

Proposed Amendments to Rule 3.704 (The Criminal Punishment Code)

The Criminal Procedure Rules Committee proposes amendments to Rule 3.704 (The Criminal Punishment Code) to address cases in which the lowest permissible sentence exceeds the statutory maximum for an individual felony offense. (*State v. Gabriel*, 314 So. 3d 1243 (Fla. 2021).) Additionally, the proposed amendments address findings by the jury that a nonstate prison sanction could present a danger to the public. (*Gaymon v. State*, 228 So. 3d 1087 (Fla. 2020).)

Pursuant to Florida Rule of General Practice and Judicial Administration 2.140, the Criminal Procedure Rules Committee invites comments on the proposed amendments. Interested persons have until December 30, 2022, to submit any comments, electronically, to the Chair Cynthia Cohen and the Attorney Liaison Heather Savage Telfer at rules@floridabar.org.

RULE 3.704. THE CRIMINAL PUNISHMENT CODE

(a) Use. This rule is to be used in conjunction with the forms located at rule 3.992. This rule implements the 1998 Criminal Punishment Code, in compliance with chapter 921, Florida Statutes. This rule applies to offenses committed on or after October 1, 1998, or as otherwise required by law.

(b) Purpose and Construction. The purpose of the 1998 Criminal Punishment Code, and the principles it embodies, are set out in subsection 921.002(1), Florida Statutes. Existing case law construing the application of sentencing guidelines will continue as precedent unless in conflict with the provisions of this rule or the 1998 Criminal Punishment Code.

(c) Offense Severity Ranking.

(1) Felony offenses subject to the 1998 Criminal Punishment Code are listed in a single offense severity ranking chart located at section 921.0022, Florida Statutes. The offense

severity ranking chart employs 10 offense levels, ranked from least severe to most severe. Each felony offense is assigned to a level according to the severity of the offense, commensurate with the harm or potential for harm to the community that is caused by the offense, as determined by statute. The numerical statutory reference in the left column of the chart and the felony degree designations in the middle column of the chart determine whether felony offenses are specifically listed in the offense severity ranking chart and the appropriate severity level. The language in the right column is merely descriptive.

(2) Felony offenses not listed in section 921.0022 are assigned a severity level in accordance with section 921.0023, Florida Statutes, as follows:

- (A) a felony of the third degree within offense level 1;
- (B) a felony of the second degree within offense level 4;
- (C) a felony of the first degree within offense level 7;
- (D) a felony of the first degree punishable by life within offense level 9; or
- (E) a life felony within offense level 10.

An offense does not become unlisted and subject to the provisions of section 921.0023 because of a reclassification of the degree of felony under section 775.0845, section 775.087, section 775.0875, or section 794.023, Florida Statutes, or any other law that provides an enhanced penalty for a felony offense.

(d) General Rules and Definitions.

(1) One or more Criminal Punishment Code scoresheets must be prepared for each offender covering all offenses pending before the court for sentencing, including offenses for which the

offender may qualify as an habitual felony offender, an habitual violent felony offender, a violent career criminal, or a prison release reoffender. The office of the prosecuting attorney must prepare the scoresheets and present them to defense counsel for review as to accuracy. If sentences are imposed under section 775.084, or section 775.082(9), Florida Statutes, and the Criminal Punishment Code, a scoresheet listing only those offenses sentenced under the Criminal Punishment Code must be filed in addition to any sentencing documents filed under section 775.084 or section 775.082(9).

(2) One scoresheet must be prepared for all offenses committed under any single version or revision of the guidelines or Criminal Punishment Code pending before the court for sentencing.

(3) If an offender is before the court for sentencing for more than one felony and the felonies were committed under more than 1 version or revision of the guidelines or Criminal Punishment Code, separate scoresheets must be prepared and used at sentencing. The sentencing court may impose such sentence concurrently or consecutively.

(4) The sentencing judge must review the scoresheet for accuracy and sign it.

(5) Felonies, except capital felonies, with continuing dates of enterprise are to be sentenced under the guidelines or Criminal Punishment Code in effect on the beginning date of the criminal activity.

(6) “Conviction” means a determination of guilt that is the result of a plea or trial, regardless of whether adjudication is withheld.

(7) “Primary offense” means the offense at conviction pending before the court for sentencing for which the total sentence points recommend a sanction that is as severe as, or more severe than, the sanction recommended for any other offense committed by the offender and pending before the court at sentencing. Only 1

count of one offense before the court for sentencing shall be classified as the primary offense.

(8) “Additional offense” means any offense other than the primary offense for which an offender is convicted and which is pending before the court for sentencing at the time of the primary offense.

(9) “Victim injury” is scored for physical injury or death suffered by a person as a direct result of any offense pending before the court for sentencing. Except as otherwise provided by law, the sexual penetration and sexual contact points will be scored as follows. Sexual penetration points are scored if an offense pending before the court for sentencing involves sexual penetration. Sexual contact points are scored if an offense pending before the court for sentencing involves sexual contact, but no penetration. If the victim of an offense involving sexual penetration or sexual contact without penetration suffers any physical injury as a direct result of an offense pending before the court for sentencing, that physical injury must be scored in addition to any points scored for the sexual contact or sexual penetration.

Victim injury must be scored for each victim physically injured and for each offense resulting in physical injury whether there are 1 or more victims. However, victim injury must not be scored for an offense for which the offender has not been convicted.

Victim injury resulting from 1 or more capital offenses before the court for sentencing must not be included upon any scoresheet prepared for non-capital offenses also pending before the court for sentencing. This does not prohibit the scoring of victim injury as a result of the non-capital offense or offenses before the court for sentencing.

(10) Unless specifically provided otherwise by statute, attempts, conspiracies, and solicitations must be indicated in the space provided on the Criminal Punishment Code scoresheet and must be scored at 1 severity level below the completed offense.

Attempts, solicitations, and conspiracies of third-degree felonies located in offense severity levels 1 and 2 must be scored as misdemeanors. Attempts, solicitations, and conspiracies of third-degree felonies located in offense severity levels 3, 4, 5, 6, 7, 8, 9, and 10 must be scored as felonies 1 offense level beneath the incomplete or inchoate offense.

(11) An increase in offense severity level may result from a reclassification of felony degrees under sections 775.0845, 775.087, 775.0875, or 794.023, Florida Statutes. Any such increase must be indicated in the space provided on the Criminal Punishment Code scoresheet.

(12) A single assessment of 30 prior serious felony points is added if the offender has a primary offense or any additional offense ranked in level 8, 9, or 10 and 1 or more prior serious felonies. A 'prior serious felony' is an offense in the offender's prior record ranked in level 8, 9, or 10 and for which the offender is serving a sentence of confinement, supervision, or other sanction or for which the offender's date of release from confinement, supervision, or other sanction, whichever is later, is within 3 years before the date the primary offense or any additional offenses were committed. Out of state convictions wherein the analogous or parallel Florida offenses are located in offense severity level 8, 9, or 10 must be considered prior serious felonies.

(13) If the offender has 1 or more prior capital felonies, points must be added to the subtotal sentence points of the offender equal to twice the number of points the offender receives for the primary offense and any additional offense. Out-of-state convictions wherein the analogous or parallel Florida offenses are capital offenses must be considered capital offenses for purposes of operation of this section.

(14) "Prior record" refers to any conviction for an offense committed by the offender prior to the commission of the primary offense. Prior record includes convictions for offenses committed by the offender as an adult or as a juvenile, convictions by federal, out of state, military, or foreign courts and convictions for violations of county or municipal ordinances that incorporate by reference a

penalty under state law. Federal, out of state, military or foreign convictions are scored at the severity level at which the analogous or parallel Florida crime is located.

(A) Convictions for offenses committed more than 10 years before the date of the commission of the primary offense must not be scored as prior record if the offender has not been convicted of any other crime for a period of 10 consecutive years from the most recent date of release from confinement, supervision, or other sanction, whichever is later, to the date of the commission of the primary offense.

(B) Juvenile dispositions of offenses committed by the offender within 5 years before the date of the commission of the primary offense must be scored as prior record if the offense would have been a crime if committed by an adult. Juvenile dispositions of sexual offenses committed by the offender more than 5 years before the date of the primary offense must be scored as prior record if the offender has not maintained a conviction-free record, either as an adult or as a juvenile, for a period of 5 consecutive years from the most recent date of release from confinement, supervision, or sanction, whichever is later, to the date of commission of the primary offense.

(C) Entries in criminal histories that show no disposition, disposition unknown, arrest only, or a disposition other than conviction must not be scored. Criminal history records expunged or sealed under section 943.058, Florida Statutes, or other provisions of law, including former sections 893.14 and 901.33, Florida Statutes, must be scored as prior record where the offender whose record has been expunged or sealed is before the court for sentencing.

(D) Any uncertainty in the scoring of the offender's prior record must be resolved in favor of the offender and disagreement as to the propriety of scoring specific entries in the prior record must be resolved by the sentencing judge.

(E) When unable to determine whether the conviction to be scored as prior record is a felony or a

misdemeanor, the conviction must be scored as a misdemeanor. When the degree of felony is ambiguous or the severity level cannot be determined, the conviction must be scored at severity level 1.

(15) “Legal status points” are assessed when an offender:

- (A) escapes from incarceration;
- (B) flees to avoid prosecution;
- (C) fails to appear for a criminal proceeding;
- (D) violates any condition of a supersedeas bond;
- (E) is incarcerated;
- (F) is under any form of a pretrial intervention or diversion program; or

(G) is under any form of court-imposed or post-prison release community supervision and commits an offense that results in conviction. Legal status violations receive a score of 4 sentence points and are scored when the offense committed while under legal status is before the court for sentencing. Points for a legal status violation must only be assessed once regardless of the existence of more than 1 form of legal status at the time an offense is committed or the number of offenses committed while under any form of legal status.

(16) Community sanction violation points occur when the offender is found to have violated a condition of:

- (A) probation;
- (B) community control; or
- (C) pretrial intervention or diversion.

Community sanction violation points are assessed when a community sanction violation is before the court for sentencing. Six community sanction violation points must be assessed for each

violation or if the violation results from a new felony conviction, 12 community sanction violation points must be assessed. For violations occurring on or after March 12, 2007, if the community sanction violation that is not based upon a failure to pay fines, costs, or restitution is committed by a violent felony offender of special concern as defined in section 948.06, Florida Statutes, 12 community sanction violation points must be assessed or if the violation results from a new felony conviction, 24 community sanction points must be assessed. Where there are multiple violations, points may be assessed only for each successive violation that follows a continuation of supervision, or modification or revocation of the community sanction before the court for sentencing and are not to be assessed for violation of several conditions of a single community sanction. Multiple counts of community sanction violations before the sentencing court may not be the basis for multiplying the assessment of community sanction violation points.

(17) Possession of a firearm, semiautomatic firearm, or a machine gun during the commission or attempt to commit a crime will result in additional sentence points. Eighteen sentence points are assessed if the offender is convicted of committing, or attempting to commit, any felony other than those enumerated in subsection 775.087(2), Florida Statutes, while having in his or her possession a firearm as defined in subsection 790.001(6), Florida Statutes. Twenty-five sentence points are assessed if the offender is convicted of committing or attempting to commit any felony other than those enumerated in subsection 775.087(3), Florida Statutes, while having in his or her possession a semiautomatic firearm as defined in subsection 775.087(3), Florida Statutes, or a machine gun as defined in subsection 790.001(9), Florida Statutes. Only 1 assessment of either 18 or 25 points can be made.

(18) "Subtotal sentence points" are the sum of the primary offense points, the total additional offense points, the total victim injury points, the total prior record points, any legal status points, community sanction points, prior serious felony points, prior capital felony points, and points for possession of a firearm or semiautomatic weapon.

(19) If the primary offense is drug trafficking under section 893.135, Florida Statutes, ranked in offense severity level 7 or 8, the subtotal sentence points may be multiplied, at the discretion of the sentencing court, by a factor of 1.5.

(20) If the primary offense is a violation of the Law Enforcement Protection Act under subsection 775.0823(2), (3), or (4), Florida Statutes, the subtotal sentence points are multiplied by 2.5. If the primary offense is a violation of subsection 775.0823(5), (6), (7), (8), or (9), Florida Statutes, the subtotal sentence points are multiplied by 2.0. If the primary offense is a violation of section 784.07(3) or 775.0875(1), Florida Statutes, or the Law Enforcement Protection Act under subsection 775.0823(10) or (11), Florida Statutes, the subtotal sentence points are multiplied by 1.5.

(21) If the primary offense is grand theft of the third degree of a motor vehicle and the offender's prior record includes 3 or more grand thefts of the third degree of a motor vehicle, the subtotal sentence points are multiplied by 1.5.

(22) If the offender is found to have committed the offense for the purpose of benefitting, promoting, or furthering the interests of a criminal gang under section 874.04, Florida Statutes, at the time of the commission of the primary offense, the subtotal sentence points are multiplied by 1.5.

(23) If the primary offense is a crime of domestic violence as defined in section 741.28, Florida Statutes, which was committed in the presence of a child under 16 years of age who is a family household member as defined in section 741.28(2), Florida Statutes, with the victim or perpetrator, the subtotal sentence points are multiplied by 1.5.

(24) (A) Adult on minor sex offense. The subtotal sentence points are multiplied by 2.0 if:

(i) the offender was 18 years of age or older and the victim was younger than 18 years of age at the time the offender committed the primary offense; and

(ii) the primary offense was committed on or after October 1, 2014, and is a violation of:

a. section 787.01(2) (kidnapping) or 787.02(2) (false imprisonment), Florida Statutes, if in the course of committing the kidnapping or false imprisonment the defendant committed a sexual battery under chapter 794, Florida Statutes, or a lewd act under section 800.04 or 847.0135(5), Florida Statutes, against the victim;

b. section 787.01(3)(a)2. or (3)(a)3., Florida Statutes, (kidnapping of a child under 13 with a sexual battery or lewd act);

c. section 787.02(3)(a)2. or (3)(a)3., Florida Statutes, (false imprisonment of a child under 13 with a sexual battery or lewd act);

d. section 794.011, Florida Statutes, (sexual battery), excluding section 794.011(10);

e. section 800.04, Florida Statutes, (lewd or lascivious offenses); or

f. section 847.0135(5), Florida Statutes, (lewd or lascivious exhibition using a computer).

(B) Notwithstanding subdivision (d)(24)(A), the court may not apply the multiplier and must sentence the defendant to the statutory maximum sentence if applying the multiplier results in the lowest permissible sentence exceeding the statutory maximum sentence for the primary offense under chapter 775, Florida Statutes.

(25) “Total sentence points” are the subtotal sentence points or the enhanced subtotal sentence points.

(26) The lowest permissible sentence is the minimum sentence that may be imposed by the trial court, absent a valid reason for departure. The lowest permissible sentence is any

nonstate prison sanction in which the total sentence points equals or is less than 44 points, unless the court determines within its discretion that a prison sentence, which may be up to the statutory maximums for the offenses committed, is appropriate. When the total sentence points exceeds 44 points, the lowest permissible sentence in prison months must be calculated by subtracting 28 points from the total sentence points and decreasing the remaining total by 25 percent. The total sentence points must be calculated only as a means of determining the lowest permissible sentence. ~~The permissible range for sentencing must be the lowest permissible sentence up to and including the statutory maximum, as defined in section 775.082, Florida Statutes, for the primary offense and any additional offenses before the court for sentencing. The sentencing court may impose such sentences concurrently or consecutively. However, any sentence to state prison must exceed 1 year. If the lowest permissible sentence under the Code exceeds the statutory maximum sentence as provided in section 775.082, Florida Statutes, the sentence required by the Code must be imposed.~~ The maximum sentence for each individual felony offense is the statutory maximum as provided in s. 775.082, Florida Statutes, unless the lowest permissible sentence exceeds the statutory maximum for that offense. If the lowest permissible sentence exceeds the statutory maximum for an individual felony offense, the lowest permissible sentence replaces the statutory maximum and must be imposed for that offense. See *State v. Gabriel*, 314 So. 3d 1243 (Fla. 2021). Sentences for multiple felony offenses may be imposed concurrently or consecutively. However, any sentence to state prison must exceed 1 year. If the total sentence points are greater than or equal to 363, the court may sentence the offender to life imprisonment. ~~The sentence imposed must be entered on the scoresheet.~~

(27) The sentence imposed must be entered on the scoresheet.

(28) For those offenses having a mandatory minimum sentence, a scoresheet must be completed and the lowest permissible sentence under the Code calculated. If the lowest permissible sentence is less than the mandatory minimum

sentence, the mandatory minimum sentence takes precedence. If the lowest permissible sentence exceeds the mandatory sentence, the requirements of the Criminal Punishment Code and any mandatory minimum penalties apply. Mandatory minimum sentences must be recorded on the scoresheet.

(289) Any downward departure from the lowest permissible sentence, as calculated according to the total sentence points under section 921.0024, Florida Statutes, is prohibited unless there are circumstances or factors that reasonably justify the downward departure. Circumstances or factors that can be considered include, but are not limited to, those listed in subsection 921.0026(2), Florida Statutes.

(A) If a sentencing judge imposes a sentence that is below the lowest permissible sentence, it is a departure sentence and must be accompanied by a written statement by the sentencing court delineating the reasons for the departure, filed within 7 days after the date of sentencing. A written transcription of orally stated reasons for departure articulated at the time sentence was imposed is sufficient if it is filed by the court within 7 days after the date of sentencing. The sentencing judge may also list the written reasons for departure in the space provided on the Criminal Punishment Code scoresheet.

(B) The written statement delineating the reasons for departure must be made a part of the record. The written statement, if it is a separate document, must accompany the scoresheet required to be provided to the Department of Corrections under subsection 921.0024(6), Florida Statutes.

If a split sentence is imposed, the total sanction (incarceration and community control or probation) must not exceed the term provided by general law or the maximum sentence under the Criminal Punishment Code.

(2930) If the lowest permissible sentence under the criminal punishment code is a state prison sanction but the total sentencing points do not exceed 48 points (or 54 points if 6 of those points are for a violation of probation, community control, or other

community supervision that does not involve a new crime), the court may sentence the defendant to probation, community control, or community supervision with mandatory participation in a prison diversion program, as provided for in section 921.00241, Florida Statutes, if the defendant meets the requirements for that program as set forth in section 921.00241, Florida Statutes.

(301) If the total sentence points equal 22 or less, the court must sentence the offender to a nonstate prison sanction unless it makes written findings that a nonstate prison sanction could present a danger to the public. Unless there is a stipulation, there must be a finding by the jury that a nonstate prison sanction could present a danger to the public before the court may sentence a defendant to prison under section 775.082(10), Florida Statutes.

(312) Sentences imposed after revocation of probation or community control must be imposed according to the sentencing law applicable at the time of the commission of the original offense.

Committee Note

The terms must and shall, as used in this rule, are mandatory and not permissive.

2001 Amendment. 3.704(d)(14)(B). The definition of “prior record” was amended to include juvenile dispositions of offenses committed within 5 years prior to the date of the commission of the primary offense. “Prior record” was previously defined to include juvenile disposition of offenses committed within 3 years prior to the date of the commission of the primary offense. This amendment reflects the legislative change to section 921.0021, Florida Statutes, effective July 1, 2001. This new definition of prior record applies to primary offenses committed on or after July 1, 2001.