

**ENHANCEMENTS SUBCOMMITTEE
JANUARY 17, 2020, REPORT TO CRIMINAL PUNISHMENT CODE TASK FORCE**

PROPOSED RECOMMENDATION #1

**GIVE JUDGES DISCRETION TO DEPART FROM MANDATORY LIFE SENTENCES ON INDIVIDUALS
FACING PRISON RELEASEE REOFFENDER (PRR) SANCTIONS AND ALLOW FOR A MANDATORY
MINIMUM TERM OF YEARS**

- Under section 775.087, Florida Statutes (10-20-Life statute), the Court has discretion to sentence an individual who has committed a felony and during the commission of that felony discharged a firearm, destructive device, semiautomatic firearm and its high-capacity detachable magazine, or a machine gun to a mandatory minimum of 25 years' prison to life. *See* § 775.087(2)(a)3., Fla. Stat. (2019); § 775.087(3)(a)3., Fla. Stat. (2019).

- Currently, section 775.082(9)(a)3.a., Florida Statutes (2019) states:
 - 3. If the state attorney determines that a defendant is a prison releasee reoffender as defined in subparagraph 1., the state attorney may seek to have the court sentence the defendant as a prison releasee reoffender. Upon proof from the state attorney that establishes by a preponderance of the evidence that a defendant is a prison releasee reoffender as defined in this section, such defendant is not eligible for sentencing under the sentencing guidelines and must be sentenced as follows:
 - a. For a felony punishable by life, by a term of imprisonment for life...

§ 775.082(9)(a)3.a., Fla. Stat. (2019).

Similar to the discretion given judges in section 775.087, section 775.082(9)(a)3.a. could be amended to allow discretion to judges for individuals convicted of first degree felonies punishable by life where the state is seeking to have the court sentence the defendant as a prison releasee reoffender, but the judge believes that a life sentence would not be appropriate given the facts of the case (where no firearm was discharged and there was no death or great bodily harm) as well as other mitigating evidence presented at the sentencing hearing.

Recommendation: Amend section 775.082(9)(a)3.a., Florida Statute to read: For a felony punishable by life, by a term of imprisonment for life, **but where no firearm was discharged and no death or great bodily harm occurred, for a term of not less than 30 years and not more than a term of imprisonment for life.**

PROPOSED RECOMMENDATION #2

GIVE JUDGES DISCRETION REGARDING THE STACKING OF MANDATORY MINIMUMS UNDER THE 10-20-LIFE STATUTE

- Section 775.087(2)(a), Florida Statute holds that a person who commits or attempts to commit a listed felony (including, for example, arson and narcotics trafficking) while possessing a firearm or destructive device must be given a mandatory minimum prison sentence of 10 years for the firearm possession. Currently, section 775.087(2)(d) requires that the prison sentence for each count of firearm possession be served consecutively to any other sentence:

It is the intent of the Legislature that offenders who actually possess, carry, display, use, threaten to use, or attempt to use firearms or destructive devices be punished to the fullest extent of the law, and the minimum terms of imprisonment imposed pursuant to this subsection shall be imposed for each qualifying felony count for which the person is convicted. The court shall impose any term of imprisonment provided for in this subsection consecutively to any other term of imprisonment imposed for any other felony offense.

§ 775.087(2)(d) Fla. Stat. (2019). Judges have no discretion under this paragraph to impose any sentence concurrently to other sentences.

- The mandatory nature of the stacking provision creates a significant threat to proportionality in sentencing. The mandatory nature of the stacking provision also creates a significant incentive for law enforcement to engage in sentencing manipulation in narcotics cases. Even if Florida law enforcement has not engaged in this practice, the fact that federal law enforcement has done so under the federal analogue (18 U.S.C. § 924(c)) demonstrates that it is not a good idea to sustain a statutory authorization for such practices.

It is important to note that this statute covers mere possession of a firearm during a listed felony. It does not require that the firearm be brandished or discharged, nor even that the firearm be used in furtherance of the felony. It is enough that the defendant possess the firearm during the commission of the felony.

Obviously, it will sometimes be appropriate for a court to impose consecutive sentences for a person convicted of multiple counts of a section 775.087(2) violation. For example, it may will be appropriate to add three consecutive 10-year sentences to the prison term of a person who commits three sexual assaults and who uses a firearm to subdue his victim in each case.

But as worded, the statute covers a broad range of additional conduct for which stacking creates obviously and significantly disproportionate sentences. For example, a person who habitually and lawfully carries a holstered firearm might try to commit insurance fraud by burning down three unoccupied buildings owned by himself, on three separate occasions. If a prosecutor chose to charge the defendant with three counts of arson under section 806.01(2) and three counts

of possessing a firearm during the commission of the arson under section 775.087(2), a court would be required to impose the appropriate sentence for arson plus thirty years for the firearm possession – despite the fact that the firearm possession did nothing to further the crime.

The statute also creates a significant risk of improper sentencing manipulation by law enforcement. One of the listed felonies is narcotics trafficking under section 893.135(1). The narcotics trafficking statute covers defendants who possess as little as 28 grams of a mixture containing cocaine, or 4 grams of a mixture containing morphine. These are street-level dealer quantities, and as such are subject to mandatory minimum sentences of three years. If the dealer carries a gun while dealing (even without brandishing or discharging), section 775.087(2) more than quadruples the sentence, from three years to thirteen. This may be appropriate given the enhanced danger that comes with gun possession during a drug deal. But mandatory stacking creates the risk that law enforcement will send in an undercover agent to do multiple buys in order to threaten the dealer with a sentence of 50 years or more unless the dealer pleads guilty.

This sort of thing happens already in the federal system under 18 U.S.C. § 924(c), which is the federal analogue to the Florida stacking provision. I call your attention to the following opinion by then-judge Paul Cassell decrying the extreme injustice of such stacking provisions: *United States v. Angelos*, 345 F. Supp. 2d 1227 (D. Utah 2004). Paul Cassell is very much a law-and-order conservative, but his opinion speaks eloquently about the injustice of such mandatory stacking provisions.

Recommendation: Amend the language in section 775.087(2)(d) to give judges discretion to make the firearms sentences consecutive or concurrent. Amend section 775.087(2)(d), Florida Statute to read: ... The court shall impose any term of imprisonment provided for in this subsection **concurrently or** consecutively to any other term of imprisonment imposed for any other felony offense.

PROPOSED RECOMMENDATION #3
LEGISLATIVE FIX OF TRAFFICKING IN CANNABIS STATUTE

- Currently, section 893.135(1)(a), Florida Statutes (2019) states:
 - (a) Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possess of, in excess of 25 pounds of cannabis, or 300 or more cannabis plants, commits a felony of the first degree, which felony shall be known as “trafficking in cannabis,” punishable as provided in s. 775.082, 775.083, or s. 775.084. If the quantity of cannabis involved:
 1. Is in excess of 25 pounds, but less than 2,000 pounds, or is 300 or more cannabis plants, but not more than 2,000 cannabis plants, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 years, and the defendant shall be ordered to pay a fine of \$25,000.

2. Is 2,000 pounds or more, but less than 10,000 pounds, or is 2,000 or more cannabis plants, but not more than 10,000 cannabis plants, such person shall be sentenced to a mandatory minimum term of imprisonment of 7 years, and the defendant shall be ordered to pay a fine of \$50,000.

3. Is 10,000 pounds or more, or is 10,000 or more cannabis plants, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and pay a fine of \$200,000.

§ 893.135(1)(a), Fla. Stat. (2019).

As currently written, both the 3 year and 7 year mandatory minimum terms would apply to an individual convicted of trafficking in 2,000 cannabis plants. As currently written, both the 7 year and 15 year mandatory minimum terms would apply to an individual convicted of trafficking in 10,000 cannabis plants. Because only one mandatory minimum term should apply to an individual convicted of trafficking in 2,000 cannabis plants and an individual convicted of trafficking in 10,000 cannabis plants, the statute must be amended to reflect one mandatory minimum term for an individual convicted of trafficking in 2,000 cannabis plants and one mandatory minimum term for an individual convicted of trafficking in 10,000 cannabis plants.

Recommendation: Amend section 893.135(1)(a)1., Florida Statute to read: If the quantity of cannabis involved: 1. Is in excess of 25 pounds, but less than 2,000 pounds, or is 300 or more cannabis plants, but ~~not more than~~ **less than** 2,000 cannabis plants, such person shall be sentenced to a mandatory minimum term if imprisonment of 3 years, and the defendant shall be ordered to pay a fine of \$25,000.

Amend section 893.135(1)(a)2., Florida Statute to read: If the quantity of cannabis involved: 2. Is 2,000 pounds or more, but less than 10,000 pounds, or is 2,000 or more cannabis plants, but ~~not more than~~ **less than** 10,000 cannabis plants, such person shall be sentenced to a mandatory minimum term of imprisonment of 7 years, and the defendant shall be ordered to pay a fine of \$50,000.

PROPOSED DISCUSSION ITEM #1

JUDICIAL REVIEW FOR INMATES AFTER A CERTAIN PERIOD OF TIME IN PRISON

- Currently, there is no opportunity for release of individuals who have been sentenced to an extensive period of incarceration or life. This is not an attempt to reinstate parole, but a proposal to explore the benefits of having a judicial review process after a certain period of time, maybe 30 years, for individuals serving sentences of 40 years to life and who are no longer a threat to society. This judicial review would not be limited to inmates with significant illnesses, but could take into account one factor of whether an inmate over the age of 55, with or without a significant illness, who has been in prison for 25 years, is still a threat to society.

- The case review would be similar to the juvenile offender case review under section 921.1402. Again, not advocating for re-instituting parole, but once the task force receives the data from the Department of Corrections on the number of inmates over the age of 55 and how long they have been in prison for, would like explore the possibility of judicial review for offenders who have served over 30 years in prison for certain offenses (not murders, sex offense, child pornography, etc.) while maintaining the emphasis on protection of the community at large.

RECEIVED

JAN 23 2020

MICHELLE SISCO
CIRCUIT JUDGE

January 20, 2020

Honorable Michelle Sisco
Circuit Court Judge 13th Judicial Circuit
Chair -- Enhancements Subcommittee
Florida Criminal Punishment Code Task Force

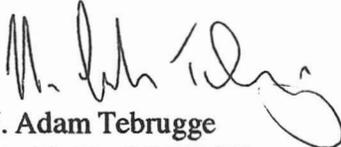
Dear Judge Sisco:

I am writing to offer "public comment" on the subcommittee meeting that was held on January 8, 2020. I am writing now because the recommendations of the subcommittee were not made available until after the meeting. Specifically, I am writing to comment on "Discussion item #1, Judicial review for inmates after a certain period of time in prison."

1. I would like to encourage the subcommittee to continue this discussion. I would respectfully suggest that the subcommittee offer a specific proposal for the Task Force as a whole to consider. If it would be helpful, I would draft something for the subcommittee to consider.

2. You may recall that I previously suggested during public comment that Fla. R. Crim. Pro. 3.800 should be amended to allow modification of a sentence at any time upon stipulation of the state attorney and the defendant, a public hearing and approval by the court. I am taking the liberty of attaching my proposal, along with a brief discussion of its merits.

Thank you very much for your consideration,


N. Adam Tebrugge
Florida Bar# 0473650

Proposal:

Amend Florida Rule of Criminal Procedure (FRCP) 3.800(c) 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.”

Discussion:

Florida courts need the ability to correct or modify a criminal sentence on a case by case basis. Presently no rule or statute specifically allows this procedure. The proposal would allow all officers of the court to work together on an appropriate case to provide a just result quickly.

This proposal has several protections built in: First, the State Attorney is the gatekeeper. Second, the judge has discretion to reject the stipulation. Third, it is contemplated that an Order of modification could only be entered after a properly noticed public hearing. Fourth, it is contemplated that all Florida laws concerning victim notification would apply. Fifth, the legislature could add any additional criteria.

This proposal has both substantive and procedural components and so should be considered both by the legislature and the Florida Supreme Court pursuant to their rule-making authority.

This TaskForce is the appropriate place to debate this proposal so that any concerns could be addressed. If this Task Force recommended the change, this would likely carry considerable weight with the legislature.

Submitted by: N. Adam Tebrugge Fla. Bar # 0473560 January 20, 2020