

## 1. THE SENTENCING COMMISSION

**Q. What year was the commission established? Has the commission essentially retained its original form or has it changed substantially or been abolished?**

The Florida Sentencing Commission (“Commission”) was established in 1982.<sup>1</sup> It remained in its original form until its abolition in 1997, when the Commission and its guidelines were replaced by the Criminal Punishment Code (“Code”).<sup>2</sup>

**Q. Membership: who appoints them, for what terms, with what required qualifications?**

The Florida Sentencing Commission was abolished in 1997.

**Q. Is the commission an independent agency, or is it located in or hosted by some other state agency?**

The Florida Sentencing Commission had been deemed to be a joint effort of the Legislature and Supreme Court and was staffed and supported by the office of the State Courts Administrator;<sup>3</sup> however, it was abolished in 1997.

**Q. How many staff does the commission have? Are they dedicated to the commission, or shared with another agency?**

The Commission was abolished in 1997 and therefore has no staff.

**Q. What is the commission’s current statutory mandate?**

The Florida Sentencing Commission was abolished in 1997. The Commission’s mandate prior to its abolishment was to: (1) facilitate the “initial development of a statewide system of sentencing guidelines;” (2) periodically evaluate these guidelines; and (3) provide recommended changes on a continuing basis that ensure the incarceration of violent offenders and nonviolent repeat offenders who are not amenable to less restrictive penalties.<sup>4</sup>

**Q. Do statutes and/or guidelines identify management of prison and jail resources as a goal?**

In 1997, the Florida Legislature abolished the Florida Sentencing Commission, and replaced the statutes that had governed the Commission and the creation of the sentencing guidelines with the Criminal Punishment Code. The Code requires that the Criminal Justice Estimating Conference, with assistance from the Department of Corrections, estimate the impact of any proposed changes to the Code on future incarceration rates and total prison population.<sup>5</sup> The Criminal Justice Estimating Conference is also tasked with producing forecasts of prison admissions and population and felony supervision admissions and population.<sup>6</sup>

<sup>1</sup> 1982 Fla. Laws 145.

<sup>2</sup> 1997 Fla. Laws 194; see also Fla. Dep’t of Corr., *Florida’s Criminal Punishment Code: A Comparative Assessment* (2018), [http://www.dc.state.fl.us/pub/scoresheet/cpc\\_code.pdf](http://www.dc.state.fl.us/pub/scoresheet/cpc_code.pdf) (last visited July 1, 2019).

<sup>3</sup> Fla. Stat. § 921.001 (1997).

<sup>4</sup> Fla. Stat. § 921.001(1) (1997).

<sup>5</sup> Fla. Stat. § 921.002(4) (2018).

<sup>6</sup> Fla. Stat. § 216.136 (5) (2018).

**Q. Are sentencing practices studied by means of annual or other regular data sets? If so, are those data sets made available to outside researchers?**

The Department of Corrections reports on trends in sentencing practices and annually submits its findings to the Florida Legislature.<sup>7</sup> The reports that are available online date back to 2015.<sup>8</sup> The Department of Corrections also provides numerous publications summarizing findings from the Offender Based Information System (“OBIS”) database. The entire OBIS database is available for the public to download.<sup>9</sup>

## 2. THE GUIDELINES

**Q. When were the guidelines first implemented?**

The first sentencing guidelines in Florida were enacted on October 1, 1983. The guidelines, along with the abolition of parole, which occurred at the same time, were intended to provide for “truth in sentencing.” However, by the 1990’s the guidelines had been eroded, and offenders were serving an average of only 34% of their pronounced sentence. In 1994, the guidelines were significantly revised. Enacted to increase the amount of time served, eliminate unwarranted disparity, and incarcerate violent offenders, the 1994 guidelines imposed a simpler worksheet structure that better differentiated between offenses and accounted for additional factors commonly included in guidelines criminal history scores. The guidelines were revised again in 1995 to increase sentence lengths and provide for additional enhancements (e.g., adding points for offenders who commit a serious felony and have a recent history of serious felony convictions). In 1997, the Sentencing Commission was abolished and the guidelines were repealed and replaced by the Criminal Punishment Code (“Code”), which is located in Chapter 921 of the Florida Statutes.<sup>10</sup> The Code is similar in structure to the 1995 guidelines, but unlike the former guidelines, the Code permits the imposition of a prison sentence for any felony conviction. Since that time, the Code has served as the mandatory sentencing guidelines for Florida.<sup>11</sup>

**Q. In recent years, have they been modified at least once a year?**

Because the Code is codified in statute, it is subject to amendment during the annual legislative cycle, and is frequently amended.

**Q. Do the commission’s recommended initial or modified guidelines require affirmative legislative approval, or do they take effect subject to legislative override?**

Unlike other guidelines systems, in which sentencing commission propose amendments to the guidelines, because the Florida commission was abolished, there is no centralized independent body recommending amendments or providing advice and counsel to the Legislature about the efficacy of proposals from other sources. Because the Code is codified in statute, all amendments must go through the legislative process to be enacted into law.

<sup>7</sup> Fla. Stat. § 921.002(4) (2018).

<sup>8</sup> Fla. Dep’t of Corr., *Index to Statistics and Publications*, dc.state.fl.us, <http://www.dc.state.fl.us/pub/> (last visited July 1, 2019).

<sup>9</sup> Fla. Dep’t of Corr., *Public Records Requests for the OBIS Database*, dc.state.fs.us, [http://www.dc.state.fl.us/pub/obis\\_request.html](http://www.dc.state.fl.us/pub/obis_request.html) (last visited July 1, 2019).

<sup>10</sup> Fla. Dep’t of Corr., *Florida’s Criminal Punishment Code: A Comparative Assessment* (2018), [http://www.dc.state.fl.us/pub/scoresheet/cpc\\_code.pdf](http://www.dc.state.fl.us/pub/scoresheet/cpc_code.pdf) (last visited July 1, 2019).

<sup>11</sup> See Fla. Stat § 921.002 et seq. See also Fla. R. Crim. P. 3.704 and 3.992 (implementing the Criminal Punishment Code).

**Q. Do the sentencing guidelines only apply to felonies, or are some misdemeanors and other lesser offenses also covered? Are some felonies excluded (e.g., those subject to life and/or death penalty)?**

The Code applies “to all felony offenses, except capital felonies, committed on or after October 1, 1998.” Misdemeanors are not covered.<sup>12</sup>

**Q. Is a grid used? Are there multiple grids? How many severity levels does the grid contain?**

The Florida Criminal Punishment Code utilizes a sentencing scoresheet rather than a sentencing grid for calculating an offender’s “lowest permissible sentence” based upon the severity of the current offense and other factors such as victim injury, prior record, and legal status (i.e., fleeing or failure to appear).<sup>13</sup> The guidelines categorize offenses into ten severity levels.<sup>14</sup>

**Q. How is the presumptive sentence determined?**

The Code is designed to determine the offender’s “lowest permissible sentence,” which is the “minimum sentence that may be imposed by the trial court, absent a valid reason for departure.”<sup>15</sup> The sentence scoresheet is used to account for factors relating to the offense and the offender’s prior record and experience with the criminal justice system to arrive at a point total that dictates the “lowest permissible sentence.”

The scoresheet is first used to tally “subtotal sentence points” from the following items:

- **Primary Offense.** The primary offense is the offense currently pending before the court for sentencing that carries the most severe potential punishment.<sup>16</sup> The severity level of the primary offense is determined by referring to the “Offense Severity Ranking Chart,”<sup>17</sup> and points are added based upon the assigned severity level. There are ten offense severity levels; the lowest severity level adds 4 points and the highest severity level adds 116 points.<sup>18</sup> If an offender has a prior capital felony in his criminal record, these points are tripled.<sup>19</sup>
- **Additional Offense(s).** An additional offense is “any offense other than the primary offense for which an offender is convicted and which is pending before the court for sentencing at the time of the primary offense.”<sup>20</sup> Felonies are scored according to their severity level on the offense severity ranking chart, but are worth fewer points than if they were the primary offense. Points for additional felonies range from 0.7 for a severity level 1 offense to 58 for a severity level 10 offense. Misdemeanors are also scored at 0.2 points each.<sup>21</sup> If an offender has a prior capital felony in his criminal record, these points are tripled.<sup>22</sup>

<sup>12</sup> Fla. Stat. § 921.002 (2018).

<sup>13</sup> Fla. Crim. Punishment Code Scoresheet Preparation Manual 7-15 (2018).

<sup>14</sup> Fla. Stat. § 921.0022(2) (2018).

<sup>15</sup> Fla. Stat. § 921.0024 (2018).

<sup>16</sup> Fla. Sta. § 921.0021(4) (2018).

<sup>17</sup> Fla. Stat. § 921.0022(3) (2018).

<sup>18</sup> Fla. Stat. § 921.0024(1)(a) (2018).

<sup>19</sup> Fla. Stat. § 921.0024(1)(b) (2018) (prior capital felony points).

<sup>20</sup> Fla. Stat. § 921.0021(1) (2018).

<sup>21</sup> Fla. Stat. § 921.0024(1)(a) (2018).

<sup>22</sup> Fla. Stat. § 921.0024(1)(b) (2018) (prior capital felony points).

- Victim Injury. Victim injury is defined as “the physical injury or death suffered by a person as a direct result of the primary offense, or any additional offense for which an offender is convicted and which is pending before the court for sentencing at the time of the primary offense.”<sup>23</sup> Points may be added for seven types of injury: (1) 2nd degree murder; (2) death; (3) severe physical injury; (4) moderate physical injury; (5) slight physical injury; (6) sexual penetration; and (7) sexual contact.<sup>24</sup> Point values range from 2 for slight physical injury to 240 for 2nd degree murder.<sup>25</sup> Points are added for each victim.<sup>26</sup>
- Prior Record. Prior record is broadly defined to include prior convictions committed as a juvenile or adult, including federal, out-of-state, and military court convictions, as well as certain violations of county and municipal ordinances.<sup>27</sup> Prior felonies are scored according to their severity level on the offense severity ranking chart, but are worth fewer points than if they were the primary offense, ranging from 0.5 for a severity level 1 offense to 29 for a severity level 10 offense. Prior misdemeanors are also scored at 0.2 points each.<sup>28</sup>
- Legal Status. This section adds points if the offender: (1) escaped from incarceration; (2) fled to avoid prosecution; (3) failed to appear for a criminal proceeding; (4) violated any condition of a supersedeas bond; (5) is incarcerated; (6) is under any form of pretrial intervention or diversion program; and (7) is under court-imposed or post-prison release community supervision and committed an offense resulting in a conviction.<sup>29</sup> An offender can receive no more than 4 points from this category.<sup>30</sup>
- Community Sanction. An offender receives points for violating a condition of probation, community control, or pretrial intervention/diversion when that violation is before the court for sentencing. Point values of 6 to 24 points can be assigned per violation depending on various factors such as whether the violation included commission of a new felony offense.<sup>31</sup>
- Firearm. Points are also added for possession of a firearm during commission of the offense. An offender either receives 18 or 25 points depending on the conviction offense and the type of firearm possessed.<sup>32</sup>
- Serious Felony. If the current offense is at severity level 8, 9, or 10, an additional 30 points are added if the offender also has “prior serious felony” on his record. A “prior serious felony” is defined as a prior offense ranked at severity levels 8, 9, or 10 for which the offender is serving a sentence of confinement, supervision or other sanction or for which the offender’s date of release from these sanctions is within 3 years before the date the current conviction offense or any additional offenses were committed.<sup>33</sup>

<sup>23</sup> Fla. Stat. § 921.0021(7)(a) (2018).

<sup>24</sup> Fla. Stat. § 921.0024(1)(a) (2018).

<sup>25</sup> Fla. Stat. § 921.0024(1)(a) (2018).

<sup>26</sup> Fla. R. Crim. P. 3.704(d)(9)(2018).

<sup>27</sup> Fla. Stat. § 921.0021(5) (2018).

<sup>28</sup> Fla. Stat. § 921.0024(1)(a) (2018).

<sup>29</sup> Fla. Stat. § 921.0021(3) (2018).

<sup>30</sup> Fla. R. Crim. P. 3.704(d)(15) (2018).

<sup>31</sup> Fla. Stat. § 921.0024(1)(b) (2018).

<sup>32</sup> Fla. Stat. § 921.0024(1)(b) (2018).

<sup>33</sup> Fla. Stat. § 921.0024(1)(b) (2018).

Once the “subtotal sentence points” are calculated, it must be determined if any sentencing multipliers apply. Multipliers will result in the subtotal being multiplied by a factor ranging from 1.5 to 2.5 in certain circumstances such as when the crime was committed for the benefit of a gang or when an act of domestic violence was committed in front of a child.<sup>34</sup> If an enhancement is applied, the resulting score is the “total sentence points.”

Having worked through these calculations, the “lowest permissible sentence” is determined by the “subtotal sentence points” if no enhancements were applied, or by the “total sentence points” if enhancements were applied, as follows:

### **0 to 44 points.**

If the score is 44 points or lower, the lowest permissible sentence is any non-state prison sanction.<sup>35</sup> A non-state prison sanction includes a variety of alternatives including a split sentence, probation, jail time, and participation in a treatment program.<sup>36</sup> For certain offenses, if the score is in the 0-22 point range, the court *must* impose a non-prison sanction unless it makes written findings that imposing such a sanction could present a danger to the public.<sup>37</sup>

### **More than 44 points.**

If the score is greater than 44, the lowest permissible sentence is a state prison sanction with a duration in months equal to the total sentence points minus 28 then multiplied by 0.75.<sup>38</sup> If the score is 60 points or less and the court makes appropriate findings, the court may sentence the offender to drug court.<sup>39</sup> If the score is 363 or greater, a life sentence may be imposed.<sup>40</sup>

Having determined the lowest permissible sentence, “the permissible range for sentencing shall be the lowest permissible sentence up to and including the statutory maximum.”<sup>41</sup>

**Q. Is the choice among types of sentences regulated by a “disposition” or other prison in/out line? Are “out” sentences accompanied by suspended execution of prison or suspended imposition of sentence? By definitive preclusion or prison for those cases?**

The recommended disposition under the Florida Criminal Punishment Code is determined by the score derived from the scoresheet. A score of 44 or less merits a non-prison sanction, while a score over 44 merits a prison sanction.<sup>42</sup> For certain offenses, if the score is 22 or less, the court *must* impose a non-

<sup>34</sup> Fla. Stat. § 921.0024(1)(b) (2018).

<sup>35</sup> Fla. Stat. § 921.0024(2) (2018).

<sup>36</sup> Fla. Stat. § 921.187 (2018).

<sup>37</sup> Fla. R. Crim. P. 3.704(d)(29) (2018). *See also* Fla. Stat. § 775.082(10) (2018) (if a defendant is sentenced to a “third degree felony but not a forcible felony [ . . . ] and if the total sentence points [ . . . ] are 22 points or less, the court must sentence the offender to a non-state prison sanction”). Note that a federal court has found this statute unconstitutional to the extent that it requires the court rather than a jury to make the findings that support imposition of a state prison sentence rather than a shorter jail sentence. *Booker v. State*, 244 So. 3d 1151, 1161-62 (Fla. Dist. Ct. App. 2018).

<sup>38</sup> Fla. Stat. § 921.0024(2) (2018). Note that the scoresheet and statute provide different directions for computing the duration, but both methods provide the same result. The scoresheet subtracts 28 then multiplies the total by .75 while the statute calls for subtracting 28 and reducing the total by 25 percent. *Compare* Fla. Crim. Punishment Code Scoresheet Preparation Manual 25 (2017) *with* Fla. Stat. § 921.0024(2) (2018).

<sup>39</sup> *See* Fla. Crim. Punishment Code Scoresheet Preparation Manual 25 (2017); Fla. Stat. § 948.20 (2018) (requiring the court to make a finding that the “defendant is a chronic substance abuser whose criminal conduct is a violation [Florida Statutes] or other nonviolent felony”); Fla. Stat. § 397.334(3) (2018) (listing the conditions associated with the drug court program).

<sup>40</sup> Fla. Stat. § 921.0024(2) (2018).

<sup>41</sup> Fla. Stat. § 921.0024(2) (2018).

<sup>42</sup> Fla. Stat. § 921.0024(2) (2018).

prison sanction.<sup>43</sup> For all other scores, including those between 23 and 44, the court retains the authority to impose a sentence ranging from the lowest permissible sentence up to and including the statutory maximums.<sup>44</sup>

A non-state prison sanction includes a variety of alternatives, including a split sentence, probation, jail time, and participation in a treatment program.<sup>45</sup> When the court orders a sentence of probation, the court does not pronounce or impose a prison sentence; instead imposition is stayed and a prison sentence is only imposed if probation is later revoked.<sup>46</sup>

## Q. Are there border boxes or other categories permitting multiple sentence types?

The Florida Criminal Punishment Code determines the lowest permissible sentence. For those who score 44 or fewer points, the Code recommends a non-prison sanction.<sup>47</sup> However, except for specified situations in which the individual is being sentenced for certain offenses and has a score of 22 points or less,<sup>48</sup> the court is free to impose a prison sentence for all felony offenses.<sup>49</sup> Therefore, for scoresheets in the 0 to 44 point range, the court has a choice between a prison and non-prison sanction, and neither choice is considered a departure.

## Q. Are the guidelines purely advisory, or are they legally binding?

As a statutory scheme, the Criminal Punishment Code is legally binding. However, it is designed to provide broad discretion to the court. The court cannot impose a sentence less than the lowest possible sentence absent a valid reason for departure.<sup>50</sup> But the court can impose a sentence anywhere between the lowest permissible sentence and the statutory maximum.<sup>51</sup>

## 3. DEPARTURES AND SIMILAR ADJUSTMENTS TO GENERALLY-RECOMMENDED SENTENCES

### Q. What is the overall/general standard for departure?

The court is prohibited from departing downward from the lowest permissible sentence “unless there are circumstances or factors that reasonably justify the downward departure.”<sup>52</sup> The facts supporting the departure must be proven by a preponderance of evidence.<sup>53</sup> Imposing a sentence greater than the “lowest permissible sentence” is not considered a departure because the court has discretion to sentence within the range from the lowest permissible sentence to the statutory maximum.<sup>54</sup>

<sup>43</sup> Fla. Stat. § 775.082(10) (2018). Though the statute permits the court to impose a prison sentence in certain circumstances, a federal court has found this statute unconstitutional to the extent that it requires the court rather than a jury to make the findings that support imposition of a state prison sentence rather than a shorter jail sentence. *Booker v. State*, 244 So. 3d 1151, 1161-62 (Fla. Dist. Ct. App. 2018).

<sup>44</sup> Fla. Stat. § 921.0024(2) (2018).

<sup>45</sup> Fla. Stat. § 921.187 (2018); *Booker v. State*, 244 So. 3d 1151, 1162 (Fla. Dist. Ct. App. 2018).

<sup>46</sup> Fla. Stat. § 948.01(2)(3) (2018). Note that there is a second type of probation referred to as community control, which involves more intensive supervision. In this situation, the law is unclear whether a prison sentence is also imposed and stayed.

<sup>47</sup> Fla. Stat. § 921.0024(2) (2018).

<sup>48</sup> Fla. Stat. § 775.082(10) (2018). Note that the provision of this statute allowing the court to impose a state prison sentence in these cases rather than a shorter jail sentence has been determined to be unconstitutional. *Booker v. State*, 244 So. 3d 1151, 1161-62 (Fla. Dist. Ct. App. 2018).

<sup>49</sup> See Fla. Stat. § 921.002(1)(g) (2018).

<sup>50</sup> Fla. Stat. § 921.002(1)(f) (2018).

<sup>51</sup> Fla. Stat. § 921.0024(2) (2018).

<sup>52</sup> Fla. Stat. § 921.0026(1) (2018); *State v. Chubuck*, 141 So. 3d 1163, 1168 (Fla. 2014).

<sup>53</sup> Fla. Stat. § 921.002(1)(f) (2018).

<sup>54</sup> Fla. Stat. § 921.0024(2) (2018).

**Q. Are there lists of aggravating and mitigating circumstances permitting departure? If so, are such lists non-exclusive? Is there a list of prohibited factors?**

The Criminal Punishment Code (“Code”) includes a non-exhaustive list of mitigating factors for determining when a downward departure is “reasonably justified.” The only statutorily prohibited factor is that “the defendant’s substance abuse or addiction, including intoxication at the time of the offense” cannot justify a downward departure.<sup>55</sup> However, there is an exception for departing in order to place certain drug offenders (those convicted of a non-violent felony who have a score of 60 points or fewer) in a treatment-based drug court program.<sup>56</sup>

**Q. Do the guidelines expressly address mitigations based on a guilty plea, acceptance of responsibility, and/or providing assistance to law enforcement?**

Yes. Factors relevant in granting a downward departure include the presence of a “legitimate, uncoerced plea bargain” or the offender’s cooperation “with the state to resolve the current offense or any other offense.”<sup>57</sup>

**Q. Are there limits on the degree of durational (length-of-custody) departure?**

In Florida, courts may impose a downward departure in certain circumstances. There is no limit to the degree of the departure. Though a sentence below the lowest permissible sentence may be appealed, the *extent* of that departure is not subject to appellate review.<sup>58</sup>

**Q. Are there limits on the availability of dispositional departure (executed-prison vs. stayed sentence)?**

When an offender scores more than 44 points on the Florida scoresheet, the recommended disposition is a prison sanction. However, the court can impose a non-prison sanction (which would be a downward dispositional departure) so long as “there are circumstances or factors that reasonably justify the downward departure.”<sup>59</sup> When an offender scores 44 points or fewer on the scoresheet, the recommended disposition is a non-prison sanction. However, because the Code allows the court to impose a prison sanction for nearly all felonies, a prison sentence would not be considered a departure. The only exception is that for certain nonviolent felonies, if the offender scores 22 points or fewer on the scoresheet, the court *must* impose a non-prison sanction unless it makes written findings that such a sanction would present a danger to the public.<sup>60</sup>

<sup>55</sup> Fla. Stat. § 921.0026(2)–(3) (2018).

<sup>56</sup> Fla. Stat. § 921.0026(2)(m) (2018).

<sup>57</sup> Fla. Stat. § 921.0026(2)(a), (i) (2018).

<sup>58</sup> Fla. Stat. § 921.0026(1) (2018).

<sup>59</sup> Fla. Stat. § 921.0026(1) (2018).

<sup>60</sup> Fla. Stat. § 775.082(10) (2018). Note that a federal court has found this statute unconstitutional to the extent that it requires the court rather than a jury to make the findings the support imposition of a state prison sentence rather than a shorter jail sentence. *Booker v. State*, 244 So. 3d 1151, 1161-62 (Fla. Dist. Ct. App. April 18, 2018).

## 4. PRISON RELEASE DISCRETION

**Q. Does the jurisdiction utilize parole release discretion or has it been abolished for all or most offenders?**

Parole was abolished for all non-capital offenses in 1983 with the passage of the original sentencing guidelines.<sup>61</sup> By 1995, parole had also been eliminated for virtually all capital offenses.<sup>62</sup>

**Q. Does the state have a “truth in sentencing” law, limiting the extent of early release?**

For offenses committed on or after October 1, 1995, offenders sentenced to state prison are required to serve at least 85% of their sentence.<sup>63</sup>

**Q. Do recommended and imposed sentences under the guidelines set the minimum time to serve in prison, the maximum, both the minimum and maximum, a target/recommended/expected prison duration, or some other combination of these parameters?**

The sentences prescribed by the Criminal Punishment Code generally represent the *minimum* sentence considered appropriate for the offender being sentenced.<sup>64</sup> However, once pronounced, the “sentence imposed by the sentencing judge reflects the length of *actual* time to be served, shortened only by the application of incentive and meritorious gain-time as provided by law.”<sup>65</sup>

**Q. Is the period of post-prison supervision independent of any unserved prison term?**

The Conditional Release Program Act mandates post-prison supervision for certain types of offenders, such as “violent habitual offender[s]” and “sexual predator[s].” Offenders released under this program are subject to post-prison supervision for a time equal to the “gain-time” they earned while in prison.<sup>66</sup> All other offenders are released from prison after serving their sentence less any allowable gain time, and are not subject to post-prison supervision, but are entitled by law to any assistance available to them through probation and parole offices.<sup>67</sup>

It should also be noted that Florida law allows for the imposition of a “split sentence,” which requires an offender to serve a period of probation or community control following a period of incarceration. At sentencing, the court will “stay and withhold the imposition” of the portion of that sentence for which the offender is to serve probation.<sup>68</sup>

**Q. What good-time credits do prisoners earn? Is program participation considered?**

Offenders may reduce their time served by earning “gain-time.” There are several types of gain-time. First, incentive gain-time is awarded for work and participation in programs. An offender may earn up to 10 days

<sup>61</sup> Fla. Dep’t of Corr., *Florida’s Criminal Punishment Code: A Comparative Assessment* (2018), [http://www.dc.state.fl.us/pub/scoresheet/cpc\\_code.pdf](http://www.dc.state.fl.us/pub/scoresheet/cpc_code.pdf) (last visited July 1, 2019).

<sup>62</sup> Fla. Comm’n on Offender Review, *Release Types* (2014), <https://www.fcor.state.fl.us/release-types.shtml> (last visited July 2, 2019).

<sup>63</sup> Fla. Stat. §§ 921.002(1)(e); 944.275(4)(f) (2018).

<sup>64</sup> Fla. Stat. § 921.00265(1) (2018).

<sup>65</sup> Fla. Stat. § 921.002(1)(e) (2018) (emphasis added).

<sup>66</sup> Fla. Stat. §§ 944.291(2); 947.1405 (2018); Fla. Comm’n on Offender Review, *Release Types* (2014), <https://www.fcor.state.fl.us/release-types.shtml> (last visited July 2, 2019).

<sup>67</sup> Fla. Stat. § 944.291(1) (2018)

<sup>68</sup> Fla. Stat. § 948.012(1), (2) (2018).

per month of incentive gain-time. Second, meritorious gain-time is granted to offenders who perform “some outstanding deed, such as saving a life or assisting in recapturing an escaped inmate.” The amount of time awarded ranges from 1 to 60 days. Third, gain time may be awarded for completion of education or training. Earned gain-time may be forfeited if an individual is subsequently found guilty of an infraction of state law or the rules of the Department of Corrections.<sup>69</sup>

## Q. Are prisoners subject to exceptional, “second-look” releasing mechanisms?

Florida allows for conditional medical release for those inmates who suffer from a terminal illness or who have been rendered permanently physically incapacitated and no longer present a danger to the public.<sup>70</sup> Additionally, the governor may commute a sentence or grant a pardon through executive clemency.<sup>71</sup>

## 5. RELATIONSHIP TO CRIMINAL LAWS

### Q. Did the guidelines replace some or all previous statutory maxima?

In most cases, the Criminal Punishment Code works within existing statutory maximum. The Code determines the lowest permissible sentence, and the court can impose sentence anywhere between the lowest permissible sentence and the statutory maximum.<sup>72</sup> However, in some instances (e.g., when a sentence multiplier is applicable), the lowest minimum sentence may exceed the statutory maximum. When this occurs, the sentence provided by the Code must be imposed even if it exceeds the statutory maximum.<sup>73</sup> The Florida Supreme Court has further held that when the lowest permissible sentence exceeds the statutory maximum, “the lowest permissible sentence under the code becomes the maximum sentence which the trial judge can impose.”<sup>74</sup>

### Q. Are guidelines built on top of (i.e., equal to or more severe than) any remaining mandatory minima, or are they set independently and over-ridden whenever a mandatory applies?

The Code is set independently of statutory minimums. “If the lowest permissible sentence is less than the mandatory minimum sentence, the mandatory minimum sentence takes precedence.”<sup>75</sup>

### Q. Are some “mandatory” minima subject to case-specific “departure” or other exception?

The departure procedures under the Code do not apply to offense-specific mandatory minimums.<sup>76</sup> There are no departure procedures within the mandatory minimum statutes.<sup>77</sup>

<sup>69</sup> Fla. Stat. §§ 944.275; 944.801 (2018).

<sup>70</sup> Fla. Stat. § 947.149 (2018).

<sup>71</sup> Fla. Stat. ch. 940 (2018).

<sup>72</sup> Fla. Stat. § 921.0024(2) (2018).

<sup>73</sup> Fla. Stat. § 921.0024(2) (2018); *see also* Fla. R. Crim. P. 3.704(d)(25);

<sup>74</sup> *Butler v. State*, 838 So. 2d 554, 556 (Fla. 2003).

<sup>75</sup> Fla. R. Crim. P. 3.704(d)(26) (2018).

<sup>76</sup> *See, e.g. Rochester v. State*, 140 So. 3d 973 (Fla. 2014) (denying defendant’s motion for a departure because the applicable statute provided for a mandatory minimum sentence of 25 years).

<sup>77</sup> *See, e.g., Fla. Stat. § 775.087* (2018) (mandatory minimums for use of firearms in the commission of certain felonies) Fla. Stat. § 893.135 (2018) (mandatory minimums for certain drug offense).

## 6. CRIMINAL HISTORY SCORING

### Q. What are the major components of the criminal history score?

The Criminal Punishment Code scoresheet does not contain a category referred to as criminal history. However, the scoresheet does assign points for four items that relate to an offender's criminal history: prior record; legal status; community sanction; prior serious felony; and prior capital felony.

- Prior Record. Prior record is broadly defined to include prior convictions committed as a juvenile or adult, including federal, out-of-state, and military court convictions, as well as certain violations of county and municipal ordinances.<sup>78</sup> Prior felonies are scored according to their severity level on the offense severity ranking chart, but are worth fewer points than if they were the primary offense, ranging from 0.5 for a severity level 1 offense to 29 for a severity level 10 offense. Prior misdemeanors are also scored at 0.2 points each.<sup>79</sup>
- Legal Status. This section adds points if the offender: (1) escaped from incarceration; (2) fled to avoid prosecution; (3) failed to appear for a criminal proceeding; (4) violated any condition of a supersedeas bond; (5) is incarcerated; (6) is under any form of pretrial intervention or diversion program; and (7) is under court-imposed or post-prison release community supervision and committed an offense resulting in a conviction.<sup>80</sup> An offender can receive no more than 4 points from this category.<sup>81</sup>
- Community Sanction. An offender receives points for violating a condition of probation, community control, or pretrial intervention/diversion when that violation is before the court for sentencing. Point values of 6 to 24 points can be assigned per violation depending on various factors such as whether the violation included commission of a new felony offense.<sup>82</sup>
- Serious Felony. If the current offense is at severity level 8, 9, or 10, an additional 30 points are added if the offender also has "prior serious felony" on his record. A "prior serious felony" is defined as a prior offense ranked at severity levels 8, 9, or 10 for which the offender is serving a sentence of confinement, supervision or other sanction or for which the offender's date of release from these sanctions is within 3 years before the date the current conviction offense or any additional offenses were committed.<sup>83</sup>
- Prior Capital Felony. If the offender has a one or more capital felonies in his criminal history, the points assigned for the conviction offense and any additional offenses are tripled.<sup>84</sup>

<sup>78</sup> Fla. Stat. § 921.0021(5) (2018).

<sup>79</sup> Fla. Stat. § 921.0024(1)(a) (2018).

<sup>80</sup> Fla. Stat. § 921.0021(3) (2018).

<sup>81</sup> Fla. R. Crim. P. 3.704(d)(15) (2018).

<sup>82</sup> Fla. Stat. § 921.0024(1)(b) (2018).

<sup>83</sup> Fla. Stat. § 921.0024(1)(b) (2018).

<sup>84</sup> Fla. Sta. § 921.0024(1)(b) (2018).

**Q.** Does the jurisdiction utilize “decay”/washout rules, that is, do old convictions count less or drop out? Which older convictions decay, when, and how?

Florida employs a gap rule, providing that convictions more than 10 years old will not be counted in the prior record “if the offender has not been convicted of any other crime for a period of 10 consecutive years from the most recent date of release from confinement, supervision, or sanction, whichever is later, to the date of the primary offense.”<sup>85</sup>

**Q.** Do the Guidelines include any other significant limitations on how criminal history can be used (e.g., limits on eligibility for high-history categories; adjustments for older offenders)?

There are no other significant rules limiting the use of an offender’s criminal history.<sup>86</sup>

## 7. CRIMINAL HISTORY SCORING

**Q.** Are consecutive sentences limited? If so, how (e.g. prohibited, permissive, or mandatory in certain cases; limits on total duration; use of a multiple-counts enhancement formula)?

For offenses charged in the same indictment, information, or affidavit, the presumption is that sentences will be served concurrently unless the court specifies that they are to be served consecutively. For offenses not charged in the same instrument, the presumption is that the sentences will be served consecutively unless the court specifies that they are to be served concurrently. Any sentence for sexual battery or murder must be consecutive to any other sentence for sexual battery or murder that arose out of a separate incident.<sup>87</sup>

**Q.** In consecutive sentencing, how is the offender’s criminal history taken into account?

A single scoresheet is used, which contains one “primary offense” and lists the other offenses as “additional offense[s].”<sup>88</sup> Once the lowest permissible sentence is determined, the court may impose sentence on each offense in the range from the lowest permissible sentence to the statutory maximum, and these sentences may be concurrent or consecutive.<sup>89</sup>

## 8. ENFORCEMENT MECHANISMS (LOCATION ON THE “ADVISORY”-TO-“MANDATORY” CONTINUUM)

**Q.** Are recommended sentences enforced by prosecution and defense sentence appeals?

Both the prosecutor and defendant can appeal an unlawful or illegal sentence. The defendant can also appeal a sentence exceeding statutory maxima, whereas the prosecutor can appeal a sentence outside the permissible and/or recommended guidelines range.<sup>90</sup> Though imposition of a sentence that is below

<sup>85</sup> Fla. R. Crim. P. 3.704(d)(14)(A).

<sup>86</sup> Cf. Fla. R. Crim. P. 3.704(14) (limitations on an offender’s prior record).

<sup>87</sup> Fla. Stat. § 921.16(1) (2018).

<sup>88</sup> Fla. Stat. § 921.0024(1) (2018).

<sup>89</sup> Fla. Stat. § 921.0024(2) (2018).

<sup>90</sup> Fla. R. App. P. 9.140(b), (c) (2018). Note that the right of appeal in statute is slightly narrower in statute than in the appellate rule. Fla. Stat. § 924.06 (2018).

the lowest permissible sentence is subject to appellate review, the extent of that departure is not subject to review.<sup>91</sup>

**Q. Are other enforcement methods used (e.g., required reasons for departure; published judge-specific departure rates; narrow permitted sentencing alternatives and/or ranges)?**

Downward departures from the lowest permissible prison sentence must be accompanied by a “written statement delineating the reasons for departure” which is then made part of the record.<sup>92</sup> The Department of Corrections compiles data, including compliance rates by judicial district, from the sentencing scoresheets and submits an annual report to the legislature.<sup>93</sup>

**Q. Are some deviations from the guidelines not deemed departures?**

Imposing a sentence greater than the lowest permissible prison sentence is not deemed a departure.<sup>94</sup>

**Q. Do some deviations require especially strong justification? Or minimal justification?**

All downward departures are subject to the standard that a departure is appropriate only when circumstances or factors reasonably justify mitigation.<sup>95</sup>

<sup>91</sup> Fla. Stat. § 921.0026(1) (2018); cf. Fla. Stat. § 924.07 (2018).

<sup>92</sup> Fla. Stat. § 921.00265 (2018).

<sup>93</sup> Fla. Stat. § 921.002(4)(a) (2018).

<sup>94</sup> See Fla. Stat. § 921.002(1)(g) (2018).

<sup>95</sup> Fla. Stat. § 921.0026(1) (2018).