

Supreme Court of Florida

No. 66,801

THE FLORIDA BAR: AMENDMENT TO
RULES OF CRIMINAL PROCEDURE
(3.701, 3.988 -- SENTENCING GUIDELINES).

[April 11, 1985]

PER CURIAM.

Pursuant to subsection 921.001(4)(b), Florida Statutes (1983), the Sentencing Guidelines Commission has submitted proposed changes in the sentencing guidelines which require amendment of criminal rules of procedure 3.701 and 3.988. After studying these recommendations, we approve the changes.* We

*The essential changes and reasons therefor are:
a) Add section 327.351, Florida Statutes (Supp. 1984), to Category 1: Murder, Manslaughter. The legislature has provided that, upon conviction, any person who operates any vessel on the waters of this state while intoxicated, resulting in the death of any human being, shall be guilty of manslaughter and punished as provided by the existing law relating to manslaughter.
b) Rule 3.701(d)(5)(a) is revised by the elimination of the words "disposed of." These words are not susceptible of definition within the context of the rule and have generated confusion. The elimination of this wording does not alter the intent of this section.
c) Rule 3.701(d)(5)(b) and (d)(5)(c) are revised by the substitution of the wording "primary offense" for the wording "instant offense." This change will conform to changes to the prior record section of the rule and is susceptible of definition under the rule.
d) Rule 3.701(d)(6) is revised by the substitution of the word "escapees" for the word "escapes" as it appears in the present text of the rule. The inclusion of the word "escapees" was a typographical error.
e) The Committee Note to rule 3.701(d)(7) is revised to include language to clarify that victim injury is to be scored for each victim and each occurrence in excess of one where the same victim is involved. The present text of the rule has caused confusion.

draw attention to the increased penalty for burglary. This will have a fiscal impact on the state penal system, the extent of which this Court is unaware. We consider these current changes severable from one another, however, and we recognize the legislature's power to accept or reject them in part or in whole. As with our previous adoptions of sentencing guidelines, In re Rules of Criminal Procedure (Sentencing Guidelines), 439 So.2d 848 (Fla. 1983), and The Florida Bar: Amendment to Rules of Criminal Procedure (Sentencing Guidelines), 451 So.2d 824 (Fla. 1984), the Committee Notes adopted herein are part of these rules. Subject to the legislature's approval, these changes will be effective at 12:01 a.m., July 1, 1985.

It is so ordered.

BOYD, C.J., ADKINS, OVERTON, ALDERMAN, McDONALD, EHRLICH and SHAW, JJ., Concur

NO MOTION FOR REHEARING WILL BE ENTERTAINED BY THE COURT.

f) Rule 3.701(d)(3) is revised to define primary offense as that offense at conviction which, when scored on the guidelines scoresheet, recommends the most severe sanction. The definition appearing in the present text of the rule has generated confusion.

g) The comment to rule 3.701(d)(5), original guidelines manual, is included as rule 3.701(d)(15). Inclusion of this wording will limit the scoring of prior convictions under the same category, prior conviction multiplier in categories 3, 5, and 6 to felony convictions.

h) The Committee Note to rule 3.701(d)(10) is revised to clarify the relation of both types of enhancement statute, i.e., reclassification and habitual offender, to the sentencing guidelines. The present text of the note speaks only to reclassification and has generated confusion.

i) The scoring of the offense of escape is moved from category 9 to category 8. In addition section 944.40, Florida Statutes (1971), is added to category 8 under Appendix B of the guidelines manual and to rule 3.701(c).

j) The primary offense points for a second-degree felony in category 5 are increased from their present values of 30, 36, 39, and 42 to 40, 48, 52, and 56 and the multiplier value of prior category 5 convictions is increased from 5 to 40.

RULE 3.701. SENTENCING GUIDELINES

a. This rule is to be used in conjunction with forms 3.988(a)-(i).

b. Statement of Purpose

The purpose of sentencing guidelines is to establish a uniform set of standards to guide the sentencing judge in the sentence decision-making process. The guidelines represent a synthesis of current sentencing theory and historic sentencing practices throughout the state. Sentencing guidelines are intended to eliminate unwarranted variation in the sentencing process by reducing the subjectivity in interpreting specific offense and offender-related criteria and in defining their relative importance in the sentencing decision.

The sentencing guidelines embody the following principles:

1. Sentencing should be neutral with respect to race, gender, and social and economic status.
2. The primary purpose of sentencing is to punish the offender. Rehabilitation and other traditional considerations continue to be desired goals of the criminal justice system but must assume a subordinate role.
3. The penalty imposed should be commensurate with the severity of the convicted offense and the circumstances surrounding the offense.
4. The severity of the sanction should increase with the length and nature of the offender's criminal history.
5. The sentence imposed by the sentencing judge should reflect the length of time to be served, shortened only by the application of gain time.
6. While the sentencing guidelines are designed to aid the judge in the sentencing decision and are not intended to usurp judicial discretion, departures from the presumptive sentences established in the guidelines shall be articulated in writing and made only for clear and convincing reasons.
7. Because the capacities of state and local correctional facilities are finite, use of incarcerative sanctions should be limited to those persons convicted of more serious offenses or those who have longer criminal histories. To ensure such usage of finite resources, sanctions used in sentencing convicted felons should be the least restrictive necessary to achieve the purposes of the sentence.

c. Offense Categories

Offenses have been grouped into nine (9) offense categories encompassing the following statutes:

Category 1: Murder, manslaughter: Chapter 782 [except subsection 782.04(1)(a)], and subsection 316.1931(2), and section 327.351

Category 2: Sexual offenses: Chapters 794 and 800 and section 826.04

- Category 3: Robbery: Section 812.13
- Category 4: Violent personal crimes: Chapters 784 and 836 and section 843.01
- Category 5: Burglary: Chapter 810 and subsection 806.13(3)
- Category 6: Thefts, forgery, fraud: Chapters 322, 409, 443, 509, 812 (except section 812.13), 815, 817, 831, and 832
- Category 7: Drugs: Chapter 893
- Category 8: Weapons: Chapter 790 and section 944.40
- Category 9: All other felony offenses

d. General Rules and Definitions

1. One guideline scoresheet shall be prepared for each defendant covering all offenses pending before the court for sentencing. The state attorney's office will prepare the scoresheets and present them to defense counsel for review as to accuracy in all cases unless the judge directs otherwise. The sentencing judge shall approve all scoresheets.
2. "Conviction" means a determination of guilt resulting from plea or trial, regardless of whether adjudication was withheld or whether imposition of sentence was suspended.
3. **"Primary offense"-is-defined-as-the-most-serious offense-at-conviction."** Primary offense" is defined as that offense at conviction which, when scored on the guidelines scoresheet, recommends the most severe sanction. In the case of multiple offenses, the primary offense is determined in the following manner:
 - a) A separate guidelines scoresheet shall be prepared scoring each offense at conviction as the "primary offense at conviction" with the other offenses at conviction scored as "additional offenses at conviction."
 - b) The guidelines scoresheet which recommends the most severe sentence range shall be the scoresheet to be utilized by the sentencing judge pursuant to these guidelines.
4. Additional offenses at conviction: All other offenses for which the offender is convicted and which are pending before the court shall be scored as additional offenses based upon their degree and the number of counts of each.
5. a) "Prior record" refers to any past criminal conduct on the part of the offender, resulting in conviction, ~~disposed-of~~ prior to the commission of the primary offense. Prior record includes all prior Florida, federal, out-of-state, military, and foreign convictions.
 - 1) Entries in criminal histories which show no disposition, disposition unknown, arrest only, or other nonconviction disposition shall not be scored.
 - 2) When scoring federal, foreign, military, or out-of-state convictions, assign the score

for the analogous or parallel Florida statute.

- 3) When unable to determine whether an offense at conviction is a felony or misdemeanor, the offense should be scored as a misdemeanor. Where the degree of the felony is ambiguous or impossible to determine, score the offense as a third-degree felony.
 - 4) Prior record shall include criminal traffic offenses, which shall be scored as misdemeanors.
 - 5) Convictions which do not constitute violations of a parallel or analogous state criminal statute shall not be scored.
- b) Adult record: An offender's prior record shall not be scored if the offender has maintained a conviction-free record for a period of ten (10) consecutive years from the most recent date of release from confinement, supervision or sanction, whichever is later, to the date of the instant offense: primary offense.
- c) Juvenile record: All prior juvenile dispositions which are the equivalent of convictions as defined in section (d) (2), occurring within three (3) years of the commission of the instant-offense primary offense and which would have been criminal if committed by an adult, shall be included in prior record.
6. Legal status at time of offense is defined as follows: Offenders on parole, probation, or community control; in custody serving a sentence; escapes; escapees; fugitives who have fled to avoid prosecution or who have failed to appear for a criminal judicial proceeding or who have violated conditions of a supersedeas bond; and offenders in pretrial intervention or diversion programs.
 7. Victim injury shall be scored if it is an element of any offenses at conviction.
 8. Guidelines ranges: The presumptive sentences provided in the guideline grids are assumed to be appropriate for the composite score of the offender. However, a sentence range is provided in order to permit some discretion without the requirement of a written explanation for departing from the presumptive sentence.
 9. Mandatory sentences: For those offenses having a mandatory penalty, a scoresheet should be completed and the guideline sentence calculated. If the recommended sentence is less than the mandatory penalty, the mandatory sentence takes precedence. If the guideline sentence exceeds the mandatory sentence, the guideline sentence should be imposed.
 10. Sentences exceeding statutory maximums: If the composite score for a defendant charged with a single offense indicates a guideline sentence that exceeds the maximum sentence provided by statute for that offense, the statutory maximum sentence should be imposed.

11. Departures from the guideline sentence:
Departures from the guideline range should be avoided unless there are clear and convincing reasons to warrant aggravating or mitigating the sentence. Any sentence outside of the guidelines must be accompanied by a written statement delineating the reasons for the departure. Reasons for deviating from the guidelines shall not include factors relating to prior arrests without conviction. Reasons for deviating from the guidelines shall not include factors relating to the instant offenses for which convictions have not been obtained.
12. Sentencing for separate offenses: A sentence must be imposed for each offense. However, the total sentence cannot exceed the total guideline sentence unless a written reason is given.
13. Community control, a form of intensive supervised custody in the community involving restriction of the freedom of the offender, is a sanction which the court may impose upon a finding that probation is an unsuitable disposition. When community control is imposed, it shall not exceed the term provided by general law.
14. Sentences imposed after revocation of probation or community control must be in accordance with the guidelines. The sentence imposed after revocation of probation may be included within the original cell (guidelines range) or may be increased to the next higher cell (guidelines range) without requiring a reason for departure.
15. Categories 3, 5, and 6 contain an additional factor to be scored under the heading of Prior Record: Prior convictions for similar offenses. Prior convictions scored under this factor should be calculated in addition to the general prior record score. Scoring is limited to prior felony convictions included within the category.

COMMITTEE NOTE: (a) The operation of this rule is not intended to change the law or requirements of proof as regards sentencing.

(b) These principles are binding on the sentencing court.

(c) Only one category is proper in any particular case. Category 9, "All Other Felony Offenses," should be used only when the primary offense at conviction is not included in another, more specific category. The guidelines do not apply to capital felonies.

Inchoate offenses are included within the category of the offense attempted, solicited, or conspired to, as modified by ch. 777.

(d) (1) Ultimate responsibility for assuring that scoresheets are accurately prepared rests with the sentencing court. Due to ethical considerations, defense counsel may not be compelled to submit a scoresheet. Probation and parole officers may be directed to compile guidelines scoresheets only when a presentence investigation has been ordered. The forms for calculating the guidelines are forms 3.988(a)-(i).

(d) (2) This definition applies to both instant offense and prior record scoring.

(d) (3) The proper offense category is identified upon determination of the primary offense. When the defendant is convicted of violations of more than one unique statute, the

offenses are to be sorted by statutory degree. In the event of multiple offenses of the same statutory degree, the primary offense is identified by the corresponding offense category with the lowest numerical designation.

(d) (4) No points shall be scored for lesser and included offenses.

(d) (5) Each separate prior felony and misdemeanor conviction in an offender's prior record which amounts to a violation of Florida law shall be scored, unless discharged by the passage of time. Any uncertainty in the scoring of the defendant's prior record shall be resolved in favor of the defendant, and disagreement as to the propriety of scoring specific entries in the prior record should be resolved by the trial judge.

Prior record includes all offenses for which the defendant has been found guilty, regardless of whether adjudication was withheld or the record has been expunged.

Juvenile dispositions, with the exclusion of status offenses, are included and considered along with adult convictions by operation of this provision. However, each separate adjudication is discharged from consideration if three (3) years have passed between the date of disposition and the commission of the instant offense.

(d) (7) This provision implements the intention of the commission that points for victim injury be added only when the defendant is convicted of an offense (scored as either primary or additional offense) which includes physical impact or contact. Victim injury is to be scored for each victim for whom the defendant is convicted of injuring and is limited to physical trauma. Victim injury shall be scored additionally for each count where victim injury is an element of each offense at conviction in excess of one count as to each victim.

(d) (8) The first guideline cell in each category (any nonstate prison sanction) allows the court the flexibility to impose any lawful term of probation with or without a period of incarceration as a condition of probation, a county jail term alone or any nonincarcerative disposition. The presumptive sentences in the succeeding grids refer to commitments to state prison. Any presumptive sentence may include the requirement that a fine be paid. The presumptive sentences are found in forms 3.988(a)-(i).

(d) (10) If an offender is convicted under an enhancement statute, the reclassified degree should be used as the basis for scoring the primary offense in the appropriate category. If the offender is sentenced under section 775.084 (habitual offender), the maximum allowable sentence is increased as provided by the operation of that statute. If the sentence imposed departs from the recommended sentence, the provisions of paragraph (d) (11) shall apply.

(d) (11) Reasons for departure shall be articulated at the time sentence is imposed. The written statement shall be made a part of the record, with sufficient specificity to inform all parties, as well as the public, of the reasons for departure. The court is prohibited from considering offenses for which the offender has not been convicted. Other factors, consistent and not in conflict with the Statement of Purpose, may be considered and utilized by the sentencing judge.

(d) (12) The sentencing court shall impose or suspend sentence for each separate count, as convicted. The total sentence shall not exceed the guideline sentence, unless the provisions of paragraph (11) are complied with.

If a split sentence is imposed (i.e., a combination of state prison and probation supervision), the incarcerative portion imposed shall not be less than the minimum of the guideline range nor exceed the maximum of the range. The total sanction (incarceration and probation) shall not exceed the term provided by general law.

(d) (13) Community control is a viable alternative for any state prison sentence less than twenty-four (24) months without requiring a reason for departure.

(e) Category 5: Burglary

I. Primary offense at conviction

Degree	Number of Counts			
	1	2	3	4
Life	80	96	104	112
1st pbl	70	84	91	98
1st	60	72	78	84
2nd	40	48	52	56
3rd	20	24	26	28

Number of Counts Above 4

_____ x 8 = _____
 _____ x 7 = _____
 _____ x 6 = _____
 _____ x 3 = _____
 _____ x 2 = _____

II. Additional offenses at conviction

Degree	Number of Counts			
	1	2	3	4
Life	16	19	21	23
1st pbl	14	16	18	20
1st	12	14	16	17
2nd	6	7	8	9
3rd	4	5	6	7
MM	1	2	3	4

Number of Counts Above 4

_____ x 2 = _____
 _____ x 2 = _____
 _____ x 1 = _____
 _____ x 1 = _____
 _____ x 1 = _____
 _____ x 1 = _____

III. A. Prior record

Degree	Number of Prior Convictions			
	1	2	3	4
Life	60	130	210	307
1st pbl	48	104	168	246
1st	36	78	126	184
2nd	18	39	63	90
3rd	6	13	21	30
MM	1	2	3	4

Number of Priors Above 4

_____ x 97 = _____
 _____ x 78 = _____
 _____ x 58 = _____
 _____ x 27 = _____
 _____ x 9 = _____
 _____ x 1 = _____

B. Prior convictions for Category 5 offenses

Number prior convictions ___ x 40 =

IV. Legal status at time of offense

No restrictions 0
 Legal constraint 10

V. Victim injury (physical)

None 0
 Slight 5
 Moderate 10
 Death or severe 15

Original Proceedings - Rules of Criminal Procedure

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for Petitioner