Filing # 19480254 Electronically Filed 10/16/2014 03:33:50 PM

RECEIVED, 10/16/2014 15:38:44, John A. Tomasino, Clerk, Supreme Court

IN THE
SUPREME COURT OF FLORIDA

JERMAINE C. JACKSON,
Petitioner,

Case No. SC14-842

vs.

L.T. Case Nos. 4D11-3174
562010CF001229A

STATE OF FLORIDA,
Respondent.

On Discretionary Review from a Decision of the
Fourth District Court Of Appeal

PETITIONER'S INITIAL BRIEF ON THE MERITS

CAREY HAUGHWOUT
Public Defender
15th Judicial Circuit of Florida

NAN ELLEN FOLEY
Assistant Public Defender
Florida Bar No. 0708984
421 Third Street
West Palm Beach, Florida 33401
(561) 355-7600
appeals@pd15.org

Attorney for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FLORIDA CASES

FEDERAL CASES

UNITED STATES CONSTITUTION

FLORIDA CONSTITUTION

FLORIDA STATUTES

FLORIDA RULES

LEGISLATIVE MATERIALS

EXECUTIVE MATERIALS

OTHER

STATUTE UNDER REVIEW

The statutory classification at issue is found in section 958.04(1)(b) of the Florida Statutes (eff. Oct. 1, 2008 to present). The relevant language is in boldface.

958.04. Judicial disposition of youthful offenders

(1) The court may sentence as a youthful offender any person:

> (a) Who is at least 18 years of age or who has been transferred for prosecution to the criminal division of the circuit court pursuant to chapter 985;
>
> (b) Who is found guilty of or who has tendered, and the court has accepted, a plea of nolo contendere or guilty to a crime that is, under the laws of this state, a felony if **the offender is younger than 21 years of age at the time sentence is imposed; and**
>
> (c) Who has not previously been classified as a youthful offender under the provisions of this act; however, a person who has been found guilty of a capital or life felony may not be sentenced as a youthful offender under this act.

Credits.
Laws 1978, c. 78-84, § 5; Laws 1980, c. 80-321, § 1; Laws 1985, c. 85-288, § 20; Laws 1987, c. 87-58, § 1; Laws 1987, c. 87-110, § 3; Laws 1990, c. 90-208, § 7; Laws 1990, c. 90-211, § 11; Laws 1991, c. 91-225, § 11; Laws 1993, c. 93-406, § 8; Laws 1994, c. 94-209, § 101. Amended by Laws 1996, c. 96-312, § 22, eff. July 1, 1996; Laws 1997, c. 97-94, § 31, eff. July 1, 1997; Laws 1997, c. 97-194, § 36, eff. Oct. 1, 1998; Laws 1998, c. 98-204, § 21, eff. Oct. 1, 1998; Laws 1998, c. 98-280, § 61, eff. June 30, 1998; Laws 2008, c. 2008-250, § 7, eff. Oct. 1, 2008.

PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and appellant in the Fourth District Court of Appeal. The Respondent is the State of Florida. The parties are referred to as the defendant and the State.

Citations to Florida Statutes refer to 2014 statutes if no year is provided. The following references are used:

R.	Circuit Court Record.
CCH.	Circuit Court Case History (preceding paginated documents in Volume 1).
SSR.	Second Supplemental Record.
T.	Trial and Sentencing Transcript.
The DOC	The Florida Department of Corrections.
Age-at-Sentencing	The classification on review. § 958.04(1)(b), Fla. Stat. (Oct. 1, 2008 to Present).
Age-at-Offense	The pre-amendment classification. § 958.04(1)(b), Fla. Stat. (Jan. 1, 1979 to Sept. 30, 2008).
Chapter 958	The Florida Youthful Offender Act.
FYCA	Federal Youth Corrections Act.

STATEMENT OF FACTS

Proceedings in the Circuit Court

The State charged the defendant with robbery with a firearm while wearing a mask. R2, 126, 146. The offense is a first-degree felony punishable by up to life imprisonment. § 812.13(2)(a), Fla. Stat. (2010).[1] Defendant turned twenty-one years old while awaiting trial as follows:

DATE	EVENT	AGE
April 18, 2010	Offense	20 years, 5 months
April 20, 2010	Arrest	20 years, 5 months
November 2010	21st Birthday	21 years
March 21-25, 2011	Trial	21 years, 4 months
July 22, 2011	Sentencing	21 years, 8 months

R2, 7, 128, 150.

The defendant was held in the St. Lucie County Jail pending trial (bond having been set at $100,000). R9-10. One month after his arrest, the Office of the Public Defender withdrew as counsel because it represented the complainant in an unrelated case. R15. The trial court appointed the Office of Criminal Conflict and Civil Regional Counsel (RCC). R16.

[1]The use of a mask did not reclassify the offense to a life felony. § 775.0845, Fla. Stat. (2010). *Mendez v. State*, 747 So.2d 1032 (Fla. 3d DCA 1999).

In November, the defendant wrote the judge requesting a hearing because he had not seen or heard from his court-appointed attorney in seven months and did not have "documents containing my case." R25. The clerk's notes indicate that the defendant was not transported from the jail for docket soundings. CCH, 3-4. When defendant appeared at a mid-December hearing on his complaint, he was told he would be getting a new lawyer and his request for an inquiry was moot. CCH, 4.

In January 2011, the defendant appeared in court with a second RCC attorney. CCH, 4. He rejected the State's plea offer; the State amended the Information to allege the actual possession of a firearm. CCH, 4. The next month, a third RCC attorney filed a demand for speedy trial followed by a notice of alibi. R31-2. The State provided better addresses for five witnesses. R32-3. The jury trial began in March 2011—eleven months after the defendant's arrest and four months after his 21st birthday. R127.

At trial, the State presented evidence that someone called a Papa John's in Fort Pierce around lunchtime and placed a $75 food order. T67-8, 72, 79. The complainant delivered it. T29. A man wearing a bandana over his nose and mouth came out from the side of a duplex and approached the complainant. T36-7.

The man held a firearm to the complainant's head and ordered him to empty his pockets and lie on the ground. T37-8. The complainant, who had $20 in cash and a cell phone, complied. T40. The man then ordered the complainant to leave.

T40. As the complainant drove away, he saw the man collect the food, the cash, and the phone. T40, 47-8.

The disputed issue was identity. The complainant did not identify the defendant. T45, 57, 84. Neither did three other people who saw the offender. T103-4, 111, 135-8. The State relied on the defendant's statements, which linked him to the phone used to order the food. T146-56, 189-20. It also relied on the defendant's admission to his intellectually disabled friend. T174. The defendant, on the other hand, testified at trial in support of his alibi. T260-83.

The jury found defendant guilty as charged. R126, T487-8. A presentence report was ordered because defendant had no prior adult convictions. T491.

Defendant was sentenced four months later. R1, 150. The minimum sentence was 10 years in prison under the 10/20/Life statute. § 775.087(2)(a) 1., Fla. Stat. (2010). The maximum was life without parole. § 812.13(2)(a), Fla. Stat. (2010).

The defense asked the court to impose the minimum mandatory. T521-2. In support, it presented testimony from the defendant's godmother and his child's mother. T502-8. The defendant also testified T509-18. He continued to maintain his innocence. T517. Yet he understood that the jury found him guilty and the court's "job is to punish me." T517. The defendant also acknowledged that he was trying to "hustle money" to buy marijuana, in addition to food and diapers for his son. T515. Upon his release, he hoped to move to Georgia where his family

resides. T513. He, and his son's mother, testified they grew up without their fathers and did not want the same for their son. T506, 511.

The State requested a life sentence. T526. It pointed to the nature of the offense and the defendant's juvenile record, which consisted of four non-violent felonies and a misdemeanor battery. R144, T525-6. The investigating detective testified to his suspicion that the defendant committed other robberies. T518-20.

The Court considered only the instant offense. T521. It imposed a sentence of life without parole, stating in full:

> All right. Well, notwithstanding the Defendant's position that he's not guilty of this crime, he certainly has the right to maintain that innocence. There's absolutely nothing wrong with that, but I remember this trial and there was so much evidence in this case that, that linked this Defendant to the crime. I mean, it was – to me it was very compelling evidence, it was circumstantial in the sense that nobody was able to – that he wasn't – he wasn't apprehended at the scene and nobody saw his face because there was a mask on the – on the face of the robber, but all of the evidence in this case is – was pretty compelling to me, and the jury's decision was certainly supported by it.
>
> So notwithstanding the Defendant's position on that, which he's entitled to maintain, I'm confined to impose a sentence on a person that this jury found is guilty of armed robbery with a firearm. And I do regret that you have a child and perhaps you have started the next generation of this unfortunate cycle of men growing up without any male figure in their life to guide them properly, but you weren't very much guidance to this child for the first year of his life. In fact, if this last day before your arrest in any way describes your lifestyle, you didn't do very much of anything for anybody, not even yourself. But that's – that's sad, but that – that's already been written.
>
> Armed robbery is the most serious crime you can commit in my view besides killing somebody. And to be sure, anytime you hold up a gun to

> somebody's face and whatever it is you say to them, that could – that could kill some people just by the sight of a barrel being shown to your face, so you're – you're actually risking somebody else's life any time you do something like that.
>
> This poor man, I remember him being so afraid of what had happened, he actually – he actually left the area. Thought he could make a living and support his family in this town, but that was enough to make him and his family get up and leave, lock, stock and barrel. He didn't want anything more to do with this community. And that's also unfortunate, but I can't blame him.
>
> The jury having found you guilty of robbery with a firearm while wearing a mask, I'll find that, adjudicate you guilty as charged, sentence you to life in prison, for the record, with credit for [459 days]. T526-8.

The court recalled the case later that day to pronounce, in defendant's presence, the 10-year term under the 10/20/Life law. T530-31.

Motion to Correct Sentencing Errors Pending Appeal

Defendant moved to correct sentencing errors pursuant to Fla. R. Crim. P. 3.800(b)(2). He argued that the trial court violated due process by relying on arbitrary factors such as its opinion that armed robbery "is the most serious crime you can commit in my view besides killing somebody," the victim's emotional trauma, and the defendant's lifestyle. SSR1, 6-10. He also requested an evidentiary hearing to establish that the life sentence is grossly disproportionate to sentences imposed on other defendants with comparable sentencing scores. SR10-13. Finally, he challenged certain costs and fees. SSR1, 13-4. The motion was denied by operation of law when the trial court failed to rule within 60 days. SSR31.

Direct Appeal

On direct appeal, the defendant raised the same sentencing issues. The Fourth District affirmed the sentence but remanded for correction of costs. *Jackson v. State*, 137 So.3d 470, 472-3 (Fla. 4th DCA 2014).

Defendant also challenged the constitutionality of section 958.04(1)(b) of the Florida Youthful Offender Act, which limits eligibility to defendants "younger than 21 years of age at the time sentence is imposed." § 958.04(1)(b), Fla. Stat. (eff. Oct. 1 2008 to present). The Fourth District upheld the statute against defendant's claims that it violates equal protection and due process guarantees under the Florida and United States Constitutions. *Id.* at 474-6.

This Court granted discretionary review. Art. V, § 3(b)(3), Fla. Const.

SUMMARY OF THE ARGUMENT

The age-restriction for sentencing under the Florida Youthful Offender Act violates the basic requirements of equal justice and due process of law under the United States Constitution and separately the Florida Constitution. As redrawn in 2008, eligibility turns on whether a defendant is "younger than 21 years of age at the time sentence is imposed." § 958.04(1)(b), Fla. Stat. (eff. Oct. 1 2008).

Defendants do not stand equal before the law because many are arbitrarily excluded based on factors beyond their control, ranging from pure happenstance to the timing of highly-valued procedural requirements. Moreover, the redrawn classification creates an unnecessary sentencing deadline in violation of substantive due process. Eligibility automatically expires needlessly and capriciously on a date-certain. No procedure can avoid or remedy the lost opportunity for sentencing as a youthful offender.

This Court should apply heightened scrutiny because the age-at-sentencing classification encroaches upon the deeply rooted and constitutionally protected rights of the accused. It divorces the sentencing date from the orderly and sequential procedures that guarantee justice in our adversarial system.

But even under rationality review, the age-at-sentencing classification fails to promote its goal of aligning the age-restriction for judicial dispositions with the DOC's long-standing restriction of youthful offender treatment to inmates who are

younger than 25 years old. It is aimed at defendants who are sentenced to prison, but governs all types of youthful offender supervision. As to prisoners, it fails to account for time served thus excluding defendants whose sentences will expire as if they were sentenced before their 21st birthdays. Finally, it conflicts with other sections of chapter 958 that authorize youthful offender prison terms extending beyond the DOC's age limit, regardless of the offender's age at sentencing. The redrawn classification imposes arbitrary and oppressive burdens on many defendants without commensurate benefit to the state.

The pre-amendment statute should be revived so that youthful offender sentencing is available "if such crime was committed before the defendant's 21st birthday." § 958.04(1)(b), Fla. Stat. (Jan.1, 1979 to Sept. 30, 2008). Defendant asks this Court to reverse *Jackson v. State*, 137 So.3d 470 (Fla. 4th DCA 2014) upholding section 958.04(1)(b) and to remand his case for resentencing.

Defendant further asks this Court to exercise its discretion to review an issue beyond the scope of review. He asks for resentencing before another judge whether or not section 958.04(1)(b) is invalidated. The sentencing judge violated due process when he relied on his personal (and necessarily arbitrary) view that armed robbery is "the most serious crime" a person can commit apart from murder and considered facts inherent in every armed robbery to impose a life sentence far exceeding the 10-year mandatory minimum.

I. Section 958.04(1)(b) of the Florida Youthful Offender Act violates equal protection and due process guarantees where age-eligibility for alternative sentencing is determined by the defendant's age at the time sentence is imposed.

For nearly thirty years, defendants were eligible for sentencing under the Florida Youthful Offender Act if, among other things, the "crime was committed before the defendant's 21st birthday." § 958.04(1)(b), Fla. Stat. (Jan. 1, 1979 to Sept. 30, 2008). This age-at-offense classification was based on a past event that was determined by the defendant alone and directly relevant to culpability. The sentencing range was fixed throughout the proceedings. Eligibility was not subject to uncontrollable events or dependant on the exhaustion of the trial process by a date certain. In short, it applied equally to all and did not encroach upon constitutionally guaranteed procedures that are essential to fundamental fairness.

In 2008, the Legislature redrew the classification to exclude defendants who are no longer "younger than 21 years of age at the time sentence is imposed." § 958.04(1)(b), Fla. Stat. (eff. Oct. 1, 2008). This is to say, it moved the marker from the starting gate to the finishing line. The classification arbitrarily distinguishes defendants by imposing a sentencing deadline that is indifferent to the constitutional rights that guarantee due process. Moreover, it penalizes otherwise eligible defendants without promoting the intended benefit. It does not align the age-restriction for judicial dispositions with the restriction of the DOC's youthful offender institutions and programs to inmates who are 14 through 24 years old.

Defendant asks this Court to reverse the Fourth District's decision upholding the classification against defendant's claims that it violates the Equal Protection and Due Process Clauses of the United States and Florida Constitutions. *Jackson v. State*, 137 So.3d 470 (Fla. 4th DCA 2014).

Standard of Review. The constitutionality of a Florida statute is reviewed de novo. *D.M.T. v. T.M.H.*, 129 So.3d 320, 332 (Fla.2013).

Preservation. Defendant challenged the facial constitutionality of section 958.04(1)(b) for the first time on direct appeal. 4D11-3174. He alleged the statute violates equal protection guarantees where it arbitrarily distinguishes defendants based on factors beyond their control and is not rationally related to a legitimate state interest. Initial Brief at 34-8. He further argued it triggers, and fails, strict-scrutiny review under both the Equal Protection and Due Process Clauses where it penalizes the exercise of constitutionally protected rights. Initial Brief at 39-41.

Defendant was not required to preserve his objection in the trial court. The statute has not been "declared unconstitutional in any appellate decision binding on the trial court." *Brannon v. State*, 850 So.2d 452, 458 (Fla.2003); *Harvey v. State*, 848 So.2d 1060, 1063 (Fla.2003). Defendant's case is the only decision on point.[2]

[2]In *Young v. State*, 137 So.3d 532, n.1 (Fla. 4th DCA 2014), the issue was raised and summarily rejected in a footnote citing *Jackson*. The two cases were decided by the same panel and both opinions were authored by Judge Damoorgian. In *Young*, the issue was rendered moot by the reversal for a new trial.

Defendant has reworked his substantive due process claim in response to the Fourth District's opinion. If this Court decides it was not sufficiently raised below, he asks the Court to review it for fundamental error. *Westerheide v. State*, 831 So.2d 93, 105 (Fla.2002)(electing to review a due process challenge to the Jimmy Ryce Act where a conviction "under a facially invalid statute would constitute fundamental error" and where "once an appellate court has jurisdiction it may, if it finds it necessary to do so, consider any item that may affect the case"), quoting *Trushin v. State*, 425 So.2d 1126, 1129-30 (Fla.1982).

A. The age-at-sentencing classification violates equal protection.

The Fourteenth Amendment's Equal Protection Clause shields against arbitrary classifications. It guarantees that all persons "shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." *Engquist v. Oregon Dep't of Agriculture*, 553 U.S. 591, 602 (2008)(internal quotation omitted); Amend. XIV, § 1, U.S. Const. Laws that treat like persons differently must, at a minimum, "be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation...." *Reed v. Reed*, 404 U.S. 71, 76 (1971), quoted in *United States v. Windsor*, 133 S.Ct. 2675, 2716-8 (Alito, J. dissenting)(collecting cases on tiered-review of equal protection claims). In the sentencing context, the right protects against a state law that "lays an unequal hand on those who have

committed intrinsically the same quality of offense...." *Skinner v. State of Okla. ex rel. Williamson*, 316 U.S. 535, 541 (1942).

Under our federalist system, the United States Constitution "represents the floor for basic freedoms; the state constitution, the ceiling." *Rigterink v. State*, 66 So.3d 866, 884 (Fla.2011)(internal quotation omitted). This Court serves as the "definitive arbiter of the Florida Constitution" and has "the duty to *independently* examine and determine questions of state law...." *State v. Kelly*, 999 So.2d 1029, 1043 (Fla.2008)(italics in original).

Florida's Equal Protection Clause guarantees that "[a]ll natural persons, female and male alike, are equal before the law." Art. I, § 2, Fla. Const. Florida's statutes must operate so that "everyone is entitled to stand before the law on equal terms with, to enjoy the same rights as belong to, and to bear the same burden as are imposed upon others in a like situation." *Caldwell v. Mann*, 157 Fla. 633, 26 So.2d 788, 790 (1946), quoted in *Estate of McCall v. United States,* 134 So.3d 894, 901 (Fla.2014)(plurality opinion invalidating a statutory cap on wrongful death noneconomic damages as violative of Florida's Equal Protection Clause after it was upheld by the United States Court of Appeals for the Eleventh Circuit).

1. Florida disfavors the classification.

Defendant acknowledges that youthful offender sentencing requires an age restriction. In fact, he seeks revival of the age-at-offense classification in the predecessor statute. § 958.04(1)(b), Fla. Stat. (Jan. 1, 1979 to Sept. 30, 2008).

The problem with the classification on review is that it draws the line "at the time sentence is imposed." § 958.04(1)(b), Fla. Stat. (2014). No other Florida sentencing schema distinguishes defendants on this basis. The mere fact that Florida disfavors the classification should give pause. *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-8 (1928)("[d]iscriminations of an unusual character especially suggest careful consideration..." under the Equal Protection Clause).

Florida's Criminal Punishment Code, for example, authorizes a downward-departure sentence if "*[a]t the time of the offense*, the defendant was too young to appreciate the consequences of the offense." § 921.0026(2)(k), Fla. Stat. (italics supplied). The age mitigator for death penalty sentencing also considers the "age of the defendant at the time of the crime." § 921.141(6)(g), Fla. Stat.

Age at the time of the offense determines a child's right to be treated as a juvenile under Florida's Juvenile Justice Act. § 985.0301(1), Fla. Stat.; *State v. Griffith*, 675 So.2d 911, 913 (1996)("the age of the defendant when the offense was committed rather than when the charges are filed controls whether the charges should be filed in juvenile court or criminal court"). Age "at the time the alleged

offense was committed" dictates whether the state can prosecute (and sentence) a juvenile as an adult for specified offenses. §§ 985.557, 985.56, Fla. Stats.

The distinguishing fact for sentencing as a youthful offender—a defendant's age at sentencing—is an anomaly in Florida's sentencing laws and practices.

2. Rehabilitative sentencing laws disfavor the classification.

The Florida Youthful Offender Act promotes rehabilitation. § 958.021, Fla. Stat. Traditionally, rehabilitative sentencing involves age-based dispositions of indeterminate length. Florida continues this practice in its juvenile dispositions. §§ 985.0301(5)(b) 2., 985.455(3), Fla. Stats. (eff. July 1, 2014) (allowing for indeterminate commitments following adjudication that do not exceed the maximum penalty for the offense or the child's 21st birthday, whichever is sooner). But these schemes do not categorically deny eligibility based on a defendant's age "at the time sentence is imposed." § 958.04(1)(b), Fla. Stat.

From 1979 to 1985, the Florida Youthful Offender Act provided for probationary sentences that could not "exceed two years or extend beyond the 23rd birthday of the defendant." § 958.05(1), Fla. Stat. (Jan. 1, 1979 to June 30, 1985). This indeterminate term, like a juvenile disposition, expired by operation of law at a certain age.[3]

[3]Terms of youthful offender imprisonment, while also indeterminate, did not expire at a certain age. § 958.05(2), (3), Fla. Stat. (Jan. 1, 1979 to June 30, 1985).

Unlike the classification at bar, the automatic expiration of probation on the offender's 23rd birthday did not exclude all defendants over 21 from youthful offender sentencing. And, it did not apply to every type of sentence. Courts could consider a defendant's age at sentencing either to withhold a youthful offender sentence or to impose another type of youthful offender sentence. Even so, the Legislature repealed it in 1985. Ch. 85-288, § 20, Laws of Fla.

The Federal Youth Corrections Act (FYCA), in effect from 1950 to 1984, classified defendants based on age at the time of "conviction." 18 U.S.C. § 5006(e) ("youth offenders" under 22) and 18 U.S.C. s. 4209 ("young adult offenders" between 22 and 26). *See Dorszynski v. United States*, 418 U.S. 424 (1974)(discussing Congress's adoption of England's Borstal system, which treated corrigible youths during a developmental phase "when special factors operated to produce habitual criminals"). The age-at-conviction classification allowed the Youth Correction Division "a flexible amount of time during which strenuous efforts may be made to rehabilitate the youth offender." *United States v. Carte*r, 225 F. Supp. 566, 568 (D.D.C.1964).

The FYCA was upheld against equal protection and due process challenges based on the fact youths could serve longer sentences than adults who committed the same offenses. The courts answered that the confinements were not as punitive

and the convictions could be set aside upon successful completion. *United States v. Lowery*, 726 F.2d 474, 476 (9th Cir.1983)(collecting cases).

Yet even the FYCA disfavored the age-at-sentencing classification as arbitrary and unreasonable. Courts interpreted "conviction" to mean the plea or verdict, not the sentencing. *Carter*, *supra*. *See also United States v. Branic*, 495 F.2d 1066 (D.C. Cir.1974) *and Holloway v. United States*, 951 A.2d 59 (D.C. Cir. 2008)(both adopting *Carter*).

In *Carter,* the defendant was found guilty on November 21, 1963. He was 21 years old at the time. The next day, President Kennedy was assassinated. The presentence report was not completed until after his 22nd birthday, which fell in December. He was sentenced after the Christmas recess. The Court ruled the defendant's age at the time of the verdict controlled. That interpretation of "conviction" best served the FYCA's purpose and:

> **To withhold such benefit**—from both the defendant and the public—merely because the defendant has turned twenty-two by the time of sentence, although he was twenty-one at the time of a verdict or plea, **is to make fortuitous circumstances determine an important substantive decision**. *Id.* at 569 (boldface supplied).

Florida did not adopt the FYCA's age-at-conviction classification in its Youthful Offender Act. Ch. 78-84, Laws of Fla. Nor did Florida adopt its higher age limit of twenty-six. *See Allen v. State*, 526 So.2d 69, 70 (Fla.1988)(noting the Florida statute was "patterned after the Federal Youth Corrections Act and the

Alabama Youthful Offender Act.").[4] Instead, Florida drew the line at the offense date. § 958.04(1)(b), Fla. Stat. (Jan. 1, 1979 to Sept. 30, 2008)(the "crime was committed before the defendant's 21st birthday").

Florida got it right the first time.

3. The classification creates arbitrary and irrational distinctions between otherwise eligible defendants.

The imposition of sentence marks the end of a criminal proceeding. *Miller v. Aderhold*, 288 U.S. 206, 211 (1933). The length of that proceeding depends on variety of circumstances. Some are utterly random. Some are constitutionally required. Most are beyond a defendant's control. None meaningfully distinguish defendants who are otherwise eligible for youthful offender sentencing.

In *Haag v. State,* 591 So.2d 614 (Fla.1992), this Court recognized that legal rights should not be determined by "happenstance." It ruled that pro se inmate petitioners are protected by the "the mailbox rule" as a matter of Florida law, notwithstanding the filing requirements of Fla. R. Crim. P. 3.850. Their pleadings are deemed filed when given to state agents for delivery. Writing for a unanimous court, Justice Kogan addressed the equal protection concerns as follows:

---

[4]Alabama not only rejected the age-at-conviction classification, it required courts to grant or refuse youthful offender status early in the proceedings. Ala. Code 1975 § 15-19-1(a), (b); *Clemmons v. State*, 321 So.2d 238, 242 (1975).

> A rule other than the mailbox rule **would interject a level of arbitrariness that could undermine equal protection and equal access to the courts**. For example, **two pro se inmates** who delivered a document to prison officials at the same time, seeking the same relief, and facing the same court deadline, **could be treated quite differently based entirely on happenstance**. **One inmate's petition might make it to the courthouse on time, while the other's might be delayed for unknown reasons.** The first would obtain a full hearing, while the second would be denied relief. **Such arbitrariness cannot fairly be characterized either as equal protection or equal access to the courts, and it therefore cannot be allowed**. Art. I, §§ 2, 21, Fla. Const.

Id. at 617 (boldface supplied). If a litigant must be protected against the chance a petition "might be delayed" for reasons beyond his or her control, then so must a defendant whose sentencing date "might be delayed."

Admittedly, the line between "childhood and maturity" cannot be precisely fixed. *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 41 (1928)(Holmes, J. dissenting). In arguing for a highly deferential standard of review, Justice Holmes concluded "the decision of the Legislature must be accepted unless we can say that it is very wide of any reasonable mark." *Id.* at 41.

From 1979 to 2008, the Florida Youthful Offender Act had "a reasonable mark" in its age-at-offense classification. § 958.04(1)(b), Fla. Stat. (Jan. 1, 1979 to Sept. 30, 2008). It was related to the defendant's maturity at the time the offense was committed, a traditional sentencing consideration. Eligibility could not be revoked during the course of the proceedings for reasons unrelated to the appropriate penalty. Defendants younger than 21 when the crime was committed

were able "to stand before the law on equal terms with, to enjoy the same rights as belong to, and to bear the same burden as are imposed upon others." *Caldwell v. Mann*, 26 So.2d 788, 790 (Fla.1946).

The redrawn classification imposes different and additional burdens on otherwise eligible defendants based on factors that are beyond their control. § 958.04(1)(b), Fla. Stat. (eff. Oct. 1, 2008 to present). Arbitrary results are sure to ensue. In Justice Holmes words, "it is very wide of any reasonable mark."

B. The age-at-sentencing classification violates due process.

Both the Florida and the United States Constitutions guarantee that the state shall not deprive a person of liberty "without due process of law." Art. I, § 9, Fla. Const.; Amend. XIV, § 1, U.S. Const. Substantive due process prohibits arbitrary, capricious, and unreasonable legislative encroachments "regardless of the fairness of the procedures used to implement them." *State v. Robinson*, 873 So.2d 1205, 1212, 1213 (Fla.2004))(distinguishing equal protection, procedural due process, and substantive due process). *See also City of Chicago v. Morales*, 527 U.S. 41 (1999)(anti-loitering ordinance facially unconstitutional under the Due Process Clause where it failed to notify ordinary people of the prohibited conduct and was susceptible to arbitrary and discriminatory enforcement).

1. Eligibility implicates liberty interests.

As this Court has recognized, a "primary benefit" of a youthful offender sentence is "the limitation on the time period for confinement." *Allen v. State,* 526 So.2d 69, 70 (Fla.1988). Within a six-year sentencing range, the courts have broad discretion to impose individualized sentences including:

- probation or community control (with or without a period of up to 364 days incarceration in a local facility or residential program), § 958.04(2)(a), (b); or
- placement in a county-operated boot camp, § 958.046; or
- a split sentence of one to four years' state prison followed by community supervision, § 958.04(2)(c); or
- a suspended prison term with placement in a community control program, § 958.06; or
- up to six years of imprisonment. § 958.04(2)(d).

§§ 958.04(2)(a)-(d), 958.046, 958.06, Fla. Stats. Youthful offender penalties operate "[i]n lieu of" mandatory-minimum sentences and fines that would otherwise control. § 958.04(2), Fla. Stat.

Chapter 958 creates a liberty interest even though youthful offender sentencing is discretionary. In *State v. Johnson*, 616 So.2d 1, 3 (Fla.1993), the Court found the habitual felony offender statute implicated "fundamental 'liberty' due process interests" where it allowed, but did not require, a "substantially extended term of imprisonment." *See also Wilkinson v. Austin*, 545 U.S. 209, 224

(2005)(prisoner had a liberty interest in avoiding assignment to a state "supermax" prison, as it imposed an atypical and significant hardship and disqualified otherwise eligible inmates from parole consideration).

The people of Florida also have an interest in the rehabilitation of youthful offenders. The Florida Youthful Offender Act's statement of legislative intent begins with this premise, stating, "The purpose of this chapter is to improve the chances of correction and successful return to the community of youthful offenders sentenced to imprisonment...." § 958.021, Fla. Stat. A similar societal interest was recognized in *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972). The Court opined that because society-at-large "has a stake in" restoring a probationer "to normal and useful life within the law," it also has "an interest in not having parole revoked" without due process of law. So too, all Floridians have an interest in avoiding the arbitrary denial of rehabilitative sentencing.

2. Eligibility is automatically denied.

A hallmark characteristic of substantive due process violations is that the government action automatically and illogically deprives a person of liberty or property. In *Bearden v. Georgia*, 461 U.S. 660 (1983), the defendant's probation was automatically revoked based on his failure to pay restitution and fines, even though he had no ability to pay. The Court ruled the deprivation of liberty was arbitrary, unreasonable, and "contrary to the fundamental fairness required by the

Fourteenth Amendment." *Id*. at 673. *See also Del Valle v. State*, 80 So.3d 999 (Fla.2011)(following *Bearden*).

The Florida Youthful Offender Act's age-at-sentencing classification also operates to automatically deny less punitive sanctions. Defendants cannot motion the courts to postpone their 21st birthdays. Eligibility cannot be restored upon a post-deprivation motion. Granted, the pre-2008 age-at-offense classification also operated automatically. But it determined eligibility based on the defendant's conduct, not arbitrarily. The age-at-sentencing classification denies eligibility based a multitude of factors. And, as argued in subsection F, the factors causing a deprivation of eligibility are not amenable to judicial review.

3. There is no safety valve.

A sentencing judge cannot avoid arbitrary applications. The Florida Youthful Offender Act provides no exceptions to its requirement that defendants must be "younger than 21 years of age at the time sentence is imposed." § 958.04(1)(b), Fla. Stat. Defendants who are older than 21 must be sentenced to any mandatory-minimum term attached to the offense. *Compare Rochester v. State*, 140 So.3d 973, 975 (Fla.2014)(trial court lacked discretion to depart from the mandatory minimum sentence for adults convicted of lewd or lascivious molestation of a child) *with State v. Wooten*, 782 So.2d 408 (Fla. 2d DCA 2001)(youthful offender statute applies in lieu of 10/20/Life statute).

In the absence of a mandatory minimum, the sentencing court is bound by the lowest permissible sentence under the Criminal Punishment Code. § 921.00265(1), Fla. Stat. The courts cannot downward depart to the equivalent of a youthful offender sentence. "Youth" is a mitigating circumstance only if:

> (k) At the time of the offense the defendant was too young to appreciate the consequences of the offense.
>
> (l) The defendant is to be sentenced as a youthful offender.

§ 921.0026(2)(k), (l), Fla. Stat. The statute's dual provisions refute an argument that youthful offenders are by definition "too young to appreciate the consequences of the offense." *Goode v. State*, 39 So.461, 463 (Fla.1905)("that construction is favored which gives effect to every clause and every part of the statute"). *See State v. Salgado*, 948 So.2d 12 (Fla. 3d DCA 2006)(reversing downward-departure sentence premised on unsupported finding that the 21-year-old defendant was unable to appreciate consequences of the offense).

There is no safety valve, also known as due process. Section 958.04(1)(b), Florida Statutes, arbitrarily and unreasonably excludes defendants from eligibility for youthful offender sentencing on the day they turn 21 years old, regardless of their youth when the offense was committed or their potential for rehabilitation.

C. The age-at-sentencing classification triggers heightened review because it encroaches upon the rights of the accused.

Section 958.04(1)(b) needlessly encroaches upon fundamental rights expressly guaranteed in the Bill of Rights and Florida Declaration of Rights. As such, it triggers heightened review. *D.M.T. v. T.M.H.*, 129 So.3d 320, 339 (Fla.2013). Its sentencing deadline offends equal protection guarantees because otherwise eligible defendants do not share the same burdens. It offends substantive due process because it operates without regard for the rights of the accused.

The Fourth District ruled that section 958.04(1)(b) does not violate substantive due process, writing:

> While this limitation may affect a defendant's trial strategy and thus implicate his or her rights to counsel, confrontation, and trial, any such implication is indirect because the 2008 amendment does not control how a defendant actually defends him or herself. 137 So.3d. at 476.

Statutes need not be directly coercive to impermissibly encroach upon constitutional rights. *Dep't of Law Enforcement v. Real Property,* 588 So.2d 957, 960 (Fla.1991)("Substantive due process under the Florida Constitution protects the full panoply of individual rights from *unwarranted encroachment* by the government.") (italics supplied); *United States v. Jackson*, 390 U.S. 570, 583 (1968)("The question is not whether the chilling effect is 'incidental' rather than intentional; the question is whether that effect is unnecessary and therefore excessive.").

Moreover, and as shown in the following pages, more than "trial strategy" is at stake. Defendant has cited the specific rules, statutes, and constitutional rights that are needlessly restricted by section 958.04(1)(b)'s sentencing deadline. When this Court interprets the rights enumerated in the Declaration of Rights of the Florida Constitution, such as the rights to equal protection and due process, it looks to "factors that inhere in [our] unique state experience" including its history, statutes, and traditions. *Traylor v. State*, 596 So.2d 957, 962 (Fla.1992).

Formal Charge. Criminal proceedings commence when the state files an Indictment or Information. Until that happens, the trial court lacks jurisdiction to accept a plea and enter a judgment. *Chapman v. Stubbs*, 147 So. 227 (Fla.1933). *See also* Fla. R. Crim. P. 3.160(c)(relating to arraignment). Similarly, the state is not required to participate in reciprocal discovery until the charge is filed. Fla. R. Crim. P. 3.220(a); *State v. Naveira*, 873 So.2d 300, n. 2 (Fla.2004).

These procedures are rooted in the due process right to notice of the charge and access to the evidence. Amends. VI, XIV, U.S. Const.; Art. I, §§ 2 (equal protection), 9 (due process), 15(a) (prohibiting trial without indictment or information), 16(a) ("... be informed of the nature and cause of the accusation....").

Defendants have no control over the state's filing date and cannot plead guilty to an unspecified charge.

Incompetence to Proceed. Criminal proceedings can be stayed for up to five years following an adjudication of incompetency due to mental illness, or two years if the incompetency is due to an intellectual disability or autism. §§ 916.145, 916.303, Fla. Stats.; Fla. R. Crim. P. 3.210(a), 3.213(1), (2). And, the state can refile if competency is attained in the future. *Id.* These statutes and rules protect the due process right not to be proceeded against while incompetent. *Pate v. Robinson*, 383 U.S. 375 (1966); Amend. XIV, U.S. Const.; *Caraballo v. State*, 39 So.3d 1234, 1252 (Fla.2010); Art. I, §§ 9, 16(a), Fla. Const.

Proceedings can be stayed. A defendant's age cannot.

State Appeals. Proceedings may be stayed during the pendency of a state appeal or petition for certiorari review. §§ 924.07(1)(h), (2), 924.19, Fla. Stats.; Fla. R. App. P. 9.140(c)(3). Multiple constitutional rights are at stake if the appeal relates to an involuntary confession, illegal search or seizure, egregious government conduct, or grounds for a new trial. Amends. IV, V, VI, XIV, U.S. Const.; Art. I, §§ 2, 9, 12, 16(a), 22, Fla. Const. Likewise, the state can appeal an illegal sentence or unauthorized downward departure resulting in de novo sentencing. § 924.07(1)(e), (i), Fla. Stat.; Fla. R. App. P. 9.140(c)(1)(M), (N).

Defendants cannot control the trial court's ruling, the state's decision to appeal, or the timing of the appellate court's decision.

Assertion of Innocence. Florida has a long-standing preference for a trial on the merits. *Pope v. State*, 47 So. 487, 488 (Fla.1908). The court's authority to deprive a defendant of liberty at sentencing stems from the procedures that govern every step before the sentence is imposed. *Alleyne v. United States,* 133 S.Ct. 2151, 2158-60 (2013)(noting the jury acts "as an intermediary between the State and criminal defendants" by determining the sentencing range). The most dangerous aspect of the age-at-sentencing classification is that it needlessly encourages premature guilty pleas and penalizes defendants who rely on the adversarial system to challenge weak or overcharged cases.

The rights of the accused are deeply rooted in our national and state history. These rights include: *Presumption of Innocence* (Amends. V, XIV, U.S. Const.; Art. I, §§ 9, 16(a), Fla. Const.); *Privilege against Self-Incrimination* (Amends. V, XIV, U.S. Const.; Art. I, §§ 9, 16(a), Fla. Const.); *Effective Assistance of Counsel* (Amends. V, XIV, U.S. Const.; Art. I, §16(a), Fla. Const.); *Compulsory Process* (Amends. V, XIV, U.S. Const.; Art. I, §16(a), Fla. Const.); *Proof beyond a Reasonable Doubt* (Amends. V, XIV, U.S. Const.; Art. I, §§ 9, 16(a), Fla. Const.); *Trial by Jury* (Amends. VI, XIV, U.S. Const.; Art. I, § 16(a)(impartial), § 22 (inviolate), Fla. Const.); *Confrontation* Amends. VI, XIV, U.S. Const.; Art. I, §16(a), Fla. Const.); *Remain Silent or Testify* (Amends. V, XIV, U.S. Const.; Art.

I, §§ 9, 16(a), Fla. Const.); and *Access to Courts*, Art. I. § 21, Fla. Const. ("Justice shall be administered without ... denial ....").

Only some defendants have to choose between trial and eligibility for youthful offender sentencing. Indeed, defendants sentenced before the age of 21 cannot be excluded from eligibility because they defended themselves. *Salter v. State*, 77 So.3d 760, 764 (Fla. 4th DCA 2011)("While it is within the court's discretion to sentence someone as a youthful offender, it is improper to decline one's request because he or she opted to plead not guilty and request a jury trial").

Moreover, the Florida Youthful Offender Act does not require admissions of guilt. Its purpose is "to improve the chances of *correction*." § 958.021, Fla. Stat. (italics supplied). *Compare* § 921.0026(2)(a), (h), (i), (j), Fla. Stat. (authorizing downward departures based on uncoerced plea bargains, remorse, compensation to victim before the defendant's identity was known, or cooperation with the state).

This stands in contrast to the usual trade-offs involved in plea bargaining. *United States v. Mezzanatto*, 513 U.S. 196, 209-10 (1995)(recognizing that criminal defendants face "difficult choices" in the "plea bargaining process" when compelled to weigh "the risk of more severe punishment" after a trial against "substantial benefits in return for the plea").

In *Corbitt v. New Jersey*, 439 U.S. 212 (1978), for example, the Court upheld a statute that allowed for the possibility of a lower sentence upon a guilty

plea. It concluded the statute was in line with earlier decisions that "unequivocally recognized the State's legitimate interest in encouraging the entry of guilty pleas ... a process mutually beneficial to both the defendant and the State." *Id.* at 222.

Under the Florida Youthful Offender Act, mitigation relates to the defendant's youth and society's interest in his or her rehabilitation. Defendants who plead guilty to retain eligibility have not freely accepted offers of leniency. They have beaten the clock. Defendants who lose eligibility because they proceeded to trial are arbitrarily penalized based on the *timing* of their sentencing hearings rather than the absence of remorse.

Sentencing. Of course, entering a change of plea or swearing in a jury is not enough. A defendant must be sentenced before the age of 21. § 958.04(1)(b), Fla. Stat. Absent a negotiated agreement, a presentence report is required. § 958.07, Fla. Stat.; *Albarracin v. State*, 112 So.3d 574, 575 (Fla. 4th DCA 2013)(failure to order a youthful offender PSI required a new sentencing hearing).

Defendants who are eligible for youthful offender sentencing face an astonishingly wide range of penalties, especially for serious offenses. § 958.04(2)(a)-(d), Fla. Stat. The range extends from probation (as a youthful offender) to the maximum penalty for the offense (as a non-youthful offender). § 958.04(1)(b), Fla. Stat. Judges typically prepare in advance by reading transcripts, letters, and the parties' memoranda (in addition to the presentence report).

As observed in *United States v. Carter*, *supra*, the age-at-sentencing classification disserves the alternative sentencing option. 225 F. Supp. at 568-9. If the deadline passes, "fortuitous circumstances determine an important substantive decision." If the process is rushed, a judge may be forced to rely on a "speedy, and therefore incomplete, presentence report," or do without one. *Id*. This leads to ill-informed and arbitrary sentencing decisions. *Scull v. State*, 569 So.2d 1251 (Fla.1990) ("hastened" resentencing to accommodate a judge who did not want to "dump" the case on his successor violated due process).

Resentencing. Defendants have the right to appeal a criminal conviction under the Florida Constitution. Art. V, § 4(b)(1), Fla. Const.; *Amendments to the Rules of Appellate Procedure*, 685 So.2d 773, 774 (Fla.1996). If the appellate court grants a new trial or sentencing, the defendant may no longer be eligible for a youthful offender sentence. The law has not changed; only the defendant's age. The minimum sentence could exceed the one originally imposed. The new sentence may not establish a presumption (or even a likelihood) of vindictiveness. *See Alabama v. Smith*, 490 U.S. 794 (1989); *Wilson v. State,* 845 So.2d 142 (Fla.2003). But the likelihood of a higher sentence will discourage appeals.

The age-at-sentencing classification operates without regard for the constitutional rights of the accused and arbitrarily distinguishes defendants based on the timing of these rights. As such, it triggers heightened review.

D. The age-at-sentencing classification is not narrowly tailored, or even rationally related, to its purported purpose.

The Florida Youthful Offender Act obviously requires an age restriction. Imposing an age restriction, however, was not the Legislature's goal when it moved the demarcation from the offense date to the sentencing date, § 958.04(1)(b), Fla. Stat, as amended by ch. 2008-250, § 7, Laws of Fla. ("An act relating to the Department of Corrections"). The amendment was meant to align the age-restriction for judicial dispositions with the long-standing restriction on the DOC's youthful offender institutions and programs to inmates who are younger than 25 years old. While ensuring that court-sentenced youthful offenders receive youthful offender treatment is a legitimate goal, it is not a compelling government interest. And, under any standard of review the classification fails.

Rational Basis Test. To the extent the classification implicates a statutorily-created interest in eligibility for youthful offender sentencing, the defendant must show it lacks a rational basis. *State v. Robinson*, 873 So.2d 1205, 1214 (Fla.2004)(recognizing that the same rationality review applies to equal protection and due process challenges). This Court must determine "(1) whether the challenged statute serves a legitimate governmental purpose, and (2) whether it was reasonable for the Legislature to believe that the challenged classification would promote that purpose." *Estate of McCall v. United States,* 134 So.3d 894, 905 (Fla.2014)(plurality opinion).

The Fourth District imposed an overly restrictive standard when it required the defendant to disprove "any conceivable state of facts or plausible reason to justify" the age-at-sentencing classification. 137 So.3d at 474-5. It may have overlooked *McCall*, published just two-weeks earlier, which held a statute fails rationality review if it is "arbitrary or capriciously imposed," to wit:

> To satisfy the rational basis test, a statute must bear a rational and reasonable relationship to a legitimate state objective, and it cannot be arbitrary or capriciously imposed. *Dep't of Corr. v. Fla. Nurses Ass'n*, 508 So.2d 317, 319 (Fla.1987). Stated another way, the test for consideration of equal protection is whether individuals have been classified separately based on a difference which has a reasonable relationship to the applicable statute, and the classification can never be made arbitrarily without a reasonable and rational basis.

134 So.3d at 901. The Fourth District applied a standard that was advanced by the dissenting justices in *McCall*. 134. So.3d at 927 (Polston, C.J. dissenting).

Heightened Review. The age-at-sentencing classification also implicates rights that are constitutionally guaranteed. This triggers heightened review under both the Due Process and Equal Protection Clauses. *Mitchell v. Moore*, 786 So.2d 521, 527 (Fla.2001)(applying "goal-method analysis for substantive due process and equal protection claims" to rule the Prisoner Indigency Statute's copying requirement violated access to courts). The burden falls to the State to prove that the statute furthers a compelling interest "in the most effective way" and cannot restrict "a person's rights any more than absolutely necessary." *Id*. at 527-8. *See also United States v. Virginia*, 518 U.S. 515, 533 (1996)(heightened scrutiny

requires the government to show the classification is "substantially related to the achievement of" an important government objective).

1. The classification was not amended to ensure that the DOC's youthful offender population remains youthful.

The Fourth District relied on the Florida Youthful Offender Act's statement of legislative intent to rule the age-at-sentencing requirement passes the rational-basis test because:

> ... part of the legislature's express intent in creating the youthful offender statute was to prevent young offenders' "association with older and more experienced criminals during the terms of their confinement." § 958.021, Fla. Stat. **Limiting inclusion into a youthful offender program by the offender's age at the time of sentencing could serve to ensure that the population in such a program truly remains "youthful."** This is all that is needed to establish a rational basis. Accordingly, Appellant's equal protection argument fails. 137 So.3d at 474-5 (boldface supplied).

This incorrectly assumes that court-sentenced youthful offenders remain in the DOC's youthful offender facilities for the duration of their sentences.[5]

[5]The assumption is shared by other appellate courts. *See, e.g. Christian v. State*, 84 So.3d 437, 443 (Fla. 5th DCA 2012). The confusion may stem from chapter 958's definition of a youthful offender as a person who is "sentenced as such by the court or is classified as such by the department" and by references to inmates who meet the requirements of § 958.04 (judicial dispositions). §§ 958.03(5), 958.045(8)(a), Fla. Stats. But the statutory requirements for the DOC's institutions and programs limit them to inmates between 14 and 24. § 958.045(8)(a), 958.11(1). The DOC itself reads the statutes to exclude inmates 25 and older. Its websites for the Lake City, Lancaster, and Lowell Correctional Institutions say so, available at http://www.dc.state.fl.us/facilities/ciindex.html (Regions 2 and 3). So does its *FAQs about Inmates. Youthful Offender Facilities*, available at http://www.dc.state.fl.us/oth/inmates/yo.html.

The Legislature ensured the youthfulness of the DOC's population when, in 1985, it required the DOC to "designate separate institutions and programs for youthful offenders" between the ages of 14 and 24. § 958.11(1), (3)(f)-(h), (4), Fla. Stat., as amended by ch. 85-288, § 22, Laws of Fla. (eff. July 1, 1986 to present). Inmates over the age of 25 cannot be assigned to these separate institutions even if they are court-sentenced youthful offenders. *See generally* Fla. S. Comm. on Crim. Justice, *Youthful Offender Designation in the Department of Corrections*, No. 2011-114, (Oct. 2010), available http://www.flsenate.gov/UserContent/Session/2011/Publications/InterimReports/pdf/2011-114cj.pdf.

Although not mentioned by the Fourth District, but in accord with its reasoning, the redrawn classification was not enacted to reserve youthful offender treatment to inmates who will be released before they are 25 years old. The DOC classification includes inmates serving up to 10 years' imprisonment, i.e., inmates who will remain in custody beyond their 25th birthdays. §§ 958.045(8)(a), 958.11(4), Fla. Stats. Similarly, all juveniles (including those convicted of life and capital felonies or sentenced to terms exceeding ten years) are assigned to youthful offender institutions during their minority. § 944.1905(5)(a), Fla. Stat.

In fact, the DOC can assign an inmate who was sentenced after the age of 21 (as a non-youthful offender) to a youthful offender facility until his or her 25th birthday, as long as the sentence does not exceed 10 years. Notably, the eligibility

criteria for the DOC designation incorporates the criteria for youthful offender sentencing "under § 958.04(1)(a) and (c)" but omits (b)—the subparagraph that requires sentencing before the age of twenty-one. § 958.11(4), Fla. Stat.

The Legislature has determined that inmates can benefit from enhanced educational, vocational, and counseling opportunities, whether or not they were court-sentenced as youthful offenders and whether or not they will be moved to the adult population.

2. The classification was meant to align the age-restriction for judicial dispositions with the DOC's age-restriction.

The classification on review was amended at the DOC's initiative. Ch. 2008-250, § 7, Laws of Fla. ("An act relating to the Department of Corrections").[6] The Act does not include legislative findings. A review of other amendments impacting the DOC's youthful offender institutions, and the final Bill Analysis and Fiscal Impact Statement ("Bill Analysis"),[7] suggests the DOC prefers classifying inmates

[6]Other provisions include (1) criminalizing the unauthorized possession of cellular phones in DOC facilities, (2) reauthorizing community control for certain violent offenders; (3) restructuring the DOC's involuntary commitment procedures for mental health treatment, and (4) repealing a requirement that law enforcement trainees reimburse the DOC for wages and benefits if the trainee terminates employment within two years. Ch. 2008-250, Laws of Fla. It originated in the Senate (SB 1614) and was passed by the House of Representatives (HB 7137).

[7]Professional Bill Analysis and Fiscal Impact Statement, Florida Senate, Criminal and Civil Justice Appropriations Committee, CS/CS/CS/CS/SB 1614 (final April 22, 2008), available at http://www.archive.flsenate.gov/data/session/2008/Senate/bills/analysis/pdf/2008s1614.ja.pdf.

based on age, not youthful offender status. Nothing suggests that the Legislature meant to materially change youthful offender sentencing.

The DOC did not report a specific problem related to older court-sentenced youthful offenders. The Bill Analysis describes the amendment as follows:

> Currently, under s. 958.04 F.S., a court may sentence a person as a youthful offender if, among other criteria, the person is guilty of a felony *committed* before the defendant's 21st birthday. **The bill tightens this particular criterion** by requiring that the person must be younger than 21 at the time *sentence* is imposed.

§ III, p. 10. (Italics in original. Boldface supplied.) It does not explain why the DOC wanted to "tighten this particular criterion."

The Bill Analysis also fails to report the fiscal impact of reducing the number of court-sentenced youthful offenders. More troubling, it does not project, or acknowledge, the cost of incarcerating the no-longer eligible offenders to longer sentences under the general laws. § V(c), p. 13.

Turning to other amendments, the Florida Corrections Code was amended to allow the assignment of all inmates younger than 18 to youthful offender facilities. This includes juveniles prosecuted as adults who (1) committed capital or life felonies or (2) were sentenced to more than 10 years in prison. § 944.1905(5), Fla. Stat., amended by ch. 2008-250, § 3, Laws of Fla.

Notably, the Legislature did not amend the Florida Youthful Offender Act's sentencing provisions in this regard. It remains the law that juveniles convicted of

life or capital felonies cannot be *sentenced* as youthful offenders to terms capped at six years' imprisonment. § 958.04(1)(c), Fla. Stat. The amendment merely permits the DOC to house them in youthful offender facilities until they are 18.

This is the only youthful offender amendment summarized in the Bill Analysis's list of principle provisions and analyzed for its fiscal impact. §§ I, V(c), pp. 2, 13. The DOC reported "no fiscal impact." It was, however, "resource friendly" because the DOC was housing 15 juvenile inmates within the Marion Correctional Institution. § V(c), p. 13. The attention given to the 15 juveniles highlights the lack of attention given to the court-sentenced youthful offenders who age-out of the DOC's designation. One can only conclude that the DOC is not burdened by housing older court-sentenced youthful offenders in adult institutions.

Chapter 2008-250 also sanctioned the DOC's long-standing policy that all female youthful offenders under the age of 25 may be housed together until facilities are available to separately house the 14 to 18 year olds from the 19 to 24 year olds. § 958.11(2), Fla. Stat., amended by ch. 2008-250, § 8, Laws of Fla. In the mid-1980s, the Legislature directed the DOC to separate youthful offenders into these two age groups. Ch. 85-288, §22, Laws of Fla. The DOC built separate facilities for the younger and older male offenders, but not for the females.

The last substantive amendment related to youthful offenders is the requirement that the DOC adopt rules defining "successful participation" in

youthful offender programs like boot camp. § 958.04(2)(d), Fla. Stat., amended by ch. 2008-250, § 7, Laws of Fla.[8] It was aimed at bolstering early release.

In sum, a review of the "Act relating to the Department of Corrections" shows the DOC sought amendments impacting its housing of young inmates. It appears that the Legislature adopted its request to restrict youthful offender sentencing to defendants "younger than 21 years old at the time sentence is imposed" because the DOC moves inmates who are 25 and older to adult facilities.

3. The classification fails to promote its purpose.

The age-at-sentencing classification does not promote the goal of aligning judicial dispositions with the DOC's designation. Chapter 958 continues to authorize sentences that will extend beyond an offender's 25th birthday, regardless of age at sentencing. In fact, most youthful offenders who are sentenced to prison will be incarcerated beyond the age of 25. Moreover, the classification excludes defendants who can be rehabilitated in the community. Finally, it fails to account for time served. In many cases, a maximum youthful offender sentence will expire as if the defendant "is younger than 21 years of age at the time sentence [or a new sentence] is imposed."

---

[8]The act also repeals a requirement that youthful offenders be visited by a probation officer prior to release (because the transition is facilitated by on-site personnel). And, it deletes outdated language relating to the names of correctional institutions, administrative positions, and service providers. §§ 958.11, 958.12, Fla. Stats., amended by ch. 2008-250, §§ 8, 9, Laws of Fla.

The Florida Youthful Offender Act, as originally enacted, kept judicial disposition and the DOC classification in tandem through two provisions that have since been repealed. First, prison sentences could not exceed 4 years (followed by 2 years of community control). § 958.05(2), Fla. Stat. (Jan. 1, 1979 to June 30, 1985). A youth who committed an offense before the age of 21 was likely to be released from a 4-year prison term before the age of 25.

Second, there was no age-limit on the DOC classification. § 958.11(2), Fla. Stat. (Jan. 1, 1979 to June 30, 1986). The DOC was directed to separate youthful offenders "[i]n sofar as is practical." *Id.*

In 1985, the Legislature increased the maximum sentence to 6-years imprisonment. It also restricted the DOC's institutions and programs to inmates between the ages of 14 and 24 years old. §§ 958.04(2)(d) (prison terms), 958.11(1) (institution and programs), as amended by Ch. 85-288, §§ 20, 22, Laws of Fla.

Over the years, the Legislature continued to authorize longer prison terms for court-sentenced youthful offenders. But it did not expand the age-limit for the DOC's youthful offender institutions to include inmates 25 and older.

In 1990, the Legislature eliminated the six-year sentencing cap following revocation of probation based on a new law violation. § 958.14, Fla. Stat., amended by ch. 90-208, § 19, Laws of Fla. (Oct. 1, 1990 to present); *State v. Meeks*, 789 So.2d 982, 989 (Fla.2001).

Florida's district courts have held that although a youthful offender sentence following a substantive violation of probation may exceed six years, "youthful offender status" cannot be revoked. *Smith v. State*, 109 So.3d 1180 (Fla. 1st DCA 2013); *Yegge v. State*, 88 So.3d 1058 (Fla. 2d DCA 2012); *Jacques v. State*, 95 So.3d 419 (Fla. 3d DCA 2012), *Smith v. State*, 143 So.3d 1023 (Fla. 4th DCA 2014); *Christian v. State*, 84 So.3d 437 (Fla. 5th DCA 2012). The courts reason that youthful offender status (a phrase not found in Chapter 958) affects the DOC-designation. But they tend to overlook the age-restrictions built into the DOC's institutions and programs. §§ 958.045(8)(a), 958.11(1), (3)(f)-(h), (4), Fla. Stats.

In 2006, the Legislature eliminated the 364-day sentencing cap for defendants who violate probation after successfully completing boot camp. Ch. 2006-270, § 1, Laws of Fla. Now, a court may impose "any sentence that it might have originally imposed." § 958.045(5)(c), Fla. Stat.

As a result of these amendments, court-sentenced youthful offenders are imprisoned beyond their 25th birthdays, notwithstanding their age at sentencing. Defendants younger than 21 years old "at the time sentence is imposed" can be imprisoned until they are 26. Probation violators can be sentenced, before or after their 21st birthdays, to youthful offender sentences far exceeding the DOC's age-restriction. Thus, the age-at-sentencing classification on review is rendered irrelevant by other sections of chapter 958 that continue the age disparity.

In addition, the classification unreasonably excludes many defendants to no effect. It governs all types of youthful offender sentences thereby excluding defendants who can be successfully rehabilitated without imprisonment. §§ 958.04 (2)(a)-(c) (community supervision), 958.046 (county operated boot camps); 958.06 (suspended sentences), Fla. Stats. The better candidates for rehabilitation are irrationally penalized while more serious offenders are sentenced to youthful offender prison terms exceeding the DOC's age-restriction.

As for defendants who are sentenced to prison, the classification fails to account for time served. The last possible day of a prison sentence is determined by the number of days a defendant has been in custody. § 921.161(1), Fla. Stat. Mr. Jackson, for example, had fifteen months credit by the time he was sentenced. A maximum youthful offender sentence would have expired no later than six years from his arrest —at the age of twenty. § 958.04(2)(d), Fla. Stat.

The failure to account for time served is especially unreasonable when defendants are resentenced following an appeal or post-conviction petition. Defendants who are no longer "younger than 21 years of age at the time [the new] sentence is imposed" are ineligible. The length of their confinement, however, is determined by the date they were taken into custody at a much younger age.

Section 958.04(1)(b) actually thwarts a primary purpose of the Florida Youthful Offender Act relating to juveniles prosecuted as adults. If they were

originally sentenced to juvenile sanctions, they can be resentenced upon a finding of unsuitability. § 985.565(4)(c), Fla. Stat. They must be returned to the sentencing court for a hearing. *Id.* Despite their credit for time already spent in confinement, and the Florida Youthful Offender Act's intent to provide an alternative penalty for juveniles prosecuted as adults, they may be ineligible for youthful offender sentencing when the new sentence is imposed.

The failure to account for time served works to increase the age disparity when youthful offenders violate probation. Time spent on community supervision or in residential programs is not credited. § 958.14, Fla. Stat. (2014); *State v. Cregan*, 908 So.2d 387 (Fla.2005). Probation violators will remain in prison as court-sentenced youthful offenders past the age of 25 because (a) they lack credit for time served and (b) their youthful offender prison terms begin when probation is revoked, before or after their 21st birthdays.

Section 958.04(1)(b)'s age-at-sentencing classification is not the least restrictive means of addressing the age disparity between judicial dispositions and the DOC's designation. To remedy the disparity, the Legislature would have to amend the conflicting sentencing provisions or direct the DOC to provide rehabilitative opportunities to the older court-sentenced youthful offenders. The classification also fails rationality review. It arbitrarily and capriciously penalizes many otherwise eligible defendants without commensurate benefit to the state.

E. This case reinforces that the classification is unconstitutional.

Mr. Jackson was arbitrarily and unreasonably excluded from youthful offender sentencing. He was 20 years old at the time of the offense and arrest. If defense counsel had not waived speedy trial, a trial would have commenced no later than October 29, 2010, which was two weeks before his 21st birthday. Fla. R. Crim. P. 3.191(a), (p)(3). This might have left time for the trial and, assuming the same guilty verdict, a presentence report and sentencing hearing.

The record does not indicate why defense counsel waived speedy trial or whether he consulted with Mr. Jackson who was not present in court that day. CCH, 3. Defendant wrote the judge complaining that he had not seen or heard from counsel in seven months. R25.

But assuming Mr. Jackson concurred in the waiver, it was a decision he should have been able to make without losing eligibility for youthful offender sentencing. He was charged with a first-degree felony punishable by life. None of the four eyewitnesses identified him. The firearm was never recovered. And, those who claimed he called in the pizza order had reason to shift blame. Defendant testified in support of his alibi defense. His case needed adequate preparation and adversarial testing as guaranteed under our state and federal Constitutions.

Mr. Jackson had 15 months credit for time served when he was sentenced. A youthful offender sentence would have expired based on his arrest at the age of 20.

But he was 21 years old at sentencing. Thus, the minimum penalty was 10 years' imprisonment under the 10/20/Life statute. § 775.087(2)(a) 1., Fla. Stat. (2010). The arbitrary denial of eligibility for a significantly mitigated sentence violates equal justice and due process.

F. The predecessor statute should be revived.

The proper remedy is to declare the age-at-sentencing classification facially invalid and to revive the pre-amendment version of § 958.04(1)(b), Fla. Stat. (Jan. 1, 1979 to Sept. 30, 2008). Severance of the offending language, by contrast, would excise any age-restriction on youthful offender sentencing and "cause results not contemplated by the Legislature." *State ex rel. Boyd v. Green*, 355 So.2d 789, 795 (Fla.1978). Revival allows the statute that was repealed to remain in force. *Id.* The goal of revival theory is to avoid a "hiatus" in the law and return to a lawful statute that best epitomizes legislative intent. *B.H. v. State*, 645 So.2d 987, 995 (Fla.1994). Here, revival allows youthful offender sentencing to continue based on a classification that was used for nearly 30 years.

Moreover, as-applied challenges are unworkable. A sentencing hearing can be delayed for more than one reason. A trial court would have to determine the proximate cause, if possible. This probing would bump up against prosecutorial discretion and attorney-client confidentiality. (Why did the State add new charges? Why did defense counsel hire an expert?) These delays will rarely be attributable

to the defendant personally. If a defendant caused the delay, for example by fleeing the jurisdiction or shifting blame, then youthful offender sentencing should be denied because of the evasive conduct, not age at sentencing.

As-applied challenges will inevitably come down to just two questions. Was the "crime committed before the defendant's 21st birthday?" And, is youthful offender sentencing appropriate in this case? These are the criteria for youthful offender sentencing under the pre-amendment version of § 958.04(1)(b), Fla. Stat. (Jan. 1, 1979 to Sept. 30, 2008).

In conclusion, the Fourth District's decision validating section 958.04(1)(b) of the Florida Youthful Offender Act should be reversed. *Jackson v. State*, 137 So.3d 470 (Fla. 4th DCA 2014). The age-at-sentencing classification operates arbitrarily and capriciously without benefiting the state as intended. Consequently, it violates the Equal Protection and Due Process Clauses of the United States Constitution and separately the Equal Protection and Due Process Clauses of the Florida Constitution.

Defendant's case must be remanded for resentencing. The trial court should be directed to consider imposing a youthful offender sentence under the predecessor statute, section 958.04(1)(b) of the Florida Statutes (Jan. 1, 1979 to Sept. 30, 2008).

II. Defendant must be resentenced before another judge where his sentence is based on arbitrary considerations.

This Court has discretionary authority to review issues beyond the scope of review, in this case the validity of a state statute. *Basulto v. Hialeah Automotive,* 141 So.3d 1145, 1157 (Fla.2014). Whether the Court invalidates or upholds section 958.04(1)(b), the defendant asks to be resentenced before another judge.

A sentence within the limits of Florida's sentencing laws violates due process if it is based on impermissible considerations. *Cromartie v. State*, 70 So.3d 559, 563 (Fla.2011); Amend. XIV, U.S. Const.; Art. I, § 9, Fla. Const. Claims of arbitrary sentencing considerations are reviewed de novo. *Id.*

Mr. Jackson was convicted of armed robbery while wearing a mask, a first-degree felony punishable by up to life imprisonment. § 812.13(2)(a), Fla. Stat. (2010). The court sentenced defendant to life, stating in part:

> Armed robbery is the most serious crime you can commit **in my view** besides killing somebody. And to be sure, anytime you hold up a gun to somebody's face and whatever it is you say to them, that could—that could kill some people just by the sight of a barrel being shown to your face, so you're—you're actually risking somebody else's life any time you do something like that. T526-8.

The Florida Legislature has sole authority to determine the severity of a particular type of offense. *State v. Ayers*, 901 So.2d 942, 946 (Fla. 2d DCA 2005).

Judges must abide by the Legislature's determination. To hold otherwise invites disparate and arbitrary sentences. *Booker v. State*, 514 So.2d 1079, 1085

(Fla.1987)("abuse of discretion standard exists to ensure that sentences are not imposed ... at the whim of an individual judge whose personal feelings against ... a particular type of crime, may render the sentence imposed [unreasonable]").

The trial court further erred in considering that "anytime you hold up a gun to somebody's face ... you're actually risking somebody else's life any time you do something like that." The Legislature considered that fact to raise the minimum penalty from probation to 10-years of day-for-day imprisonment.

Strong-armed robbery is a Level 6 offense scoring 36 sentencing points. §§ 921.0022(f), 921.0024(1)(a), Fla. Stats. (2010). But for his possession of a firearm, Mr. Jackson would have scored fewer than 44 points and been eligible for a nonstate-prison sanction. Because a deadly weapon was used during the robbery, the Legislature enhanced the offense to a Level 9, scoring 92 points (an additional 56 points). §§ 921.0022(i), 921.0024(1)(a), Fla. Stat. (2010). After applying the CPC calculus, Mr. Jackson scored 52.135 months (or 4.34 years) imprisonment. Because the deadly weapon was a firearm, the Legislature mandated a minimum 10-year sentence. § 775.087(2)(a) 1., Fla. Stat. (2010). The trial court erred in considering these same facts to enhance the penalty to life without parole.

Under the guidelines, sentences could not be enhanced by considerations factored into the score. *Flemmings v. State*, 476 So.2d 292, 293-94 (Fla. 3d DCA 1985). This law abides. Fla. R. Crim. P. 3.704(b)("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.").

Defendant objected in a motion to correct sentencing error pursuant to Fla. R. Crim. P. 3.800(b)(2). SSR6-10. If this did not preserve the objection, this Court should find fundamental error. *Cromartie*, 70 So.3d at 563. The Fourth District affirmed without elaboration. 137 So.3d at 472 ("After reviewing the record, we hold that the sentencing court did not consider any impermissible factors....").

In sum, the trial court's reliance on its opinion that armed robbery "is the most serious crime you can commit in my view besides killing somebody" and factors inherent in the offense violated due process. Defendant asks this Court to reverse his sentence and order resentencing before a different judge.

CONCLUSION

Section 958.04(1)(b) of the Florida Youthful Offender Act violates the Equal Protection and Due Process Clauses of the United States and Florida Constitutions. It arbitrarily and irrationally predicates eligibility for youthful offender sentencing on the defendant's age at the time sentence is imposed. § 958.04(1)(b), Fla. Stat. (eff. Oct. 1, 2008 to present). Defendant asks this Court to reverse *Jackson v. State*, 137 So.3d 470, 472 (Fla. 4th DCA 2014) and to remand for resentencing under the predecessor statute.

He further asks the Court to exercise its discretionary jurisdiction to find the trial court violated due process by relying on arbitrary sentencing considerations in imposing the life sentence. Whether or not section 958.04(1)(b) is invalidated, defendant must be resentenced before another judge.

Respectfully submitted,

CAREY HAUGHWOUT
Public Defender
15th Judicial Circuit

/s/ Nan Ellen Foley
NAN ELLEN FOLEY
Assistant Public Defender
Florida Bar No. 0708984
421 Third Street
West Palm Beach, Florida 33401
(561) 355-7600
appeals@pd15.org

CERTIFICATE OF ELECTRONIC FILING AND SERVICE

I HEREBY CERTIFY that on October 16, 2014 this document was electronically filed through the Florida Court's E-Filing Portal and emailed to ALLEN R. GEESEY, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 North Flagler Drive, Ninth Floor, West Palm Beach, Florida 33401-3432, at CrimAppWPB@myfloridalegal.com.

/s/ Nan Ellen Foley
NAN ELLEN FOLEY
Assistant Public Defender

CERTIFICATE OF FONT

I HEREBY CERTIFY the instant brief has been prepared with 14 point Times New Roman type, in compliance with a R. App. P. 9.210(a)(2).

/s/ Nan Ellen Foley
NAN ELLEN FOLEY
Assistant Public Defender