

**PROPOSED RESOLUTIONS FROM
CASELAW ISSUES FOR CONSIDERATION**

1. RESOLUTION #13 (caselaw issue #2) – Downward departures based on minor victim’s consent to criminal offense

Background: Fla. Stat. § 921.0026(2)(f) specifies that a court may downwardly depart from the lowest permissible sentence for an offense if “[t]he victim was an initiator, willing participant aggressor, or provoker of the incident.” In *State v. Rife*, 789 So. 2d 288 (Fla. 2001), the Florida Supreme Court held that this mitigator applies even when the victim is a minor and the defendant is convicted of a crime such as statutory rape. It explained, “The plain language of the downward departure statute in question . . . does not limit its applicability to crimes in which the victims are adults.” *Id.* at 293. The Court also emphasized, however, “There is no question that the Legislature has the authority to preclude a trial judge from imposing a downward departure sentence based on willing participation or consent of the minor victim.” *Id.* at 292.

Based on the Florida Supreme Court’s invitation to the legislature to consider and address this issue for itself, the Task Force can adopt **one** of the following five different potential approaches:

a. Resolution 13a – *Make no recommendation*

b. Resolution 13b – *Protect all minors* – Resolved that Fla. Stat. § 921.0026(2)(f) be amended to read, “Mitigating circumstances under which a departure from the lowest permissible sentence is reasonably justified include, but are not limited to: . . . [t]he victim was 18 years of age or older at the time of the offense, and was an initiator, willing participant, aggressor, or provoker of the incident.”¹

This alternative would completely preclude criminal defendants from seeking downward departures based on the mitigating factor of the victim’s consent to, or participation in, an offense whenever the victim is a minor.

c. Resolution 13c – *Prohibit defendants from using the mitigator when they have violated a statute that specifically protects minors* – Resolved that Fla. Stat. § 921.0026(2)(f) be amended to read, “Mitigating circumstances under which a departure from the lowest permissible sentence is reasonably justified include, but are not limited to: . . . [t]he victim was an initiator, willing participant, aggressor, or provoker of the incident, except when the victim is a minor and one or more of the statutes of which the defendant was convicted required as an element that the victim be a minor, under a certain age, or within a certain age range.”

This alternative would preclude criminal defendants’ from seeking downward departures based on the victim’s involvement in, or consent to, the offense only where the defendant is convicted of a crime specifically enacted to protect minors. The statutory rape law at issue in *Rife*, for example, was adopted because the legislature determined that minors lack capacity to consent to

¹ Throughout these proposed resolutions, the underlined text is the recommended new language to be added to the existing statute.

sexual contact with adults. Based on that determination, it is likely improper for a court to rely on a minor's consent as a basis for granting a downward departure for a defendant convicted of such offenses. Such downward departures may be especially problematic in cases such as *Rife*, where the defendant was the victim's legal guardian.

d. Resolution 13d – *Codify the Florida Supreme Court's ruling in Rife* – Resolved that Fla. Stat. § 921.0026(2)(f) be amended to read, “Mitigating circumstances under which a departure from the lowest permissible sentence is reasonably justified include, but are not limited to: . . . [t]he victim was an initiator, willing participant, aggressor, or provoker of the incident. The court may apply this mitigating circumstance regardless of whether the victim was a minor or adult at the time of the offense, but may take into account the victim's age in exercising this discretion.”

This alternative would codify the Florida Supreme Court's holding in *Rife* and allow courts to grant downward departures to defendants who have violated laws protecting minors based on those minors' purported consent or involvement in the defendant's conduct.

e. Resolution 13e – *Bring the issue to the legislature's attention* – Resolved that the Legislature should consider whether it wishes to allow a defendant to receive a downward departure under Fla. Stat. § 921.0026(f) based on the victim's consent or involvement in an offense when the victim is a minor, particularly where the crime arose from the minor's incapacity to consent to the defendant's conduct.

This alternative would simply alert the Legislature to the issue raised in *Rife* without recommending a specific course of action.

2. **RESOLUTION #14** (caselaw issue #3) – Restitution as a basis for downward departure

Background: Fla. Stat. § 921.0026(2)(e) specifies that a court may downwardly depart from the lowest permissible sentence for an offense if “[t]he need for payment of restitution to the victim outweighs the need for a prison sentence.” District Courts of Appeals have overturned circuit courts’ rulings concerning this mitigator on several occasions on the grounds they did not make adequate findings or engage in appropriate analysis in deciding whether departure based on mitigation concerns is appropriate. *See, e.g., State v. Rogers*, 250 So. 3d 821 (Fla. 5th DCA 2018); *State v. Lackey*, 248 So. 3d 1222 (Fla. 2d DCA 2018); *State v. Montgomery*, 155 So. 3d 1182 (Fla. 2d DCA 2014); *State v. Ford*, 27 So. 3d 725 (Fla. 3d DCA 2010). In other cases, courts have applied this mitigator without making findings as to the amount of restitution a defendant would be able to provide, *see State v. Wheeler*, 180 So. 3d 1117 (Fla. 5th DCA 2015), and have refused to apply the mitigator, denying an opportunity for timely restitution, where the victim was deemed too wealthy, *Bailey v. State*, 199 So. 3d 304 (Fla. 3d DCA 2016); *Wheeler*, 180 So. 3d 1117; *Demoss v. State*, 843 So. 2d 309 (Fla. 1st DCA 2003), or the stolen materials had substantial sentimental value, *Lackey*, 248 So. 3d at 1225-26.

This proposed resolution would provide circuit courts more specific guidance in applying the restitution mitigator.

Resolution 14 – Resolved that Fla. Stat. § 921.0026(2)(e) be amended to read, “Mitigating circumstances under which a departure from the lowest permissible sentence is reasonably justified include, but are not limited to: . . . (i) the record contains some reasonable evidence of the extent of the victim’s loss; (ii) the victim requests quicker restitution rather than longer imprisonment, regardless of the extent of the victim’s wealth; (iii) the defendant has a substantial likelihood of providing materially greater and quicker restitution if a downward departure is granted; and (iv) public safety concerns do not require longer incarceration.” ~~[t]he need for restitution to the victim outweighs the need for a prison sentence.~~”

These amendments synthesize current caselaw into an easily comprehensible and applicable standard for trial courts to apply, while modifying some of the most troubling aspects or omissions of the current standard. It ensures that the standard to establish the victim’s loss are not unreasonably stringent, the victim’s preferences are taken into account, and wealthier victims are not discriminated against. Moreover, these amendments ensure that downward departures are granted where a reasonable probability exists that they will actually result in quicker restitution for the victim, without jeopardizing public safety. By guiding trial courts’ exercises of discretion, these amendments also substantially reduce the likelihood that their attempts to invoke this mitigator will continue to be overturned on appeal.

3. RESOLUTION #15 (caselaw issue #4) – Applying the unsophisticated offense departure for accidental crimes

Background: Fla. Stat. § 921.0026(2)(j) specifies that a court may downwardly depart from the lowest permissible sentence for an offense if “[t]he offense was committed in an unsophisticated manner and was an isolated incident for which the defendant has shown remorse.” In *State v. Van Bebbler*, 848 So. 2d 1046 (Fla. 2003), the Florida Supreme Court held that a defendant convicted of DUI manslaughter could take advantage of this downward departure, even though that offense is not a specific intent crime. The state had argued that, since DUI manslaughter arises from accidental, negligent, or reckless conduct, it is not the type of offense that could be committed in either a “sophisticated” or “unsophisticated” manner. The Florida Supreme Court held that § 921.0026(2)(j) was currently drafted in a manner that nevertheless allowed such defendants to receive a downward departure. It explained, “Because the statute states that the mitigator in section 921.0026(2)(j) applies to any felony offense, except any capital felony, committed on or after October 1, 1998, we hold that the mitigator in section 921.0026(2)(j) is available to support a downward departure from a felony DUI conviction.” *Van Bebbler*, 848 So. 2d at 1050. It affirmed the lower court’s decision to grant the departure in that case because “the defendant would continue to suffer a great deal of remorse and shame.” *Id.* It did not point to any other aspects of the offense that made it “unsophisticated.”

Based on the Florida Supreme Court’s invitation to the legislature to consider and address this issue for itself, the Task Force can adopt **one** of the following five different potential approaches:

a. Resolution 15a – *Make no recommendation*

b. Resolution 15b – *Prohibit the use of the “unsophisticated offense” mitigator for DUI manslaughter* – Resolved that Fla. Stat. § 921.0026(2)(j) be amended to read, “Mitigating circumstances under which a departure from the lowest permissible sentence is reasonably justified include, but are not limited to: . . . [t]he offense was committed in an unsophisticated manner and was an isolated incident for which the defendant has shown remorse, except where the offense is DUI manslaughter.”

This alternative would narrowly overturn the Florida Supreme Court’s ruling in *VanBebber*, providing that a defendant convicted of DUI manslaughter cannot receive a downward departure based on the purportedly “unsophisticated” manner in which the offense was committed. DUI manslaughter is not an intentional crime; it is not an offense that a defendant plans out. Consequently it does not seem to be the type of crime that can actually be committed in either a “sophisticated” or “unsophisticated” manner.

c. Resolution 15c – *Prohibit the use of the “unsophisticated offense” mitigator for all crimes that lack a specific intent mens rea element* – Resolved that Fla. Stat. § 921.0026(2)(j) be amended to read, “Mitigating circumstances under which a departure from the lowest permissible sentence is reasonably justified include, but are not limited to: . . . [t]he offense was committed in an unsophisticated manner and was an isolated incident for which the defendant has shown remorse, for offenses in which specific intent is an element.”

This alternative would limit the “unsophisticated manner” mitigator to intentional crimes. “Sophistication” connotes a defendant’s voluntary choice to perform a crime in a careful, planned, or particularly competent or effective manner, rather than rushed, hurriedly, and opportunistically. It appears to be a category error to attempt to consider whether an unintentional crime—typically, an accident—was performed sophisticatedly. There is little basis for granting leniency based on the unsophisticated nature of an offense when the defendant did not intentionally choose the manner in which he would commit it.

The previous proposal, Resolution 15b, would eliminate the “unsophisticated mitigator” specifically for DUI manslaughter. Eliminating the mitigator just for a single offense, while allowing it to remain in place for other, quite similar offenses (such as operating an aircraft under the influence) would be arbitrary and raise troubling inequities. Moreover, the same concern that makes the “unsophisticated manner” mitigator inappropriate for DUI manslaughter—the crime’s unintentional, essentially accidental nature—applies equally to certain other offenses in the criminal code. Thus, for both consistency and to fully implement the legislative intent underlying this mitigator, it should be limited to offenses involving specific intent as a *mens rea* element.

d. Resolution 15d – Codify the Florida Supreme Court’s Ruling in VanBebber – Resolved that Fla. Stat. § 921.0026(2)(j) be amended to read, “Mitigating circumstances under which a departure from the lowest permissible sentence is reasonably justified include, but are not limited to: . . . [t]he offense was committed in an unsophisticated manner and was an isolated incident for which the defendant has shown remorse, regardless of the *mens rea* or mental state required for the offense.”

This alternative would codify the Florida Supreme Court’s holding in *VanBebber* and allow courts to grant downward departures based on an offense’s lack of sophistication to defendants who have committed crimes based on negligence, recklessness, or strict liability.

e. Resolution 15e – Bring the issue to the legislature’s attention – Resolved that the Legislature should consider whether a defendant should be able to invoke the “unsophisticated offense” mitigator either specifically in DUI manslaughter cases or more broadly when they have been convicted of offenses that lack a specific intent *mens rea* element.

This alternative would simply alert the Legislature to the issue raised in *VanBebber* without recommending a specific course of action.

4. RESOLUTION #16 (caselaw issue #10) – Clarifying the definition of conviction

Background: Fla. Stat. § 921.0021(2) defines “conviction” as “a determination of guilt that is the result of a plea or a trial, regardless of whether adjudication is withheld.” In *Montgomery v. State*, 897 So. 2d 1282, 1286 (Fla. 2005), the Florida Supreme Court held that the definition of conviction includes no contest pleas, even when adjudication is withheld. It declared, “[A] no contest plea followed by a withhold of adjudication is a conviction for purposes of sentencing.” *Id.* The Court explained, “[A] no contest plea, where adjudication was withheld, is included as a conviction because the statute does not distinguish between guilty pleas and nolo contendere pleas.” *Id.* The Criminal Punishment Code should be clarified to dispel potential confusion about the effects of no contest pleas and withheld adjudications by codifying *Montgomery’s* holding as follows:

Resolution 16 – Resolved that Fla. Stat. § 921.0021(2) should be amended to read, “‘Conviction’ means a determination of guilt that is the result of a plea, including a plea of no contest or nolo contendere, or a trial, regardless of whether adjudication is withheld.” (note: only the underlined language is new).

REVISED PROPOSED RESOLUTIONS

Proposed Resolution #7a – Increasing the number of offense levels

Resolved that the Legislature should increase the number of offense levels used to determine the number of points assigned to each offense. The Criminal Punishment Code currently classifies offenses into ten (10) different offense levels. More offense levels are necessary to ensure the accurately classification of offenses based on severity of the consequences each entails, the amount of money or quantities of goods or illicit substances involved, vulnerability of the victims, risk to public safety, and other relevant considerations. The number of offense levels should be increased to fifteen (15), and points should be attributed to each offense level as follows:

Existing Offense Level	Current Points
1	4
2	10
3	16
4	22
5	28
6	36
7	56
8	74
9	92
10	116
<i>Levels 1 – 4 (22 or less points): non-prison sanction may be required</i>	
<i>Levels 1 – 6 (44 or less points): non-prison sanction possible</i>	

New Offense Level	Recommended Points
1	4
2	8
3	12
4	16
5	22
6	28
7	36
8	44
9	52
10	60
11	68
12	76
13	84
14	92
15	108
16	124

Levels 7 – 10 (over 44 points): prison sentence required

Levels 1 – 5 (22 or less points): non-prison sanction may be required

Levels 1 – 8 (44 or less points): non-prison sanction possible

Levels 9 – 16 (over 44 points): prison sentence required

Proposed Resolution #7b – Increasing the number of felony degrees

Resolved that the Legislature should increase the number of felony degrees into which crimes are sorted, so that the maximum statutorily authorized penalty is more specifically and accurately calibrated to the severity of the consequences each offense entails, the amount of money or quantities of goods or illicit substances involved, vulnerability of the victims, risk to public safety, and other relevant considerations.

Existing Felony Degree	Maximum Sentence (years)		New Felony Degree	Maximum Sentence (years)
Third	5 years in prison, 5 years probation \$5,000 fine		Fifth	3 years in prison, 3 years probation, \$3,000 fine
Second	15 years in prison, 15 years probation, \$10,000 fine		Fourth	6 years in prison, 6 years probation \$6,000 fine
First	30 years in prison, 30 years probation, \$10,000 fine		Third	14 years in prison, 14 years probation, \$14,000 fine
Life	Life without parole, or imprisonment followed by lifetime probation \$15,000 fine		Second	20 years in prison, 20 years probation, \$20,000 fine
Capital	Death or life without parole		First	30 years in prison, 30 years probation \$30,000 fine
			Life	Life without parole \$40,000 fine
			Capital	Death or life without parole

Proposed Resolution #7c – Recategorize offenses based on offense level

Resolved that certain offenses have been assigned inappropriate offense levels, because those offense levels are either disproportionately harsh or unreasonably lenient in light of the magnitude and severity of the harm and risks the offenses cause. Offense levels for certain offenses should be increased or decreased, as appropriate, to more accurately reflect the gravity of those offenses and the harm they cause. In adjusting offense levels, offenses in which the statute includes additional aggravating factors or circumstances should be assigned a higher offense level than the ‘base’ offense that does not involve such aggravating factors.

Proposed Resolution #7d – Coordinate offense levels and felony degrees for each offenses

Resolved that all crimes assigned to each offense level shall share the same felony degree. A single offense level shall not include crimes of different felony degrees. The offense level for each crime shall be proportionate with its felony degree, and felony degrees for various offenses should be amended as necessary to implement these reforms.

Proposed Resolution #8 – Out of State Convictions

Resolved that, in Part IV of the Score Sheet, when calculating points for out-of-state, federal, military, or foreign convictions, each prior offense of which a defendant has been convicted shall be assigned an offense level and points based on the maximum statutorily authorized sentence for the offense of conviction, under the law of the jurisdiction of conviction, based on the following schedule:

i. If the maximum possible statutorily authorized sentence for the offense was **between one month and one year** in prison, inclusive, the offense level shall be set at 3, and 2 points shall be assigned.

[**NOTE: I'm not sure whether we need this category]

ii. If the maximum possible statutorily authorized sentence for the offense was **three years or less** (but over one year), the offense level shall be set at 5, and 4 points shall be assigned.

iii. If the maximum possible statutorily authorized sentence for the offense was **six years or less** (but over three years), the offense level shall be set at 7, and 10 points shall be assigned.

iv. If the maximum possible statutorily authorized sentence for the offense was **fourteen years or less** (but over six years), the offense level shall be set at 9, and 16 points shall be assigned.

v. If the maximum possible statutorily authorized sentence for the offense was **twenty years or less** (but over fourteen years), the offense level shall be set at 11, and 20 points shall be assigned.

vi. If the maximum possible statutorily authorized sentence for the offense was **thirty years or less** (but over twenty years), the offense level shall be set at 13, and 25 points shall be assigned.

vii. If the maximum possible statutorily sentence was **over thirty years, life** in prison (with or without the possibility of parole), or **death**, the offense level shall be set at 15, and 28 points shall be assigned.

Proposed Resolution #9 – Move Prior Serious Felony points to Prior Records Points

Resolved that additional points should not be added for a Serious Felony in Part VIII. Instead, the Prior Record points in Part IV for offenses that qualify as serious felonies should be increased to reflect the failure to apply this adjustment.

Under the current offense level system, these adjustments should be made as follows:

Offense Level	Current Prior Record Points in Part IV	Revised Prior Record Points in Part IV to Offset Eliminating Part VIII
8	19	37 (<i>i.e.</i> , add 18 points to current adjustment)
9	23	47 (<i>i.e.</i> , add 24 points to current adjustment)
10	29	59 (<i>i.e.</i> , add 30 points to current adjustment)

- The amount of the enhancement for Serious Felonies would generally be less under this proposal, but a defendant would be receiving it for **each prior serious felony**, potentially receiving a greater total number of points as a result.
- If the number of offense levels is increased from 10 to 16 as recommended above, the Prior Serious Felony adjustments should be applied at Offense Levels 13 through 16. The recommendation above could be applied as follows:

Offense Level	Prior Record Points to Assign in Part IV
13	40
14	48
15	54
16	60

#	FLORIDA STATUTE	FEL. DEG.	DESCRIPTION	NOTES
1	379.2431 (1)(e)3.	3rd	Possession of 11 or fewer marine turtle eggs in violation of the Marine Turtle Protection Act.	SUBSECTION BELOW TO BE ADJ.
2	379.2431 (1)(e)4.	3rd	Possession of more than 11 marine turtle eggs in violation of the Marine Turtle Protection Act.	RAISE TO LEVEL 3
3	403.413(6)(c)	3rd	Dumps waste litter exceeding 500 lbs. in weight or 100 cu ft. in volume or any quantity for comm. purposes, or haz waste.	
4	517.07(2)	3rd	Failure to furnish a prospectus meeting requirements.	
5	590.28(1)	3rd	Intentional burning of lands.	RAISE TO LEVEL 3
6	784.05(3)	3rd	Storing or leaving a loaded firearm within reach of minor who uses it to inflict injury or death.	RAISE TO LEVEL 3
7	787.04(1)	3rd	In violation of court order, take, entice, etc., minor beyond state limits.	RAISE TO LEVEL 3
8	806.13(1)(b)3.	3rd	Criminal mischief; damage \$1,000 or more to public communication or any other public service.	
9	810.061(2)	3rd	Impairing or impeding telephone or power to a dwelling; facilitating or furthering burglary.	
10	810.09(2)(e)	3rd	Trespassing on posted commercial horticulture property.	
11	812.014(2)(c)1.	3rd	Grand theft, 3rd degree; \$750 or more but less than \$5,000.	
12	812.014(2)(d)	3rd	Grand theft, 3rd degree; \$100 or more but less than \$750, taken from unenclosed curtilage of dwelling.	RAISE \$100 TO \$300
13	812.015(7)	3rd	Possession, use, or attempted use of an antishoplifting or inventory control device countermeasure.	
14	817.234(1)(a)2.	3rd	False statement in support of insurance claim.	
15	817.481(3)(a)	3rd	Obtain credit or purchase with false, expired, counterfeit, etc., credit card, value over \$300.	
16	817.52(3)	3rd	Failure to redeliver hired vehicle.	
17	817.54	3rd	With intent to defraud, obtain mortgage note, etc., by false representation.	
18	817.60(5)	3rd	Dealing in credit cards of another.	
19	817.60(6)(a)	3rd	Forgery; purchase goods, services with false card.	

20	817.61	3rd	Fraudulent use of credit cards over \$100 or more within 6 months.	RAISE \$100 TO \$300
21	826.04	3rd	Knowingly marries or has sexual intercourse with person to whom related.	
22	831.01	3rd	Forgery.	
23	831.02	3rd	Uttering forged instrument; utters or publishes alteration with intent to defraud.	
24	831.07	3rd	Forging bank bills, checks, drafts, or promissory notes.	
25	831.08	3rd	Possessing 10 or more forged notes, bills, checks, or drafts.	
26	831.09	3rd	Uttering forged notes, bills, checks, drafts, or promissory notes.	
27	831.11	3rd	Bringing into the state forged bank bills, checks, drafts, or notes.	
28	832.05(3)(a)	3rd	Cashing or depositing item with intent to defraud.	
29	843.08	3rd	False personation.	RAISE TO LEVEL 3
30	893.13(2)(a)2.	3rd	Purchase of s. 893.03(1)(c), (2)(c)1., (2)(c)2., (2)(c)3., (2)(c)6., (2)(c)7., (2)(c)8., (2)(c)9., (2)(c)10., (3), or (4) NOT cannabis.	
31	893.147(2)	3rd	Manufacture or delivery of drug paraphernalia.	REDUCE TO 1ST DEG MISD

REDUCED DEGREE

1

INCREASED DEGREE

0

REDUCED LEVEL

0

INCREASED LEVEL

5

AMOUNT TO BE ADJUSTED

2

DEGREE TO BE ENHANCED

e.g. from 3rd degree felony to 2nd

DEGREE TO BE REDUCED

e.g. from 2nd degree felony to 3rd

OFFENSE SEVERITY TO BE INCREASED

e.g. from Level 1 to Level 2

OFFENSE SEVERITY TO BE REDUCED

e.g. from Level 2 to Level 1

AMOUNT IN CONSIDERATION TO BE ADJUSTED

e.g. worthless check from \$150 to \$300

SUBSECTION TO BE ADDED

e.g. adding enhanced level for presence of minors in DV

DRAFT