exhibits previously filed in the case and those portions of the other proceedings in the case that can be transcribed. An order that does not resolve all the claims is a nonfinal, nonappealable order, which may be reviewed when a final, appealable order is entered.\textsuperscript{1165}

If the motion is legally sufficient but all grounds in the motion can be conclusively resolved either as a matter of law or by reliance upon the records in the case, the motion must be denied without a hearing by the entry of a final order. If the denial is based on the records in the case, a copy of that portion of the files and records that conclusively shows that the defendant is entitled to no relief must be attached to the final order.\textsuperscript{1166}

\textsuperscript{1162}Fla. R. Crim. P. 3.850(f)(1).
\textsuperscript{1163}Fla. R. Crim. P. 3.850(f)(2).
\textsuperscript{1164}Fla. R. Crim. P. 3.850(f)(3).
\textsuperscript{1165}Fla. R. Crim. P. 3.850(f)(4).
\textsuperscript{1166}Fla. R. Crim. P. 3.850(f)(5).
Unless the motion, files, and records in the case conclusively show that the defendant is entitled to no relief, the court must order the state attorney to file, within the time fixed by the court, an answer to the motion. The answer shall respond to the allegations contained in the defendant’s sufficiently pleaded claims, describe any matters in avoidance of the sufficiently pleaded claims, state whether the defendant has used any other available state postconviction remedies including any other motion under Rule 3.850, and state whether the defendant has previously been afforded an evidentiary hearing.\textsuperscript{1167}

The court may appoint counsel to represent the defendant under Rule 3.850. The factors to be considered by the court in making this determination include: the adversary nature of the proceeding, the complexity of the proceeding, the complexity of the claims presented, the defendant’s apparent level of intelligence and education, the need for an evidentiary hearing, and the need for substantial legal research.\textsuperscript{1168}

If an evidentiary hearing is required, the court must grant a prompt hearing and must cause notice to be served on the state attorney and the defendant or defendant’s counsel, and must determine the issues, and make findings of fact and conclusions of law with respect thereto.\textsuperscript{1169} At an evidentiary hearing, the defendant has the burden of presenting evidence and the burden of proof in support of his or her motion, unless otherwise provided by law.\textsuperscript{1170} The order issued after the evidentiary hearing must resolve all the claims raised in the motion and must be considered the final order for purposes of appeal.\textsuperscript{1171}

The defendant’s presence is not be required at any hearing or conference held under Rule 3.850 except at the evidentiary hearing on the merits of any claim.\textsuperscript{1172}

A second or successive motion must be titled: “Second or Successive Motion for Postconviction Relief.”\textsuperscript{1173} A second or successive motion is an extraordinary pleading. Accordingly, a court may dismiss a second or successive motion if the court finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the defendant or the attorney to assert those grounds in a prior motion constituted an abuse of the procedure or there was no good

\textsuperscript{1167}Fla. R. Crim. P. 3.850(f)(6).
\textsuperscript{1168}Fla. R. Crim. P. 3.850(f)(7).
\textsuperscript{1169}Fla. R. Crim. P. 3.850(f)(8)(A).
\textsuperscript{1171}Fla. R. Crim. P. 3.850(f)(8)(C).
\textsuperscript{1172}Fla. R. Crim. P. 3.850(g).
\textsuperscript{1173}Fla. R. Crim. P. 3.850(h)(1).
cause for the failure of the defendant or defendant’s counsel to have asserted those grounds in a prior motion. When a motion is dismissed under Rule 3.850(h), a copy of that portion of the files and records necessary to support the court’s ruling must accompany the order denying the motion. \textsuperscript{1174}

The clerk of the court must promptly serve on the parties a copy of any order entered under Rule 3.850, noting thereon the date of service by an appropriate certificate of service. \textsuperscript{1175}

Any party may file a motion for rehearing of any final order addressing a motion under Rule 3.850 within 15 days of the date of service of the order. A motion for rehearing is not required to preserve any issue for review in the appellate court. A timely filed motion for rehearing will toll finality of any final order addressing a motion under Rule 3.850. A motion for rehearing must be based on a good faith belief that the court has overlooked a previously argued issue of fact or law or an argument based on a legal precedent or statute not available prior to the court’s ruling. A response may be filed within 10 days of service of the motion. The trial court’s order disposing of the motion for rehearing must be filed within 15 days of the response but not later than 40 days from the date of the order of which rehearing is sought. If no order is filed within 40 days, the motion is deemed denied. \textsuperscript{1176}

An appeal may be taken to the appropriate appellate court only from the final order disposing of the motion. All final orders denying motions for postconviction relief must include a statement that the defendant has the right to appeal within 30 days of the rendition of the final order. All nonfinal, nonappealable orders entered pursuant to Rule 3.850(f) should include a statement that the defendant has no right to appeal the order until entry of the final order. \textsuperscript{1177}

Pursuant to the procedures outlined in Fla. R. App. P. 9.141, a defendant may seek a belated appeal or discretionary review. \textsuperscript{1178}

An application for writ of habeas corpus on behalf of a prisoner who is authorized to apply for relief by motion pursuant to Rule 3.850 must not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court that sentenced the applicant or that the court has denied the applicant relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of the applicant’s detention. \textsuperscript{1179}

\textsuperscript{1174}Fla. R. Crim. P. 3.850(h)(2).

\textsuperscript{1175}Fla. R. Crim. P. 3.850(i).

\textsuperscript{1176}Fla. R. Crim. P. 3.850(j).

\textsuperscript{1177}Fla. R. Crim. P. 3.850(k).

\textsuperscript{1178}Fla. R. Crim. P. 3.850(l).

\textsuperscript{1179}Fla. R. Crim. P. 3.850(m).
No motion may be filed pursuant to Rule 3.850 unless it is filed in good faith and with a reasonable belief that it is timely, has potential merit, and does not duplicate previous motions that have been disposed of by the court. By signing a motion pursuant to Rule 3.850, the defendant certifies that: the defendant has read the motion or that it has been read to the defendant and that the defendant understands its content; the motion is filed in good faith and with a reasonable belief that it is timely filed, has potential merit, and does not duplicate previous motions that have been disposed of by the court; and, the facts contained in the motion are true and correct. The defendant must either certify that the defendant can understand English or, if the defendant cannot understand English, that the defendant has had the motion translated completely into a language that the defendant understands. The motion must contain the name and address of the person who translated the motion and that person must certify that he or she provided an accurate and complete translation to the defendant. Failure to include this information and certification in a motion will be grounds for the entry of an order dismissing the motion pursuant to Rule 3.850(f)(1), (f)(2), or (f)(3).

Conduct prohibited under Rule 3.850 includes, but is not limited to, the following: the filing of frivolous or malicious claims; the filing of any motion in bad faith or with reckless disregard for the truth; the filing of an application for habeas corpus subject to dismissal pursuant to Rule 3.850(m); the willful violation of any provision of Rule 3.850; and the abuse of the legal process or procedures governed by Rule 3.850.

The court, upon its own motion or on the motion of a party, may determine whether a motion has been filed in violation of Rule 3.850. The court must issue an order setting forth the facts indicating that the defendant has or may have engaged in prohibited conduct. The order must direct the defendant to show cause, within a reasonable time limit set by the court, why the court should not find that the defendant has engaged in prohibited conduct under Rule 3.850 and impose an appropriate sanction. Following the issuance of the order to show cause and the filing of any response by the defendant, and after such further hearing as the court may deem appropriate, the court must make a final determination of whether the defendant engaged in prohibited conduct under Rule 3.850.

If the court finds by the greater weight of the evidence that the defendant has engaged in prohibited conduct under Rule 3.850, the court may impose one or more sanctions, including: (1) contempt as otherwise provided by law; (2) assessing the costs of the proceeding against the

1180 Fla. R. Crim. P. 3.850(n).
1181 Fla. R. Crim. P. 3.850(n)(1).
1182 Fla. R. Crim. P. 3.850(n)(2).
1183 Fla. R. Crim. P. 3.850(n)(3).
1184 Fla. R. Crim. P. 3.850(n).
defendant;\textsuperscript{1186} (3) dismissal with prejudice of the defendant’s motion;\textsuperscript{1187} (4) prohibiting the filing of further pro se motions under Rule 3.850 and directing the clerk of court to summarily reject any further pro se motion under Rule 3.850;\textsuperscript{1188} (5) requiring that any further motions under Rule 3.850 be signed by a member in good standing of The Florida Bar, who shall certify that there is a good faith basis for each claim asserted in the motion;\textsuperscript{1189} and/or (5) if the defendant is a prisoner, a certified copy of the order be forwarded to the appropriate institution or facility for consideration of disciplinary action against the defendant, including forfeiture of gain time pursuant to Chapter 944, Fla. Stat.\textsuperscript{1190} If the court determines there is probable cause to believe that a sworn motion contains a false statement of fact constituting perjury, the court may refer the matter to the state attorney.\textsuperscript{1191}

\section*{§ 27.3. Correction of jail credit under Fla. R. Crim. P. 3.801}

On April 18, 2013, the Florida Supreme Court promulgated Fla. R. Crim. P. 3.801 pertaining to correction of jail credit, with an effective date of July 1, 2013.\textsuperscript{1192}

Pursuant to Rule 3.801, a court may correct a sentence that fails to allow a defendant credit for all of the time he or she spent in the county jail before sentencing as provided in section 921.161, Fla. Stat.\textsuperscript{1193} No motion will be filed or considered pursuant to Rule 3.801 if filed more than one year after the sentence becomes final.\textsuperscript{1194} The motion must be under oath and include: (1) a brief statement of the facts relied on in support of the motion;\textsuperscript{1195} (2) the dates, location of incarceration and total time for credit already provided;\textsuperscript{1196} (3) the dates, location of incarceration and total time for credit the defendant contends was not properly awarded;\textsuperscript{1197} (4) whether any other criminal

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{1186} Fla. R. Crim. P. 3.850(n)(4)(B).
\item \textsuperscript{1187} Fla. R. Crim. P. 3.850(n)(4)(C).
\item \textsuperscript{1188} Fla. R. Crim. P. 3.850(n)(4)(D).
\item \textsuperscript{1189} Fla. R. Crim. P. 3.850(n)(4)(E).
\item \textsuperscript{1190} Fla. R. Crim. P. 3.850(n)(4)(F).
\item \textsuperscript{1191} Fla. R. Crim. P. 3.850(n)(5).
\item \textsuperscript{1192} In re: Amendments to the Florida Rules of Criminal Procedure and the Florida Rules of Appellate Procedure, 2013 Florida Court Order 0011 (C.O. 0011).
\item \textsuperscript{1193} Fla. R. Crim. P. 3.801(a).
\item \textsuperscript{1194} Fla. R. Crim. P. 3.801(b).
\item \textsuperscript{1195} Fla. R. Crim. P. 3.801(c)(1).
\item \textsuperscript{1196} Fla. R. Crim. P. 3.801(c)(2).
\item \textsuperscript{1197} Fla. R. Crim. P. 3.801(c)(3).
\end{enumerate}
\end{footnotesize}
charges were pending at the time of the incarceration noted in Rule 3.801(c)(3), and if so, the location, case number and resolution of the charges,1198 and (5) whether the defendant waived any county jail credit at the time of sentencing, and if so, the number of days waived.1199 No successive motions for jail credit will be considered.1200 The following subdivisions of Fla. R. Crim. P. 3.850 apply to proceedings under Rule 3.801: Rule 3.850(e), (f), (j), (k), and (n).1201

§ 27.4. Increase of a lawful sentence

There is no authority under the Florida Rules of Court to increase a lawful sentence after pronouncement, and an increase of a lawful sentence is expressly prohibited by Florida case law, grounded on the double jeopardy clause of the Fifth Amendment to the United States Constitution.1202 Where, however, the written judgment and sentence forms have not been filed and the defendant has not commenced service of his or her sentence, the trial judge can correct his or her earlier misstatement and impose an increased sentence in accordance with the trial court’s original sentencing intention.1203

§ 27.5. Modification of a completed sentence

As a general matter, a trial court loses jurisdiction to modify or change a sentence 60 days after the sentence is imposed or becomes final.1204 Thus, a trial court lacks jurisdiction to modify a legal sentence after it has been completed by the defendant.1205

§ 28. Amendment or clarification of sentence

While a trial court has the authority to reduce or modify a legal sentence imposed by it within 60 days of the original sentencing, the court may not enhance the sentence after the defendant has

1198Fla. R. Crim. P. 3.801(c)(4).
1199Fla. R. Crim. P. 3.801(c)(5).
1200Fla. R. Crim. P. 3.801(d).
1201Fla. R. Crim. P. 3.801(e).
1202Cherry v. State, 439 So. 2d 998 (Fla. 4th DCA 1983) (trial court cannot vacate previous legal sentence and impose greater sentence); Troupe v. Rowe, 283 So. 2d 857 (Fla. 1973); Royal v. State, 389 So. 2d 696 (Fla. 2d DCA 1980); Gonzalez v. State, 384 So. 2d 57 (Fla. 4th DCA 1980); Andrews v. State, 357 So. 2d 489 (Fla. 1st DCA 1978); Flowers v. State, 351 So. 2d 387 (Fla. 1st DCA 1977); Katz v. State, 335 So. 2d 608 (Fla. 2d DCA 1976).
1203Rizzo v. State, 430 So. 2d 488 (Fla. 1st DCA 1983).
1204See, State v. Nichols, 629 So. 2d 970, 972 (Fla. 5th DCA 1993); cf. Schlabach v. State, 37 So. 3d 230 (Fla. 2010); Davis v. State, 887 So. 2d 1286 (Fla. 2004).
1205State v. Cousins, 62 So. 3d 677 (Fla. 5th DCA 2011).
begun serving it. Imposition of a harsher sentence after a defendant has already begun serving his or her original sentence violates double jeopardy principles.\textsuperscript{1206} This is true even if the original sentence was illegal or otherwise erroneous and the correction conforms to applicable law or to the court’s and parties’ intentions at sentencing.\textsuperscript{1207} The State may only challenge a sentence reduction by direct appeal.\textsuperscript{1208}

What a court can do, however, is clarify a sentence imposed to overcome clerical errors and omissions. Although the Rules of Criminal Procedure do not include a rule authorizing the correction of errors in judgments, the Florida Supreme Court has determined that a court of record may, even after expiration of term, correct formal clerical mistakes in its judgments and decrees by \textit{nunc pro tunc} order, which will, as a general rule, relate back to and take effect as of date of judgment or decree so corrected.\textsuperscript{1209} The appellate courts have expanded this determination into a \textit{de facto} adoption of Fla. R. Civ. P. 1.540(a), that “Clerical mistakes in judgments, decrees, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders,” to criminal proceedings.\textsuperscript{1210} This rule of ambiguity has also been expanded to include situations where the court’s oral pronouncement of sentence differs from the negotiated plea

\begin{itemize}
\item \textsuperscript{1206}Shepard v. State, 940 So. 2d 545 (Fla. 5th DCA 2006) (defendant’s double jeopardy rights violated when court recalled parties approximately 50 minutes after sentencing hearing had concluded and changed oral pronouncement of “concurrent” to “consecutive” on one of defendant’s sentences; original pronouncement was neither ambiguous nor illegal, and pronouncement became final when sentencing hearing ended); Ashley v. State, 850 So. 2d 1265 (Fla. 2003) (double jeopardy violation where trial court, three days after sentencing defendant as habitual felony offender, imposed habitual violent felony offender sentence along with mandatory minimum); Grant v. State, 770 So. 2d 655 (Fla. 2000); Rivera v. State, 862 So. 2d 55 (Fla. 2d DCA 2003) (An amended sentence, imposed more than 60 days after imposition of the original sentence, that deviates from the original oral pronouncement and constitutes an increased sentence is in violation of double jeopardy); Evans v. State, 675 So. 2d 1012, 1015 (Fla. 4th DCA 1996) (court’s clarification of sentence two days after oral pronouncement, to reflect the defendant’s habitual offender status, was violation of the defendant’s double jeopardy rights and constituted reversible error where the oral pronouncement clearly did not reflect the trial court’s intention to sentence defendant as habitual offender, notwithstanding fact that the trial court’s failure to include habitual sentencing in its oral pronouncement may well have been an oversight).
\item \textsuperscript{1207}Pate v. State, 908 So. 2d 613 (Fla. 2d DCA 2005); Maybin v. State, 884 So. 2d 1174, 1175 (Fla. 2d DCA 2004); Rivera v. State, 862 So. 2d 55, 56 (Fla. 2d DCA 2003); Nelson v. State, 724 So. 2d 1202, 1204 (Fla. 2d DCA 1998); see also, \textit{U.S. v. Jones}, 722 F.2d 632 (11th Cir. 1983) (resentencing of defendant who had begun to serve his original sentence, following court’s realization that it had misapprehended certain factual matters, through no fault of defendant, frustrated defendant’s legitimate expectations with respect to the duration of his sentence, and therefore violated the double jeopardy clause).
\item \textsuperscript{1209}Boggs v. Wainwright, 223 So. 2d 316 (Fla. 1969).
\item \textsuperscript{1210}Luhrs v. State, 394 So. 2d 137, 139 (Fla. 5th DCA 1981).
\end{itemize}
agreement on the record and the scoresheet used at sentencing, and the record of the plea agreement and the scoresheet are in agreement.\footnote{Duncan v. State, 59 So. 3d 1197 (Fla. 5th DCA 2011).}

\textit{Nunc pro tunc} simply means “now for then” and when applied to the entry of a legal order or judgment it normally does not refer to a new or fresh (de novo) decision, as when a decision is made after the death of a party, but relates to a ruling or action actually previously made or done but concerning which for some reason the record thereof is defective or omitted. The later record making does not itself have a retroactive effect but it constitutes the later evidence of a prior effectual act.\footnote{Luhrs v. State, 394 So. 2d 137 (Fla. 5th DCA 1981).} A judgment \textit{nunc pro tunc} presupposes a judgment actually rendered at the proper time, but not entered, and it is a general rule that a judgment \textit{nunc pro tunc} cannot regularly be entered unless such judgment has been in fact previously rendered.\footnote{Dunkle v. State, 98 Fla. 985, 124 So. 725 (Fla. 1929).} It is, therefore, a proper use of a \textit{nunc pro tunc} order to make the record “speak the truth” as to what actually occurred and not be used to change matters of substance, or to resolve a genuine ambiguity, in a judgment previously rendered and plainly and properly settled with finality.

\section*{§ 29. Sentences imposed by mistake or misconception}

To be valid, a sentence must be based on accurate information.\footnote{See, \textit{U.S. v. Tucker}, 404 U.S. 443, 92 S. Ct. 589, 30 L. Ed. 2d 592 (1972).} A sentence based upon an offense to which a defendant has neither pled guilty or \textit{nolo contendere} nor been convicted by a jury is invalid and after discovery of the error the court has the authority to properly sentence the defendant for the offense to which he or she did plead or for which he or she was convicted.\footnote{See, \textit{e.g.}, \textit{People v. Corlin}, 95 Mich. App. 740, 291 N.W.2d 188 (1980); also, Power of court to increase severity of unlawful sentence--modern status, 28 A.L.R.4th 147.}

Generally, a sentencing court has the unlimited authority to correct a sentencing error up to the point where the sentencing hearing ends and the defendant begins to serve his or her sentence and double jeopardy attaches. The court also has the authority to correct a sentence imposed on the basis of a mistake or misapprehension of sentencing laws that renders the sentence illegal, as where a court imposes a three-year mandatory minimum sentence when the proper sentence would have been a 10-year minimum mandatory,\footnote{Allen v. State, 853 So. 2d 533 (Fla. 5th DCA 2003).} or where the court erroneously imposes concurrent sentences contrary to a statute that mandates consecutive sentencing. There is, in any event, no legitimate expectation of finality on the part of the defendant in a sentence that the court has no discretion to impose, and so a court can correct a sentence to add nondiscretionary mandatory minimum terms
without violating double jeopardy even when the defendant has already begun to serve an erroneously imposed sentence.1217

Fla. R. Crim. P. 3.170(f) governs withdrawals of plea prior to sentencing. A defendant shows good cause to withdraw a plea prior to sentencing where the defendant demonstrates that his or her previously tendered guilty plea was infected by misapprehension, undue persuasion, ignorance, or was entered by one not competent to know its consequences or that it was otherwise involuntary, or that the ends of justice would be served by withdrawal of the plea.1218 If the motion to withdraw the plea is made after sentencing, the provisions of Fla. R. Crim. P. 3.170(l) apply, which allows withdrawal of the plea only on the limited grounds listed in Fla. R. App. P. 9.140(b). Once sentence has been imposed, to withdraw a plea, a defendant must demonstrate a manifest injustice requiring correction.1219 A defendant’s entry of a plea based upon his or her attorney’s misrepresentations as to the length of a sentence or eligibility for gain time can constitute such a manifest injustice and serve as a basis for allowing a defendant to withdraw the plea.1220 Mutual mistake on the part of the trial court and the parties as to the correct sentencing range the defendant is exposed to may also serve as a basis for withdrawal of a plea.1221 Note that the thirty day limitation for filing a Rule 3.170(l) motion to withdraw plea begins to run from the date the defendant realizes the sentencing mistake or misconception.1222

The rule which authorizes a sentencing court to correct an illegal sentence does not permit the court to increase a legal and unambiguous sentence after the pronouncement becomes final, even if the orally pronounced sentence was based on mistake,1223 or misapprehension as to the court’s sentencing prerogatives.1224 The written sentence must conform to the oral pronouncement of sentence and where through oversight it does not, the defendant must be sentenced in accordance

1217 Dunbar v. State, 89 So. 3d 901 (Fla. 2012).
1218 See, Wagner v. State, 895 So. 2d 453 (Fla. 5th DCA 2005); see also, Fla. Jur. 2d, Criminal Law §§ 1349, 2307.
1219 Lopez v. State, 536 So. 2d 226 (Fla. 1988).
1220 State v. Leroux, 689 So. 2d 235 (Fla. 1996); see also, Hall v. State, 891 So. 2d 1066 (Fla. 2d DCA 2004).
1221 Ganey v. State, 873 So. 2d 445 (Fla. 2d DCA 2004).
1222 Rogers v. State, 864 So. 2d 521 (Fla. 5th DCA 2004).
1223 Comtois v. State, 891 So. 2d 1130 (Fla. 5th DCA 2005).
1224 Spear v. State, 632 So. 2d 201 (Fla. 1st DCA 1994).
with the original oral pronouncement. Where, for example, the court sentences a defendant to a term of years equal to the applicable minimum mandatory prison sentence for drug trafficking, but does not orally pronounce the minimum mandatory condition of the sentence and the State does not object to this omission, the court may not thereafter, once the defendant has commenced serving the sentence, change the sentence to reflect the minimum mandatory condition, because the minimum mandatory sentence for drug trafficking can be waived by the State, and so the sentence cannot be “corrected.”

A downward departure sentence where the sentencing judge fails to file written reasons for the departure is not such a sentencing “mistake” that would void the departure and compel the court to resentence the defendant within the applicable sentencing guidelines or Criminal Punishment Code range, so long as it can be established that valid reasons for the departure exist.

Where a sentence has already been served, even if it is an illegal sentence, the court lacks jurisdiction and would violate the double jeopardy clause by resentencing the defendant to an increased sentence. An example of the application of this rule is the case of Ronald Sneed: A jury found Sneed guilty of attempted possession of cocaine and possession of drug paraphernalia. Immediately after the verdict, the trial court adjudicated Sneed guilty of both offenses and, thinking that both offenses were misdemeanors, sentenced Sneed to time served with the agreement of the State. The next day, the trial court vacated the judgment and sentence and subsequently held a new sentencing hearing, because the court and the State were wrong in their conclusion that attempted possession of cocaine was a misdemeanor when, in fact, it was a felony. At the second sentencing hearing, the trial court sentenced Sneed to 140.4 months in prison and Sneed appealed. The Fourth District Court of Appeal found that the resentencing was fundamental error because, by the time the trial court realized its mistake, Sneed’s sentence had already been served, the trial court had lost jurisdiction over the case, and the resentencing placed Sneed in double jeopardy for the same offense after Sneed had been discharged.

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1225 Shepard v. State, 940 So. 2d 545 (Fla. 5th DCA 2006) (defendant’s double jeopardy rights violated when court recalled parties approximately 50 minutes after sentencing hearing had concluded and changed oral pronouncement of “concurrent” to “consecutive” on one of defendant’s sentences; original pronouncement was neither ambiguous or illegal, and pronouncement became final when sentencing hearing ended). Ashley v. State, 872 So. 2d 350 (Fla. 1st DCA 2004) (defendant’s oral sentence as habitual felony offender to 25 years prevailed over written sentence as habitual violent felony offender).

1226 Gray v. State, 915 So. 2d 254 (Fla. 5th DCA 2005); see also, Felders v. State, 55 So. 3d 724 (Fla. 5th DCA 2011); Delemos v. State, 969 So. 2d 544, 551 (Fla. 2d DCA 2007).

1227 State v. Baksh, 758 So. 2d 1222 (Fla. 4th DCA 2000); Pease v. State, 712 So. 2d 374 (Fla. 1997).

1228 See, Palmer v. State, 182 So. 2d 625 (Fla. 4th DCA 1966); U.S. v. Silvers, 90 F.3d 95 (4th Cir. 1996).

1229 Sneed v. State, 749 So. 2d 545 (Fla. 4th DCA 2000).
§ 30. Vacatur of sentences obtained by fraud or misrepresentation

Under the common law, any court of record had absolute control over its orders, decrees, etc., and could amend, vacate, modify or change them at any time during the term at which rendered. Control now is in the courts during the period allowed by the rules of court, terms (as used in common law) having been abandoned. This restriction does, however, not apply to such orders, judgments or decrees which are the product of fraud, collusion, deceit, mistake, etc. Such may be vacated, modified, opened or otherwise acted upon at any time. This is an inherent power of courts of record, and one essential to insure the true administration of justice and the orderly function of the judicial process. As between the parties any judgment or order procured from any court by the practice of fraud or deception may, in appropriate proceedings, be recalled and set aside at any time, whether entered in a civil case or a criminal case. Generally, the power of vacatur is not limited to situations in which affirmative declarations were addressed directly to the bench in open court, but may also include invalidation of a sentence rendered in reliance upon a false out of court statement made by the defendant to a third party where the defendant knows and intends at the time the misrepresentation is made that the sentencing court would rely upon the misrepresentation.

Vacatur implicates double jeopardy. The guarantee against double jeopardy consists of three separate constitutional protections. It protects against (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. The underlying purpose of the double jeopardy clause is to avoid subjecting the defendant to repeated embarrassment, expense, anxiety, and insecurity. In short, the defendant at some point must be entitled to rely on the finality of the court’s action. A sentence does not, however, have the qualities of constitutional finality that attend an acquittal. The Double Jeopardy Clause, however, respects only the defendant’s legitimate expectations as to sentence length, and the defendant’s legitimate expectations of finality are not defeated by an increased sentence on appeal any more than are the expectations of the defendant who is placed on parole or probation that is later revoked.

1230 State v. Burton, 314 So. 2d 136, 138 (Fla. 1975) (vacatur of order for new trial granted on basis of fraudulent affidavit); Booker v. State, 503 So. 2d 888 (Fla. 1987) (an order procured by fraud upon the court, including an order denying a motion for post-conviction relief, may be set aside at any time).

1231 See Lockett v. Juviler, 65 N.Y.2d 182, 490 N.Y.S.2d 764, 480 N.E.2d 378 (1985) (vacatur of sentence where court accepted defendant’s plea of not responsible by reason of mental disease or defect in light of psychiatric expert’s opinion that defendant suffered from post-traumatic stress syndrome, which opinion was based upon defendant’s false representation that he had served in combat during the Vietnam War).


defendant’s expectations, courts draw a distinction between one who intentionally deceives the sentencing authority or thwarts the sentencing process and one who is forthright in every respect. Whereas the former will have purposely created any error on the sentencer’s part and thus can have no legitimate expectation regarding the sentence thereby procured, the latter, being blameless, may legitimately expect that the sentence, once imposed and commenced, will not later be enhanced.\textsuperscript{1236}

In federal practice, vacatur is applicable in the situation in which a misrepresentation is contained in papers filed with the court by an attorney where the defendant in whose behalf they are submitted knew of the falsity and failed to correct the misrepresentation or advise the court or his or attorney thereof.\textsuperscript{1237} In terms of sentencing, where the original sentence was affected by some affirmative act on the part of the defendant, a trial court may resentence a defendant to a longer sentence, or sentence the defendant in a different manner, than the sentence originally imposed. The basic premise is that a court must be able to sentence a defendant upon accurate information, and when the sentence imposed is based upon fraudulent information provided by the defendant, the court has the inherent power to correct that sentence.\textsuperscript{1238}

A defendant’s purposeful failure to reveal information which he or she knows would engender a different judgment can be as much a fraud on the court as is an affirmatively stated falsehood intended to conceal such dispositive information. Where, for example, a defendant intentionally falsely states his or her identity, knowing that the sentence to be imposed would be lower than a sentence which would have been imposed had his or her true identity been revealed (e.g., because of the absence of his or her prior criminal history), when the falsity of the defendant’s statements are revealed, the trial court may resentence the defendant and impose a correct sentence. This is because a defendant in such a situation has no legitimate expectation of finality in the sentence originally imposed and there is no double jeopardy prohibition against subsequent imposition of a correct sentence.\textsuperscript{1239} It is also because a court must be able to sentence a defendant upon accurate information.

While the general rule in Florida is that once a defendant has begun to serve his or her sentence, the judge may not recall that defendant and resentence him or her to an increased term,

\textsuperscript{1236}{U.S. v. Jones, 722 F.2d 632 (11th Cir. 1983); see also, U.S. v. Bishop, 774 F.2d 771, 775 (7th Cir. 1985) (“A court must be able to sentence a defendant upon accurate information and when the sentence imposed is based upon fraudulent information provided by the defendant, the court has the inherent power to correct that sentence.”).}

\textsuperscript{1237}{See U.S. v. Bishop, 774 F.2d 771 (7th Cir. 1985) (on motion to modify sentence defendant failed to advise that state court’s sentence for which defendant was seeking concurrent credit had previously been substantially reduced).}

\textsuperscript{1238}{U.S. v. Bishop, 774 F.2d 771 (7th Cir. 1985).}

\textsuperscript{1239}{Goene v. State, 577 So. 2d 1306 (Fla. 1991) (a trial court may resentence to a greater term a defendant who, because he or she affirmatively misrepresented his or her identity, was originally sentenced pursuant to an inaccurate scoresheet).}
there are exceptions to the rule that are consistent with the court’s inherent power.\textsuperscript{1240} The rule of vacatur has been extended to permit courts to vacate the granting of a defendant’s Rule 3.800(a) motion that was based on false or incomplete information, upon the State’s timely motion for rehearing, and to impose a greater sentence than was the result of granting the defendant’s motion without violating double jeopardy prohibitions.\textsuperscript{1241}

Vacatur of final discharges in Florida courts has been limited to situations of extrinsic fraud, except where extrinsic fraud is perpetrated against a criminal defendant. A final order procured by fraudulent testimony against a criminal case is deserving of no protection, and due process requires that the defendant be given every opportunity to expose the fraud and obtain relief from it.\textsuperscript{1242} Otherwise, only extrinsic fraud constitutes fraud on the court; intrinsic fraud is insufficient to set aside a final order.\textsuperscript{1243} A final order of discharge affected with intrinsic fraud such as to render it \textit{void ab initio} may therefore be set aside because it is of no force and effect from its inception.\textsuperscript{1244}

Where the defendant is represented by counsel at sentencing, misrepresentation on the part of the defendant implicates the ethical duties and responsibilities of the defense attorney toward the tribunal. The Rules Regulating The Florida Bar provide, \textit{inter alia}, that in the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 4-1.6 (Confidentiality of Information).\textsuperscript{1245} A lawyer is thus required to be truthful when dealing with others on a client’s behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false.

\textsuperscript{1240}See, \textit{e.g.}, \textit{Smith v. Brown}, 135 Fla. 830, 185 So. 732 (1938) (defendant adjudged guilty of larceny of automobile and sentenced to serve six months in county jail; during same term of the court, sentence revoked and annulled and defendant temporarily discharged on the basis of physician’s representation that removal from the jail was necessary to save defendant from pneumonia; one year later, defendant again brought before court and sentenced to serve two years in state prison under same conviction); see, also, \textit{State ex rel. Rhoden v. Chapman}, 127 Fla. 9, 172 So. 56 (1937) (where court vacates sentence at request or with consent of convicted defendant at same term at which sentence was imposed, and defers imposition of new sentence to subsequent term to which case is continued, during which time defendant is released on bond, court may, at subsequent term, impose new sentence on original conviction, even though greater or materially different in effect from first sentence).

\textsuperscript{1241}\textit{Lormeus v. State}, 10 So. 3d 190 (Fla. 4th DCA 2009).

\textsuperscript{1242}\textit{State v. Glover}, 564 So. 2d 191 (Fla. 5th DCA 1990).

\textsuperscript{1243}\textit{Thompson v. Crawford}, 479 So. 2d 169 (Fla. 3d DCA 1985), citing \textit{DeClaire v. Yohanan}, 453 So. 2d 375, 377 (Fla. 1984).

\textsuperscript{1244}\textit{Driscoll v. State}, 538 So. 2d 1283 (Fla. 1st DCA 1989).

\textsuperscript{1245}Rule 4-4.1 (Truthfulness in Statements to Others); Rule 4-1.6 (Confidentiality of Information).
Misrepresentations can also occur by failure to act. Subdivision (b) recognizes that substantive law may require a lawyer to disclose certain information to avoid being deemed to have assisted the client’s crime or fraud. The requirement of disclosure created by this subdivision is, however, subject to the obligations created by Rule 4-1.6. Under Rule 4-3(4), however, a lawyer shall not knowingly permit any witness, including a criminal defendant, to offer testimony or other evidence that the lawyer knows to be false, and is required under the rule to inform the tribunal of all material facts known to the lawyer.1246

A criminal defense counsel who learns that his or her client, the defendant, is proceeding under a false name may, nonetheless, not inform the court of this fact due to the attorney-client privilege, the client’s constitutional right to effective assistance of counsel, or the client’s constitutional privilege against self-incrimination. The attorney, however, may not assist the client in perpetrating or furthering a crime or a fraud on the court.1247 A defense lawyer also has no obligation to disclose a client’s record of prior convictions in order to prevent a court from imposing a sentence on the basis of incomplete or inaccurate information about the client’s record, provided that neither the defense lawyer nor the defendant affirmatively misrepresented to the court that the defendant had no prior record.1248

§ 31. Resentencing generally

A defendant who has had his or her sentence vacated stands before the court in the same condition as at the original sentencing and has the same procedural and due process rights as any other defendant facing original sentencing. This means that the original scoresheet or a facsimile thereof should be used at resentencing, even if at the time of resentencing the defendant has already served the maximum sentence for one or more additional charges that appeared on that scoresheet. In such cases, the defendant is entitled credit for time served on all of the scored offenses, including those for which jurisdiction otherwise would have lapsed. The exception to this is where the defendant is being resentienced after a revocation of probation, in which case those additional offenses are scored as prior record if in fact they were committed prior to the primary offense, and not at all if they occurred simultaneously with, or after, the primary offense.1249 In any event, trial courts are not authorized, on remand after direct appeal, to modify sentences or convictions not

1246 Rule 4-3.3 (Candor Towards the Tribunal); see also, Ethics Opinion 75-19, The Florida Bar (March 15, 1977).


1248 Ethics Opinion 86-3, The Florida Bar (Dec. 15, 1986); Meehan v. State, 397 So. 2d 1214 (Fla. 2d DCA 1981) (where defendant would have subjected himself to longer imprisonment by testifying to prior convictions, defendant retained his right against self-incrimination during habitual offender sentencing proceeding; thus, trial court erred when it found defendant in contempt for exercising his constitutional right to refuse to answer question regarding such alleged convictions).

1249 Sanders v. State, 35 So. 3d 864 (Fla. 2010).
disturbed by the appellate court judgment. Note that there is nothing to prohibit simultaneous resentencing the defendant for offenses for which the sentences have been vacated and sentencing of the defendant is for new offenses for which the defendant has not previously been sentenced, and using the same scoresheet if all of the offenses fall under the same sentencing scheme.

§ 32. Increased punishment upon resentencing

The constitutions of Florida and the United States impose no limitations whatever upon the power to retry a defendant who has succeeded in getting his or her first conviction set aside. A corollary of the power to retry a defendant is the power, upon the defendant’s reconviction, to impose whatever sentence may be legally authorized, whether or not it is greater than the sentence imposed after the first conviction. That a defendant’s conviction is overturned on collateral rather than direct attack is irrelevant for these purposes. A defendant who has previously been sentenced may thus be resentenced upon remand from an appellate court, upon the trial court’s granting of a motion to correct a sentencing error pursuant to Fla. R. Crim. P. 3.800, or upon vacatur of the sentence for fraud or misrepresentation, without running afoul of due process, equal protection, or double jeopardy considerations. These constitutional guarantees also impose no restrictions upon the length of a sentence imposed upon resentencing.

The controlling constitutional principle in the double jeopardy guarantee is a prohibition against multiple trials, and even this protection is not absolute. The double jeopardy guarantee does not confer immunity from punishment because of a defect sufficient to constitute reversible error in previous proceedings. The double jeopardy clause is not an absolute bar to the imposition of an increased sentence on remand from appellate review of an issue of law concerning the original

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1252 In *Stroud v. U.S.*, 251 U.S. 15, 40 S. Ct. 50, 64 L. Ed. 103 (1919), the defendant was convicted of first-degree murder and sentenced to life imprisonment. After reversal of this conviction, the defendant was retried, reconvicted of the same offense, and sentenced to death. The United States Supreme Court upheld the conviction against the defendant’s claim that his constitutional right not to be twice put in jeopardy had been violated. See also, *Murphy v. Com. of Massachusetts*, 177 U.S. 155, 20 S. Ct. 639, 44 L. Ed. 711 (1900).


sentence. This is because sentences do not have the constitutional quality of finality that attends an acquittal.

For example, a defendant who was erroneously sentenced as a habitual offender on the basis of offenses that did not qualify him for such status (e.g., use of a misdemeanor prior conviction mistaken for a felony), and the defendant successfully has the sentence overturned as illegal, on remand the State is free to introduce any other convictions which qualify the defendant as a habitual offender and the court may so sentence the defendant. Similarly, upon remand for resentencing of a defendant after reversal of the sentence, if the trial court lawfully could have imposed a multiplier at the time of the original sentencing, double jeopardy principles are not violated where the trial court imposes the multiplier at sentencing after remand. Where, however, the trial court expressly elects not to sentence as a habitual offender, such an election constitutes a determination that cannot be revisited without violating double jeopardy, and so the court which has made such an election is precluded from imposing a habitual offender sentence on remand.

The rationale for this part of our constitutional jurisprudence rests ultimately upon the premise that the original sentence has, at the defendant’s behest or as a result of the defendant’s fraud or misrepresentation, been wholly nullified and the slate wiped clean. As to whatever punishment has actually been suffered under the first sentence, that premise is a fiction, but, so far as that part of the sentence that has not yet been served, it will never be served. This also supports the policy considerations that sanctions imposed are always proportionate to the seriousness of the offense of conviction and the defendant’s criminal history, and that offenders with similar offenses will receive similar sanctions.

§ 33. Vindictive sentencing

The issue of vindictive sentencing can arise at original sentencing or at resentencing. A vindictive sentence is imposed where the defendant is punished for exercising his or her appellate

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1256 See, Harris v. State, 645 So. 2d 386 (Fla. 1994).


1258 Margiotti v. State, 844 So. 2d 829 (Fla. 3d DCA 2003); Plute v. State, 835 So. 2d 368 (Fla. 2d DCA 2003); Gordon v. Moore, 832 So. 2d 880, 887 (Fla. 3d DCA 2002); Delevaux v. State, 762 So. 2d 1062 (Fla. 3d DCA 2000).


1260 Spencer v. State, 739 So. 2d 1247 (Fla. 1st DCA 1999) (Habitual Violent Felony Offender); Grimes v. State, 616 So. 2d 996 (Fla. 1st DCA 1992) (Habitual Offender).

rights or where any judicially imposed penalty needlessly discourages assertion of the Fifth Amendment right not to plead guilty and deters the exercise of the Sixth Amendment right to demand a jury trial, and such a sentence is patently unconstitutional. Vindictiveness in sentencing does not mean that the trial judge affirmatively intends to punish the defendant for rejecting a plea. “Vindictive” in this context is a term of art which expresses the legal effect of a given course of action, and does not imply any personal or subjective animosity between the court and the defendant.

In a narrow range of cases where there is no actual vindictiveness, but instead there is an apprehension on the part of the defendant to exercise his or her legal rights due to fear of retaliation from the court, vindictiveness may be presumed. The “Pearce presumption” of vindictiveness arose out of the cases of Clifton A. Pearce and William S. Rice. Pearce was convicted in a North Carolina court of assault with intent to rape and sentenced to serve 12 to 15 years in prison; Rice pleaded guilty to four charges of burglary and was sentenced in an Alabama court to serve a total of 10 years. After having served several years, Pearce was granted a new trial because a confession used against him was held to have been obtained in violation of his constitutional right not to be compelled to be a witness against himself; Rice’s conviction was set aside because, although he was indigent, he had not been provided with a court-appointed lawyer at the time he made his guilty plea. Both respondents were retried and again convicted. Rice’s sentence was increased to 25 years, and no credit was given for time he had previously served; Pearce was sentenced to eight years which, when added to the time he had already served, amounted to a longer sentence than originally imposed. In neither case did the record contain any justification for the increased sentence, and so the United States Supreme Court reversed the sentences as being unconstitutionally vindictive.

The presumption has been narrowed considerably since its initial pronouncement, but the law remains that due process of law requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he or she receives after a new trial. Since the fear of such vindictiveness may unconstitutionally deter a defendant’s exercise of the right to appeal or collaterally attack his or her first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge. In order to assure the absence of such a motivation, whenever a judge imposes a more severe sentence upon a defendant after the grant of collateral relief or a new trial than that judge originally imposed upon the defendant, the reasons for his doing so must affirmatively appear in the record. In order to rebut the presumption of vindictiveness, those reasons must be based upon objective

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1262 U.S. v. Jackson, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968); City of Daytona Beach v. Del Percio, 476 So. 2d 197, 205 (Fla. 1985) (quoting Gillman v. State, 373 So. 2d 935, 938 (Fla. 2d DCA 1979)).

1263 Longley v. State, 902 So. 2d 925 (Fla. 5th DCA 2005); see also, Cambridge v. State, 884 So. 2d 535 (Fla. 2d DCA 2004); Harris v. State, 845 So. 2d 329 (Fla. 2d DCA 2003); Charles v. State, 816 So. 2d 731 (Fla. 3d DCA 2002).

information concerning identifiable conduct on the part of the defendant occurring before or after 1265 the time of the original sentencing proceeding, and the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal. 1266 Those factors must also be stated with particularity and specificity. 1267 A trial judge is thus not constitutionally precluded from imposing a new sentence, whether greater or less than the original sentence, in the light of events that may have thrown new light upon the defendant’s life, health, habits, conduct, and mental and moral propensities. 1268 Such information may come to the judge’s attention from evidence adduced at the second trial itself, from a new presentence investigation, from the defendant’s prison record, or possibly from other sources. 1269

When a defendant rejects an offer of a lesser sentence, the defendant assumes the risk of receiving a harsher sentence, but when the judge has been involved in the plea negotiation and then later imposes a harsher sentence, the sentence is presumed to be vindictive. This presumption may be overcome only if the record affirmatively demonstrates that the defendant’s insistence on a trial was given no consideration in the sentencing. 1270

As the United States Supreme Court explained in Texas v. McCullough, 1271 however, the evil the Pearce Court sought to prevent was not the imposition of enlarged sentences after a new trial but vindictiveness of a sentencing judge. The presumption does not apply, in any event, unless there is a realistic likelihood of vindictiveness, or, in other words, the opportunities for vindictiveness must impel the conclusion that due process of law requires a rule analogous to that of the Pearce case. 1272 A mere opportunity for vindictiveness is insufficient to justify the imposition of this prophylactic

1265 The Pearce Court did not intend to confine the sentencing authority’s consideration to “conduct” occurring subsequent to the first sentencing proceeding. See, Wasman v. U.S., 468 U.S. 559, 104 S. Ct. 3217, 82 L. Ed. 2d 424 (1984).


1270 Zeigler v. State, 60 So. 3d 578 (Fla. 2d DCA 2011); MacDonald v. State, 751 So. 2d 56 (Fla. 2d DCA 1999).


Accordingly, not every increase in sentence justifies the imposition of the rule announced in Pearce.\textsuperscript{1274}

The possibility of vindictiveness does not present itself in situations where the sentencing judge has no personal stake in the prior sentence and no motivation to engage in self-vindication.\textsuperscript{1275} The possibility of vindictiveness is not inherent in situations where the defendant is resentenced by a different judge or a different court, and the sentencing is conducted \textit{de novo},\textsuperscript{1276} where it is the original sentencing judge who grants the defendant’s motion for new trial or other collateral relief pertaining to sentencing,\textsuperscript{1277} or where a different judge imposes the second sentence and provides an on-the-record, wholly logical, nonvindictive reason for the sentence.\textsuperscript{1278} No presumption applies where the first sentence was imposed as a result of a guilty plea and the second sentence was imposed after trial because the defendant rejected an offer made by the prosecutor with no judicial participation in the plea discussions.\textsuperscript{1279} There is no basis for a presumption of vindictiveness where a second sentence imposed after trial is heavier than a first sentence imposed after a guilty plea.\textsuperscript{1280} \textit{Pearce} does not per se prohibit imposing consecutive sentences after concurrent sentences are reversed on appeal.\textsuperscript{1281}

Where the presumption applies, the sentencing authority or the prosecutor must rebut the presumption that an increased sentence or charge resulted from vindictiveness; but in all cases where the presumption does not apply, the defendant has the burden of proving actual vindictiveness.\textsuperscript{1282}

\begin{enumerate}
\item \textsuperscript{1273}\textit{U.S. v. Goodwin}, 457 U.S. 368, at 384, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982).
\item \textsuperscript{1274}See, \textit{Blackledge v. Perry}, 417 U.S. 21, 26, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974).
\item \textsuperscript{1277}\textit{Texas v. McCullough}, 475 U.S. 134, 138, 106 S. Ct. 976, 89 L. Ed. 2d 104 (1986).
\item \textsuperscript{1278}\textit{Texas v. McCullough}, 475 U.S. 134, 138, 106 S. Ct. 976, 89 L. Ed. 2d 104 (1986); see also, \textit{Macomber v. Hannigan}, 15 F.3d 155 (10th Cir. 1994).
\item \textsuperscript{1279}\textit{Wilson v. State}, 845 So. 2d 142 (Fla. 2003).
\item \textsuperscript{1280}\textit{Alabama v. Smith}, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989).
\item \textsuperscript{1281}\textit{Netherly v. State}, 873 So. 2d 407 (Fla. 2d DCA 2004).
\item \textsuperscript{1282}\textit{Wasman v. U.S.}, 468 U.S. 559, 104 S. Ct. 3217, 82 L. Ed. 2d 424 (1984); see also, \textit{Kopko v. State}, 709 So. 2d 159 (Fla. 5th DCA 1998).
\end{enumerate}
Absent a demonstration by the defendant of judicial vindictiveness or punitive action where the presumption of vindictiveness is not present, a defendant may not complain simply because he or she received a sentence after trial that was more severe than the pretrial offer of the State or the sentencing judge. There is, of course, no need to apply a presumption of vindictiveness if the record contains proof of actual vindictiveness.1283

Where vindictive sentencing has been established, the remedy is resentencing before a different judge.1284 The successor judge is to conduct a de novo sentencing hearing at which no deference is to be granted to any of the sentencing proceedings which took place before the predecessor judge. The fact that the prior sentence was reversed as vindictive places no limit on the successor judge, who can impose a greater, lesser, or equal sentence as that judge sees fit and the law permits. The successor judge who imposes a greater sentence is not required to justify the sentence imposed on the basis of facts and circumstances unknown to the predecessor judge. This is because resentencing places the defendant in the same position he or she would have been in if the prior sentence had never occurred — before a neutral arbiter to receive a lawful sentence.1285

§ 34. Sentence restructuring

On remand, or on a motion to correct sentencing error, a trial court can legally restructure a defendant’s sentence by changing concurrent terms to consecutive terms, as long as the new sentence is not found to be vindictive.1286 Merely restructuring sentences from concurrent to consecutive is not enough to support a claim that sentences were increased, and the vindictiveness presumption of Pearce1287 is not implicated at all when the combined years of consecutive new sentences do not exceed the longest original sentence.1288 The court lacks jurisdiction to restructure sentences that are not implicated in the order of remand or the motion to correct sentencing error. Where, for example, a defendant is sentenced to specific terms of years on multiple counts, with the various sentences to run concurrently, and one or more of the convictions are vacated by the trial court, the trial court cannot restructure the sentences of the remaining counts so that they run consecutively.1289 Similarly,


1285 Wilson v. State, 845 So. 2d 142 (Fla. 2003); Dominguez v. State, 924 So. 2d 58 (Fla. 3d DCA 2006).

1286 Sands v. State, 899 So. 2d 1208 (Fla. 5th DCA 2005); James v. State, 868 So. 2d 1242 (Fla. 4th DCA 2004); Buchanan v. State, 781 So. 2d 449 (Fla. 5th DCA 2001).


1288 Blackshear v. State, 531 So. 2d 956, 958 (Fla. 1988).

1289 Seago v. State, 627 So. 2d 1316 (Fla. 2d DCA 1993).
while correcting errors in one sentence, the court is without jurisdiction to restructure a sentence in which no error was made, even if the defendant was sentenced for both offenses in the same proceeding.\footnote{Kenny v. State, 916 So. 2d 38 (Fla. 4th DCA 2005).}

An example of an impermissible restructuring and increase in an original sentence is the case of Alfraedo Williams: Mr. Williams was found guilty following a jury trial of robbery with a weapon, to wit: hot coffee, in violation of section 812.13(1) and (2)(b), Fla. Stat. (1991). Williams received a sentence of thirty years for the robbery (Count 1) and for escape (Count 2). His successful appeal resulted in reversal of the armed robbery conviction and entry of judgment for second-degree robbery pursuant to section 812.13(2)(c). The judgment was otherwise affirmed. On remand, the lower court resentenced Williams “on Count 1 only” to thirty years imprisonment, with a 10-year minimum mandatory, consecutive to the 30-year sentence on Count 2. The Second District Court of Appeal reversed, finding that the consecutive terms of imprisonment on resentencing represented an impermissible increase in the original sentence that penalized Williams for success on his appeal; that the harsher consecutive sentence raised a presumption of vindictiveness, and that there was no identifiable conduct on the part of Williams which occurred after the time of the original sentence to justify the harsher sentence.\footnote{Williams v. State, 686 So. 2d 615 (Fla. 2d DCA 1996).}

The case of Mr. Williams was subsequently distinguished by the Second District in the case of husband and wife defendants William Chester Netherly and Myrtle A. Netherly. The facts underlying the charges stemming from the Netherlys’ failed residential construction business are fully set out in \textit{State v. Netherly (Netherly II)}.\footnote{Netherly v. State, 804 So. 2d 433 (Fla. 2d DCA 2001).} Of the 18 counts charged, a jury found Mr. Netherly guilty of one first-degree felony, one second-degree felony, and 12 third-degree felonies; Mrs. Netherly was found guilty of one second-degree felony and 10 third-degree felonies. Mr. Netherly was sentenced on all counts to concurrent five years’ imprisonment followed by 10 years’ probation. Mrs. Netherly was sentenced on all her counts to concurrent 4½ years’ imprisonment followed by 10 years’ probation. On appeal in \textit{Netherly II}, the Second District reversed three of Mr. Netherly’s counts and reduced the degree of a fourth, leaving him with eleven third-degree felony convictions. The Second District also reversed one of Mrs. Netherly’s counts and reduced the degree of a second, leaving her with 10 third-degree felony convictions. After affirming in part and reversing in part, the Second District remanded for resentencing because the split sentence originally imposed, five years’ incarceration followed by ten years’ probation, illegally exceeded the maximum statutory sentence for third-degree felonies, as well as the maximum permissible guidelines sentence. On remand from \textit{Netherly II}, each defendant’s scoresheet resulted in the lowest possible guidelines sentence of a nonprison sanction, with a permitted sentence of up to 22 months in prison, primarily because neither had a prior record. Instead of the concurrent sentencing scheme originally imposed for all the counts, the trial court ordered them to serve five years’ probation on two counts, followed by five years’ probation on seven counts (six for Mrs. Netherly), followed by five years’ probation
on the remaining two counts, *nunc pro tunc* to their original sentencing date, December 23, 1999, thus reaching by a different path the 15 years’ overall state supervision originally imposed. The trial court’s reasoning included concern about the victims’ losses, which were substantial, and the need for restitution, adding that probation could be shortened with full restitution and releases from the victims. On appeal, the Second District held that the trial court was not prohibited from imposing a consecutive scheme on the defendants in lieu of the originally imposed concurrent sentences, where the new sentencing scheme not only resulted in the same overall length of state supervision, but also achieved the trial court’s reasonable goal of monitoring the defendants’ compliance with the restitution orders, specifically finding that “the fifteen years’ total probation for a multitude of crimes committed over a period of several years is no harsher than five years’ incarceration followed by ten years’ probation for higher degree crimes.”

§ 35. Successor judge

If by reason of death or disability the judge before whom a trial has commenced is unable to proceed with the trial, or posttrial proceedings, another judge, certifying that he or she has become familiar with the case, may proceed with disposition of the case, except in death penalty proceedings. In death penalty proceedings, a successor judge who did not hear the evidence during the penalty phase of the trial must conduct a new sentencing proceeding before a new jury.\(^{1294}\) Note that while a successor judge can consider the court file, he or she must conduct a review *de novo*, and cannot consider a transcript of an evidentiary hearing conducted by a disqualified judge.\(^{1295}\) Where, for example, a successor judge is called upon to rule on a motion for new trial pursuant to Fla. R. Crim. P. 3.600, the successor judge’s acknowledgment that he or she has reviewed the record in the case is sufficient “certification” of competence to allow the successor judge to rule on the merits of a new trial motion. If, however, the successor judge can not certify, after a thorough review of the record, that he or she has become competent to to rule, then the new trial motion must be granted.\(^{1296}\)

Sentencing, however, is a broader issue, and a successor judge may impose sentence only under certain circumstances. Fla. R. Crim. P. 3.700(c) provides that:

(1) Noncapital Cases. In any case, other than a capital case, in which it is necessary that sentence be pronounced by a judge other than the judge who presided at trial or accepted the plea, the sentencing judge shall not pass sentence until the judge becomes acquainted with what transpired at the trial, or the facts, including any plea discussions, concerning the plea and the offense.

\(^{1293}\) *Netherly v. State*, 873 So. 2d 407 (Fla. 2d DCA 2004).

\(^{1294}\) Fla. R. Crim. P. 3.231.

\(^{1295}\) See, *Goolsby v. State*, 948 So. 2d 965 (Fla. 5th DCA 2007) (motion for postconviction relief).

\(^{1296}\) *State v. May*, 703 So. 2d 1097 (Fla. 2d DCA 1997).
(2) Capital Cases. In any capital case in which it is necessary that sentence be pronounced by a judge other than the judge who presided at the capital trial, the sentencing judge shall conduct a new sentencing procedure before a jury prior to passing sentence.1297

Rule 3.700(c) applies to sentencing.1298 This rule also applies to restitution hearings.1299 As a general proposition, a successor judge may not enter an order or judgement based solely upon evidence heard by the predecessor judge.1300 Rule 3.700(c), by its wording, makes provision for emergency situations where the trial judge is unavailable. The reason for such a provision is that a sentencing decision by the same judge avoids the need to familiarize another with the events of the trial or plea. In addition, the opportunity to observe the defendant, particularly if he or she elects to take the stand in his or her own defense, can often provide useful insights into an appropriate disposition.1301 Even in the absence of prejudice to the defendant, it is reversible error for a successor judge to sentence a defendant where the record does not show that the substitution of judges is “necessary” or dictated by an “emergency.” Mere convenience cannot justify sentencing by a successor judge.1302 A division reassignment of the judge or the defendant does not create an emergency or necessity justifying the substitution of another judge to preside over a sentencing or resentencing.1304 Where sentence is improperly imposed by a successor judge, the sentence will be reversed even without a specific showing of how the sentencing by the successor judge caused prejudice to the defendant.1305 Where the sentencing judge is different from the judge who presided at trial, the sentencing judge has an obligation to conduct an independent evaluation of the case.1306

1297 Fla. R. Crim. P. 3.700(c)(1) & (2).
1298 Clemons v. State, 816 So. 2d 1180 (Fla. 2d DCA 2002).
1299 See, L.S. v. State, 593 So. 2d 296 (Fla. 5th DCA 1992).
1300 Beattie v. Beattie, 536 So. 2d 1078 (Fla. 4th DCA 1988).
1301 Lawley v. State, 377 So. 2d 824 (Fla. 1st DCA 1979).
1302 Campbell v. State, 622 So. 2d 603 (Fla. 2d DCA 1993); Madrigal v. State, 683 So. 2d 1093 (Fla. 4th DCA 1996); Lawley v. State, 377 So. 2d 824 (Fla. 1st DCA 1979).
1303 Campbell v. State, 622 So. 2d 603 (Fla. 2d DCA 1993); Madrigal v. State, 683 So. 2d 1093, 1097 (Fla. 4th DCA 1996); Lawley v. State, 377 So. 2d 824, 825 (Fla. 1st DCA 1979).
1304 Young v. State, 950 So. 2d 516 (Fla. 2d DCA 2007); see also, the dissent of Judge Fulmer in Adams v. State, 739 So. 2d 602 (Fla. 2d DCA 1997).
1305 Baskin v. State, 898 So. 2d 266 (Fla. 2d DCA 2005).
1306 See, Moore v. State, 378 So. 2d 792 (Fla. 2d DCA 1979) (vacating sentence where sentencing judge indicated that sentence was based entirely upon recommendation of trial judge); see also, Spencer v. State, 611 So. 2d 16 (Fla. 3d DCA 1992) (holding that new sentence must reflect the independent decision of the successor judge); Madrigal v. State, 683 So. 2d 1093 (Fla. 4th DCA 1996) (sufficient where successor judge considered the PSI report, heard argument of counsel and testimony of one of the eyewitness police officers, and was briefed by counsel.
There is an apparent conflict between the First and Second District Courts of Appeal on the matter of one judge taking a plea and another imposing sentence. The First District has held that there is no reason why a substitute judge who has made himself or herself thoroughly familiar with the case file would not be as well qualified to handle the sentencing as the judge who merely accepted the plea but who had not been exposed to a trial in the case.\footnote{1307} The Second District, on the other hand, has taken the position that so long as the judge who accepted the plea is available, that judge should impose sentence or resentencing.\footnote{1308} The view of the Second District is, however, consistent with the related rule that, ordinarily, a trial judge is not permitted to rule on a matter based on the credibility of witnesses which the judge has not heard, absent a stipulation of the parties.\footnote{1309}

An exception occurs where the circumstances of the case are such that a successor judge is more involved with the case than the original judge, as where the defendant pleads to and is sentenced by one judge and then goes through a series of probation modification and other related in-court dispositions with a second judge. In such circumstances, it is necessary and appropriate for the successor judge to preside over revocation of the probation which the defendant had been given by the original judge and which the successor judge had modified, and to then sentence the defendant, even though there is no emergency reason for substitution of judges.\footnote{1310}

Another exception to the rule arises with the passage of time. When significant subsequent events impacting the ultimate sentencing decision have transpired and the passage of time has likely deprived the initial sentencing judge of recollection of the specifics of his or her earlier sentencing decision, there would seem to be little benefit in a rule that would require recall of the original regarding defendant’s plea); \textit{Spencer v. State}, 611 So. 2d 16 (Fla. 3d DCA 1992) (would be sufficient if successor sentencing judge reviews PSI report and those record portions deemed pertinent); \textit{Castor v. State}, 351 So. 2d 375 (Fla. 1st DCA 1977) (sufficient for substitute sentencing judge to consider jury’s verdict of guilt, PSI report, and prosecutor’s description of offense), affirmed 365 So. 2d 701, 703 n.4 (Fla. 1978); \textit{Lawley v. State}, 377 So. 2d 824 (Fla. 1st DCA 1979) (sufficient for substitute sentencing judge to read PSI report and discuss case with judge who presided at trial); \textit{Caplinger v. State}, 271 So. 2d 780 (Fla. 3d DCA 1973) (insufficient where successor sentencing judge did not use PSI report or record, but relied solely on counsel’s statements to become familiar with facts of case).

\footnote{1307} \textit{Mobley v. State}, 407 So. 2d 1037 (Fla. 1st DCA 1981) (after a defendant enters a \textit{nolo contendere} plea to a charge, the sentencing judge need not be the judge who accepted the plea).

\footnote{1308} \textit{Kramer v. State}, 970 So. 2d 468 (Fla. 2d DCA 2007) (questioning whether the language of Rule 3.700(c)(1) establishes the best policy for sentencing); \textit{Young v. State}, 950 So. 2d 516 (Fla. 2d DCA 2007); \textit{Clemons v. State}, 816 So. 2d 1180 (Fla. 2d DCA 2002).

\footnote{1309} See, e.g., \textit{Fratello v. State}, 950 So. 2d 440 (Fla. 4th DCA 2007) (motion for post-conviction relief); \textit{Acker v. State}, 823 So. 2d 875 (Fla. 2d DCA 2002) (holding that successor judge who did not hear witness testimony or rule on credibility could not sign written order revoking probation); \textit{Hartney v. Piedmont Technology, Inc.}, 814 So. 2d 1217 (Fla. 1st DCA 2002) (holding that successor judge who did not preside at trial or hear evidence could not enter final judgment); see also, \textit{E.J. v. Department of Children and Families}, 795 So. 2d 1131 (Fla. 5th DCA 2001); \textit{Tompkins Land and Housing, Inc. v. White}, 431 So. 2d 259, 260 (Fla. 2d DCA 1983).

\footnote{1310} See, \textit{Lester v. State}, 446 So. 2d 1088 (Fla. 2d DCA 1984).
sentencing judge for violation of probation proceedings. As a result, the rule does not extend to violation of probation or community control revocation proceedings and pronouncement of sentence following revocation.\textsuperscript{1311}

\section*{§ 36. Amendment of sentencing laws and retroactivity}

The general rule is that, with due deference to the importance of finality in any system of justice, only those changes in the law that constitute major constitutional changes, or “jurisprudential upheavals,” are applied retroactively. On the opposite end of the spectrum are “evolutionary refinements in the criminal law,” which are not applied retroactively.\textsuperscript{1312} Retroactive application in sentencing laws may, however, run afoul of \textit{ex post facto} considerations. Changes in the sentencing laws (\textit{i.e.}, the guidelines or Criminal Punishment Code) are substantive in nature for purposes of the \textit{ex post facto} law.\textsuperscript{1313} Two critical elements must be present for a criminal or penal law to be \textit{ex post facto}: It must be retrospective, that is, it must apply to events before its enactment, and it must disadvantage the offender affected by it. The State, consequently, has no standing to pursue an \textit{ex post facto} challenge to the retrospective application of amended sentencing laws because the State is not an offender adversely affected by the retroactive application of the law.\textsuperscript{1314} This means, in effect, that changes in sentencing laws that are advantageous to the defendant may be applied retroactively, but those that disadvantage the defendant cannot.

An example of the more lenient rule for defendants occurs where the defendant commits a continuing offense and while the offense is being committed the Legislature increases the punishment for that offense. Under Florida law, where the charged dates of an offense straddle the date when a sentencing statute becomes effective, the defendant is entitled to be sentenced under the more lenient version of the law that was in effect at the time he or she began committing the offense.\textsuperscript{1315}

\section*{§ 37. Scoresheet errors and ineffective assistance of counsel}

Due to ethical considerations, defense attorneys cannot be compelled to submit a scoresheet. If they do, they may be divulging privileged information and/or making admissions on behalf of their clients that the State may be able to use against them. Defense attorneys should, however, prepare their own scoresheets for private comparison with the State’s scoresheet as a matter of course to

\begin{footnotesize}
\footnotesize1311\textsupersize See, \textit{Lambert v. State}, 910 So. 2d 890 (Fla. 1st DCA 2005).

1312\textsupersize See, \textit{State v. Barnum}, 921 So. 2d 513 (Fla. 2005), as revised on denial of reh’g, (Feb. 9, 2006).

1313\textsupersize \textit{Miller v. Florida}, 482 U.S. 423, 107 S. Ct. 2446, 96 L. Ed. 2d 351 (1987); see also, \textit{Smith v. State}, 537 So. 2d 982 (Fla. 1989) (the sentencing guidelines, insofar as they limit the length of sentence to be imposed, are substantive in nature).

1314\textsupersize \textit{State v. Whiddon}, 554 So. 2d 651 (Fla. 1st DCA 1989).

1315\textsupersize \textit{Perea v. State}, 35 So. 3d 58 (Fla. 5th DCA 2010).
\end{footnotesize}
ensure their ability to advise their clients of possible sentencing consequences and to become alert
to scoresheet errors committed by the State.

The Florida Supreme Court has determined that it is essential for the trial court to have the
benefit of a properly calculated scoresheet when deciding upon a sentence, and, accordingly, has
approved the “would-have-been-imposed” test for scoresheet error raised on direct appeal or by
motion under Fla. R. Crim. P. 3.850. Under this test, a scoresheet error requires resentencing unless
it can be conclusively shown that the same sentence would have been imposed using the correct
scoresheet. Whether the court could have imposed the sentence without departing from a
scoresheet is irrelevant. To determine whether the error is harmless, the appellate court must
examine the record and determine beyond a reasonable doubt that the trial court would have imposed
the same sentence. The trial court’s denial of the defendant’s request for resentencing, without
more, does not conclusively demonstrate that the trial court would have given the same sentence with
the correct scoresheet.

Failure to object to scoresheet errors constitutes ineffective assistance of counsel. It entitles
a prisoner to postconviction relief if counsel failed to object to errors of which counsel knew or
should have known and the erroneous points affected the sentence. A defendant who enters a plea
on the basis of the erroneous advice of his or her attorney that the defendant scores any nonstate
prison sanction on the defendant’s scoresheet, when in fact the defendant scores a minimum term
of incarceration, is entitled to withdraw his or her plea on the basis of manifest injustice. Because
a sentencing judge might have imposed a different sentence based upon a properly calculated
scoresheet, scoresheet error is not subject to harmless error analysis, and a sentence based upon an
erroneous scoresheet requires reversal unless the record conclusively shows that the same sentence
would have been imposed using a correct scoresheet.

While the more defendant-friendly harmless error standard of “would have been imposed”
applies to sentencing errors brought up on direct appeal and motions filed by the defendant pursuant
to Rules 3.800(b) and 3.850, the situation changes after the time for filing Rule 3.850 motions has

1316 See, Anderson v. State, 865 So. 2d 640 (Fla. 2d DCA 2004).

1317 Colon v. State, 909 So. 2d 484 (Fla. 5th DCA 2005); Annunziata v. State, 697 So. 2d 997 (Fla. 5th DCA
1997).

1318 See, Corona v. State, 906 So. 2d 1202 (Fla. 4th DCA 2005).

1319 Richie v. State, 777 So. 2d 977 (Fla. 2d DCA 1999); see also, Gregg v. State, 839 So. 2d 794 (Fla. 4th
DCA 2003) (allowing defendant to be sentenced pursuant to a sentencing scheme that had previously been declared
unconstitutional was ineffective representation); Richardson v. State, 829 So. 2d 364 (Fla. 1st DCA 2002) (same).

1320 Aguirre-Garcia v. State, 889 So. 2d 206 (Fla. 2d DCA 2004); Waldrop v. State, 882 So. 2d 1047 (Fla.
1st DCA 2004).

1321 State v. Anderson, 905 So. 2d 111 (Fla. 2005).
passed and the State’s interest in finality are more compelling. For motions to correct sentencing error filed pursuant to Rule 3.800(a), the stricter “could have been imposed” test applies, which does not require resentencing if the sentence legally could have been imposed, absent a departure, using a correct scoresheet.\textsuperscript{1322}

When a negotiated plea is not conditional upon the imposition of a sentence within a specific sentencing range, however, improper scoring of the defendant’s scoresheet will not render the plea illegal unless the sentence exceeds the statutory maximum.\textsuperscript{1323} The Florida Supreme Court has employed the “would-have-been-imposed” standard to require resentencing when a scoresheet error existed on a 1994 or 1995 scoresheet and the defendant received a sentence within the guidelines.\textsuperscript{1324} This test does not extend, however, to cases where the defendant is not adversely affected by a scoresheet error because his or her sentence is a valid upward departure.\textsuperscript{1325} Misadvice of counsel, assuring a defendant that his or her current plea will have no sentence-enhancing consequences in a future criminal proceeding, however, does not constitute ineffective assistance of counsel.\textsuperscript{1326}

\section*{§ 38. Scoresheet manipulation}

A method of sentence manipulation occasionally practiced by some prosecutors in Florida in felony cases is underscoring. Underscoring occurs where the prosecutor does not record all, or any, of the defendant’s prior record on the defendant’s scoresheet, normally to ensure that the defendant scores a non-state prison sanction and increase the odds that the defendant will enter a plea. Other variants of this technique include omission of an additional offense, or additional offenses, victim injury points, and offense multipliers for the same purpose. Sometimes defense counsel is aware of the omissions, but does not apprise the court of this.

This practice erodes the integrity of the sentencing process and it engenders other serious problems. To begin with, the practice is a violation of the obligation of both prosecutors and defense counsel to provide the sentencing court with an accurate scoresheet.\textsuperscript{1327} Secondly, it contravenes the duty of candor all licensed attorneys have toward the court, and the corresponding prohibition on knowingly making a false statement of material fact or law to a tribunal.\textsuperscript{1328} Finally, whatever

\textsuperscript{1322}Brooks v. State, 969 So. 2d 238 (Fla. 2007).

\textsuperscript{1323}Dunenas v. Moore, 762 So. 2d 1007 (Fla. 3d DCA 2000).

\textsuperscript{1324}Anderson v. State, 865 So. 2d 640 (Fla. 2d DCA 2004).

\textsuperscript{1325}Squires v. State, 891 So. 2d 600 (Fla. 2d DCA 2005).

\textsuperscript{1326}Nichols v. State, 916 So. 2d 32 (Fla. 2d DCA 2005); Stansel v. State, 825 So. 2d 1007 (Fla. 2d DCA 2002).

\textsuperscript{1327}See, State v. Anderson, 905 So. 2d 111 (Fla. 2005).

\textsuperscript{1328}See, Rules Regulating The Florida Bar, Rule 4–3.3(a)(1).
short-term benefit a defendant gains from such a practice by being placed on probation or community control can be erased upon a violation of such supervision with the creation of an accurate scoresheet, which can result in a significantly longer prison sentence than the defendant would have received in the first place.

Another type of scoresheet manipulation practiced by some prosecutors with cases scored under the Criminal Punishment Code occurs on those rare occasions where a defendant is charged with a Level 6 offense and a Level 5 offense with no sentencing qualifiers, enhancements or multipliers for either. Normally, a prosecutor would score the Level 6 offense as the primary offense for 36 points and the Level 5 offense as an additional offense for 5.4 points, for a total of 41.4 points. Under the Criminal Punishment Code, a defendant with a score of 44 points or less is eligible for a non-state prison sentence, while a score of greater than 44 points mandates a prison sentence in the absence of lawful reasons to depart downward. Using the “5/6 Dipsy–Do” technique, the prosecutor scores the Level 5 offense as the primary offense for 28 points and the Level 6 offense for 18 points, for a total of 46 points, thereby making a prison sentence mandatory. The rationale used to justify this practice is that scoring the defendant’s offenses this way results in a total sentence points that recommends a more severe sanction than if the offenses were scored the other way around.1329

This procedure takes advantage of a mathematical anomaly in the mandated method of scoresheet calculation which, although not specifically prohibited by applicable statute or rule, is not consistent with either. Both section 921.0021(4) and Fla. R. Crim. P. 3.704(d)(7) are written in the singular, referring to the offense for which the total sentence points recommend a sanction that is as severe as, or more severe than, the sanction for any other offense committed by the defendant and pending before the court for sentencing, and not in terms of any synergistic effect in combination with any other offense.1330 The practice also seeks to take advantage of some perceived ambiguity in the language of the applicable statute and rule, ambiguity that would be resolved in favor of the defendant under the rule of lenity.1331

A different form of deliberate scoresheet manipulation is practiced by some judges to avoid imposing a sentence of imprisonment or to impose drug offender probation on an otherwise unqualified defendant, where that defendant has more than one offense before the court for sentencing, is to split the scoresheet and impose two or more non-incarcerative sentences. There are two basic variants of this practice. One is where the defendant has more than one open charge, the defendant’s scoresheet indicates that the lowest permissible sentence is one of imprisonment, the judge allows the defendant to enter separate pleas to these offenses, and conducts separate sentencings for each so that the defendant’s sentencing scores are artificially depressed to permit the judge to impose probationary or community control sentences. Sometimes these sentencings are

1329 This practice was taught by the Florida Prosecuting Attorneys Association at its Sentencing Seminar 2007–10, held in Orlando, Florida, on March 23, 2007.
1330 § 921.0021(4); Fla. R. Crim. P. 3.704(d)(7).
1331 § 775.021(1), Fla. Stat.
conducted within the same calendar or even within the same hearing, and sometimes they are deliberately set on different days to reinforce the impression that they are indeed “separate” events. A variant of this method occurs where the defendant has a violation of probation or violation of community control based on the commission of a new felony offense that is before the court for sentencing, and the judge allows the defendant to admit to the violation, imposes a modification of supervision, and then separately sentences the defendant on the new offense.

A hypothetical example of how this form of scoresheet manipulation is practiced is as follows:

Defendant is on probation for Felony Petit Theft and violates his probation by committing the new offense of Attempted Purchase of Cocaine. Defendant’s Criminal Punishment Code sentencing scoresheet calls for a presumptive minimum prison sentence of 14.85 months, up to 10 years imprisonment. As to drug offender probation, section 948.034, F.S., applies only to violations of section 893.13(1)(a) 1., (1)(c)2., (2)(a)1., or (5)(a), statutory sections that prohibit the sale, manufacture, or delivery, or possession with intent to sell, manufacture or delivery, of certain controlled substances, including cocaine. It does not provide a basis for sentencing below the minimum calculated sentence where other crimes are involved. This also means that where a defendant appears before the court for sentencing on a qualifying offense and a non-qualifying offense, the non-qualifying offense cannot be dovetailed into drug offender probation along with the qualifying offense.\(^\text{1332}\) To avoid having to impose imprisonment under the Criminal Punishment Code, the sentencing judge has Defendant admit to violating the conditions of probation in that case, sentences him to a “modification” of his probation in that case, then has Defendant enter a plea of no contest to the open drug offense, and places Defendant on drug offender probation in that case pursuant to section 948.034, F.S.

Thus, by sentencing the hypothetical defendant for the violation of probation prior to accepting his no contest plea on the new offense, the trial court manipulated the sentencing process to avoid the minimum sentence required by the Criminal Punishment Code and to artificially qualify the defendant for Chapter 948 drug offender probation and thwart the Criminal Punishment Code by granting the defendant an illegal downward departure sentence.

Note, however, that it is possible under certain circumstances for the sentencing court to effect a “sideways departure” sentence that places a defendant for whom the presumptive minimum sentence calls for imprisonment in a local detention facility in lieu of a Department of Corrections

\(^{1332}\)See, \textit{State v. DeMille}, 890 So. 2d 454 (Fla. 2d DCA 2004) (defendant not qualified for drug offender probation because Driving While License Suspended or Revoked is not an enumerated offense under § 948.034, Fla. Stat.); \textit{Buswell v. State}, 855 So. 2d 687, 688 (Fla. 2d DCA 2003) (trial court erred in placing defendant on drug offender probation as a sanction for his conviction of driving while license suspended); \textit{State v. Lazo}, 761 So. 2d 1244 (Fla. 2d DCA 2000) (drug offender probation impermissible for defendant charged with Possession of Cocaine and Felony Driving While License Suspended or Revoked).
facility. Where, for example, a defendant is given a split sentence of prison followed by probation, the defendant violates probation by committing a new crime, and the presumptive minimum sentence calls for imprisonment, the court can sentence the defendant to a term in the county jail while not granting credit for time the defendant previously served in prison, so long as the time the defendant served in prison when combined with the new county jail sentence is equal to or greater than the presumptive minimum sentence. Such a sentence does not qualify as a downward departure below the lowest permissible sentence. \textsuperscript{1333}

\section*{§ 39. Abatement}

Upon the death of a criminal defendant, after judgment and sentence but during the pendency of the appeal, the appeal of the conviction may be dismissed but is not to be abated ab initio in the trial and appellate courts. The presumption of innocence ceases upon the adjudication of guilt and the entry of sentence. A judgment of conviction comes for review in the appellate court with a presumption in favor of its regularity or correctness. The death of the defendant does not extinguish a presumably correct conviction and restore the presumption of innocence which the conviction overcame. The sentence imposed on the defendant also continues to be effective. Thus, monetary fines or penalties continue to be enforceable against assets which comprise a defendant’s estate. This precludes the defendant’s estate from having the financial benefit of assets which the court, by imposing a sentence, indicated should be forfeited to the State as a result of the defendant’s conviction. \textsuperscript{1334}

Depending upon the particular circumstances of a case, the interests of the defendant’s estate or the State may best be served by completion of the deceased defendant’s appeal. If fines or penalties are to be enforced against the defendant’s estate, the estate maintains the same right to appeal that the defendant would have had if living. Likewise, the State may have an interest in seeing the appeal completed. Therefore, when a defendant dies after judgment but during an appeal, the appellate court may, upon a showing of good cause by the State or a representative of the defendant, determine that the appeal should proceed. If good cause to proceed is not demonstrated, the appeal should be dismissed. \textsuperscript{1335} The deceased defendant’s representative does not show good cause for the appeal to proceed where, for example, the court has imposed a fine as part of the sentence but the State represents that it will not attempt to collect the fine from the deceased appellant’s estate. \textsuperscript{1336} Where an appeal raises a question of great public importance that is likely to

\textsuperscript{1333} See, \textit{State v. Perez}, 979 So. 2d 986 (Fla. 3d DCA 2008).

\textsuperscript{1334} \textit{State v. Clements}, 668 So. 2d 980 (Fla. 1996).

\textsuperscript{1335} \textit{State v. Clements}, 668 So. 2d 980 (Fla. 1996).

\textsuperscript{1336} \textit{Renwick v. State}, 933 So. 2d 730 (Fla. 4th DCA 2006); \textit{Bostic v. State}, 708 So. 2d 695 (Fla. 1st DCA 1998).
recur and therefore should be resolved for the benefit of bench and bar, the appellate court may decline to dismiss an appeal notwithstanding the death of the defendant.\footnote{See, \textit{Dorsey v. State}, 868 So. 2d 1192 (Fla. 2003), n. 2.}

Note that the Florida rule on abatement differs significantly from the federal rule. The federal rule is, in general, that the death of a criminal defendant pending direct appeal of his or her conviction abates the criminal proceeding ab initio as if the defendant had never been indicted or convicted. Unpaid fines and forfeitures also abate upon a criminal defendant’s death. The doctrine of abatement does not apply, however, to fines, forfeitures, and restitution paid prior to the defendant’s death. With regard to unpaid restitution orders, if the purpose of the restitution order is primarily compensatory rather than penal, it does not abate upon the death of a defendant pending direct appeal.\footnote{See, \textit{U.S. v. Estate of Parsons}, 367 F.3d 409 (5th Cir. 2004) (en banc); see also, \textit{U.S. v. Lay}, 456 F. Supp. 2d 869 (S.D. Tex. 2006).}

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<thead>
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<th>Primary Offense Date</th>
<th>Sentencing Scheme</th>
<th>Forms Used</th>
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<td>May 25, 1997–September 30, 1998\footnote{The original statutory effective dates were modified by \textit{Heggs v. State}, 759 So. 2d 620 (Fla. 2000).}</td>
<td>1995 Guidelines</td>
<td>Rule 3.990(b) Supplemental Sentencing Guidelines Scoresheet</td>
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\textbf{Forms Used} & Rule 3.988(j) Sentencing Guidelines Scoresheet & Rule 3.990(a) Sentencing Guidelines Scoresheet & Rule 3.991(a) Sentencing Guidelines Scoresheet \\
& (Untitled Continuation Sheet) & Rule 3.990(b) Supplemental Sentencing Guidelines Scoresheet & Rule 3.991(b) Supplemental Sentencing Guidelines Scoresheet \\
& & Rule 3.992(a) Criminal Punishment Code Scoresheet & Rule 3.992(b) Criminal Punishment Code Supplemental Scoresheet \\
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