MEMORANDUM

TO: **CRIMINAL PUNISHMENT CODE TASK FORCE ENHANCEMENTS SUBCOMMITTEE**

FROM: **THE HONORABLE MICHELE SISCO**

DATE: **FEBRUARY 18, 2020**

RE: **MR. N. ADAM TEBRUGGE'S PROPOSAL TO AMEND FLORIDA RULE OF CRIMINAL PROCEDURE 3.800(C)**

In a January 20, 2020, letter to this subcommittee, Attorney Mr. N. Adam Tebrugge proposed that this subcommittee recommend to the Legislature that it amend Florida Rule of Criminal Procedure 3.800(c) to allow modification of a sentence at any time upon stipulation of the state attorney and the defendant, a public hearing, victim notification, and approval by the court. Mr. Tebrugge recommends that rule 3.800(c) be amended to add language such as "Upon stipulation of the State Attorney and the Defendant, and after a hearing, the court may modify or correct a sentence at any time." Mr. Tebrugge asserts that this task force is the appropriate place to debate this proposal so that any concerns could be addressed. He further asserts that if this task force recommended the change, it would likely carry considerable weight with the Legislature.

First, it must be determined whether recommending an amendment to rule 3.800(c) is within this Criminal Punishment Code Task Force's directives from the Legislature. House Bill 7125 created the Task Force on the Criminal Punishment Code, adjunct to the Department of Legal Affairs, for the purpose of reviewing, evaluating, and making recommendations regarding sentencing for and ranking of noncapital felony offenses under the Code. If this task force were to interpret the Legislature's directive broad enough to encompass review, evaluation, and recommendations to rule 3.800(c), it would open the door to this Task Force having to review other rules of criminal procedure governing postconviction motions, including, but not limited to, rules 3.801, 3.850, and 3.853. This was not the Legislature's intent when it directed this task force to review, evaluate, and make recommendations regarding sentencing for and ranking of noncapital felony offenses under the Code. Therefore, any amendment to rule 3.800(c) does not fit within the directives given to this Task Force and should not be addressed by this Task Force.

Mr. Tebrugge asserts that Florida courts need the ability to correct or modify a criminal sentence on a case by case basis and there is presently no rule or statute specifically allowing for such a procedure. He asserts that the proposed amendment to rule 3.800(c) has several built in protections, including the State Attorney functioning as the gatekeeper, judicial discretion to reject the stipulation, a properly noticed public hearing, victim notification, and allowance for the Legislature to add any additional criteria. I respectfully disagree. Currently, rule 3.850(b)(1), governing newly discovered evidence, an exception to rule 3.850's two year limitation, allows for newly discovered evidence to be presented on cases that became final several years ago. For

decades, this rule has been utilized to allow all officers of the court to work together on appropriate cases to provide a just result.

If rule 3.800(c) was amended as proposed, it would be giving the State and the defendant an avenue to come back years later before the Court and amend a sentence imposed by a judge when a judge does not have that same discretion after the State and defense counsel have entered into a negotiated plea agreement. *See Brooks v. State,* 890 So. 2d 503 (Fla. 2d DCA 2005) (reversing trial court's order mitigating Brooks' sentences and remanding for the trial court to reinstate the original sentences because the original sentences were part of the negotiated plea between Brooks and the State). Therefore, even within the sixty days prescribed by rule 3.800(c), a judge currently does not have the authority to modify a negotiated sentence between a defendant and the State. Similarly, in the interest of finality of sentences, the State and a defendant should not be able to modify at any time a legal sentence imposed by a judge.

Additionally, if rule 3.800(c) was amended as proposed, such would undermine the perceived and actual finality of criminal sentences and consume countless hours of judicial resources. There are several clear and obvious hurdles in holding new sentencing hearings in cases that became final several years ago. Some of those include, "(1) the judge who tried the case and physically saw and heard the evidence may not be available, (2) trial transcripts may no longer be available, (3) prosecutors familiar with the case may no longer be employed with their respective office, and (4) family members who are still alive and who had to live through the trial, appeals, and postconviction motions, will be subjected to a new proceeding involving new lawyers, a new judge, stale memories, and additional appellate proceedings." *Gonzalez v. State,* 101 So. 3d 886 (Fla. 1st DCA 2012).

Recommendation: This Task Force should not recommend any amendment to rule 3.800(c) because it is not within this Task Force's directive from the Legislature.

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If rule 3.800(c) was amended as proposed, it would be giving the State and the defendant an avenue to come back years later before the Court and amend a sentence imposed by a judge when a judge does not have that same discretion after the State and defense counsel have entered into a negotiated plea agreement. *See Brooks v. State,* 890 So. 2d 503 (Fla. 2d DCA 2005) (reversing trial court's order mitigating Brooks' sentences and remanding for the trial court to reinstate the original sentences because the original sentences were part of the negotiated plea between Brooks and the State). Therefore, even within the sixty days prescribed by rule 3.800(c), a judge currently does not have the authority to modify a negotiated sentence between a defendant and the State. Similarly, in the interest of finality of sentences, the State and a defendant should not be able to modify at any time a legal sentence imposed by a judge.

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Recommendation: This Task Force should not recommend any amendment to rule 3.800(c) because it is not within this Task Force's directive from the Legislature.

TEBRUGGE
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RECEIVED
MAR 04 2020
MICHELLE SISCO
CIRCUIT JUDGE

February 26, 2020

Honorable Michelle Sisco

Chair -- Enhancements Subcommittee

Florida Criminal Punishment Code Task Force

Dear Judge Sisco:

At the request of the subcommittee, please find enclosed an expanded version of my proposal to amend Florida Rule of Criminal Procedure 3.800(c). In this version I attempted to answer several of the questions raised during the discussion on February 11, 2020.

Thank you very much for your consideration,

N. Adam Tebrugge

Florida Bar# 0473650

Adam Tebrugge 201 Whitewood Bend, Cullowhee, N.C. 28723 Phone 941 544 6151 Email Adam@TebruggeLegal.com Web: TebruggeLegal.com
Regina Tebrugge 201 Whitewood Bend, Cullowhee, N.C. 28723 Phone 941 726 7751 Email Ginawc@aol.com

Proposal to amend Florida Rule of Criminal Procedure (F.R. Crim. Pro.) 3.800(c).

Submitted by N. Adam Tebrugge, Florida Bar# 473650 adam@tebruggelegal.com

Proposal: The rule should be amended with language, such as: "Upon stipulation of the state attorney and the defendant, and after a hearing, the trial court may reduce, modify or correct a sentence at any time."

Present situation: Under F.R. Crim. Pro. 3.800 (c), a motion to modify sentence must be filed within 60 days of the sentence becoming final. No rule of procedure presently allows for a motion to modify or reduce sentence after that time has run. While an "illegal sentence" may be corrected at any time (*See* F.R. Crim. Pro. 3.800(a)), there are occasions where a legal sentence should be corrected due to oversight or error. The restrictive nature of the rule forces the parties and the court to develop "workarounds" when it is necessary to reduce, modify or correct a sentence.

History: This rule was adopted in 1968. The committee notes reflect that the rule was the "same as sections 921.24 and 921.25 Florida Statutes," and were "similar to Federal Rule of Criminal Procedure 35." The relevant Florida statutes were repealed in 1969 (*See 1970 supplement to Florida Statutes).* Now chapter 921 of the Florida Statutes contains the Criminal Punishment Code.

When considering the 60 day limitation on motions to modify, the courts have considered this to be a jurisdictional issue. *See, e.g.* Abreu v. State, 660 So.2d 703 (Fla. 1995); McCormick v. State, 961 So.2d 1099 (Fla. 2d DCA 2007); Schlabach v. State, 37 So.3d 230 (Fla. 2010). In response to these cases, F.R. Crim. Pro. 3.800(c) was amended in 2011. *See* Amendments to Rule of Criminal Procedure 3.800(c), 76 So.3d 913 (Fla. 2011). The amendment expanded the trial court's jurisdiction to rule on a timely filed motion to "90 days from the date the motion is filed or *such time as agreed by the parties or as extended by the trial court* to enter an order ruling on the motion." (emphasis added). Thus, the rule already contemplates that the court's jurisdiction can be extended by stipulation.

Why should the rule be amended? The sixty-day rule is overly restrictive and does not provide any exceptions. The court and the parties should not have to invent workarounds to the rules of procedure. There should be a mechanism that allows modification of a sentence when there is agreement. A safety valve should be in place that allows the flexibility to modify a sentence that all agree is unjust.

Safeguards: Safeguards are in place in the contemplated amendment.

a). The state attorney would be the gatekeeper, as the amendment would require their stipulation to any modification. As a constitutional officer and elected official, the state attorney is uniquely positioned to be responsive to the law and to their community.

b). Any reduction, modification or correction would require judicial approval. Judicial approval would prevent stipulated modifications that do not comply with other Florida laws.

c). The rule contemplates a properly noticed public hearing in order to ensure transparency and that there is a record of any modification.

d). The Florida Constitution (Art. I, s. 18(b)) and Florida statutes (F.S. 960.001) require notice to any victim for a hearing of this type.

Going Forward: The enhancements subcommittee should report favorably on this proposal to the Criminal Punishment Code Task Force. The Task Force should: 1) recommend that the Florida Legislature consider and adopt the proposed amendment; 2) Recommend that the Florida Bar Criminal Procedures Rules Committee adopt the proposed amendment. These recommendations appear to be within the scope of the Task Force. The Task Force was created "for the purpose of reviewing, evaluating and making recommendations regarding sentencing . . . under the Criminal Punishment Code." *See* Laws of Florida ch. 2019-167; s. 152(1).