TABLE OF CONTENTS
SENTENCING ISSUES

Contents

PROBATION: 1
***RESTRICTIONS ON CONTACT WITH CHILDREN*:** 1
ORDERS TO RECEIVE PSYCHOLOGICAL TREATMENT: 9
OTHER CONDITIONS 17
SENTENCING: 34
CASTRATION: 34
CRUEL AND UNUSUAL PUNISHMENT: 35
DANGEROUS SEXUAL FELONY OFFENDER ACT 36
DEPARTING FROM THE RECOMMENDED GUIDELINES: 37
ENHANCEMENT BASED UPON USE OF A WEAPON: 51
HABITUAL OFFENDER: 52
HIV TESTING: 52
LESSER INCLUDED OFFENSES: 53
MANDATORY MINIMUMS 63
MULTIPLE PERPETRATOR ENHANCEMENTS: 63
OVERLAPPING TIME PERIODS 65
RESTITUTION: 66
OUT OF STATE PRIORS: 67
SCORESHEET LEVELS: 67
VICTIM INJURY POINTS: 70
WITHDRAWAL 90

SENTENCING ISSUES

PROBATION:

Introduction: The vast majority of opinions in this area deal with defendants having contact with children contrary to the orders of their probation. The second major issue deals with violating a defendant's probation because of his failure to attend or complete sex offender counseling or treatment. The opinions covering each of these issues will be listed under their respective categories. Any other probation case will simply be listed under "Other."

RESTRICTIONS ON CONTACT WITH CHILDREN:

White v. State, 76 So.3d 410 (Fla. 1st DCA 2012):

Evidence that probationer was at church getting in an elevator when a minor approached him and asked him a question, and that on another occasion probationer was unloading his vehicle when he was approached by a child relative, did not establish willful and substantial violations of condition of probation prohibiting contact with children under age 18 without presence of another adult.

Lamerton v. State, 37 Fla. L. Weekly D250 (Fla. 5th DCA 2012):

Probation condition that defendant have no contact with children under 18 years of age was overly broad on sexual performance by a child conviction.

Wells v. State, 2011 WL 1681415 (Fla.App. 1 Dist.):

Revocation of probation, on ground that probationer had unsupervised contact with child, violated due process, where probation officer's affidavit only alleged that probationer was seen holding a baby, and did not allege that contact was unsupervised.

Revocation of probation, on ground that probationer had unsupervised contact with child, violated due process, where probation officer's affidavit only alleged that probationer was seen holding a baby, and did not allege that contact was unsupervised.

Carter v. State, 11 So.3d 1001 (Fla. 4th DCA 2009):

> Trial court properly revoked sex offender's probation based upon condition that prohibited contact with minors without the presence of an adult who had been advised of appellant's crime and was approved by the sentencing court. During probation inspection, officer saw defendant in presence of his girlfriend's child and she was not approved by the court.

King v. State, 990 So.2d 1191 (Fla. 5th DCA 2008):

> Failure of defendant, who pleaded guilty to attempted sexual battery upon a child under 12 years of age, to provide, while he was still imprisoned, a suitable address where he would reside upon his parole did not violate the sex offender probationary condition that prohibited him from living within 1,000 feet of certain designated locations; neither the condition of defendant's probation nor the sex offender statute requiring its imposition required defendant to give a suitable address prior to his release from prison or, for that matter, any address at all.
>
> Defendant, who pleaded guilty to attempted sexual battery upon a child under 12 years of age and was sentenced to a five-year prison term followed by a ten-year sex offender probationary term, could not be found to have violated probation while he was still in prison; defendant's probation had not yet commenced, and he had not committed any crime or engaged in any act of misconduct while incarcerated that would demonstrate his unfitness as a probationer.
>
> The Department of Corrections does not have the statutory authority to institute violation of probation proceedings based upon its inability to acquire sex offender's address prior to his release from prison.

State v. Springer, 965 So.2d 270 (5th DCA 2007):

> Although trial court order modifying condition of sex offender's probation to allow him to live within 1,000 feet of playground in gated community was not appealable, order was subject to appellate court's certiorari review.
>
> Statutory requirement that trial court prohibit probationers who committed certain specified sex-based crimes from living within 1,000 feet of any school,

day care center, park, or playground, or any other place where children regularly congregate, was mandatory, and thus trial court had no authority to modify sex offender's probation to allow him to live 865 feet from playground in neighboring gated community, provided that he did not enter any portion of subdivision and its recreation area.

Kalinowski v. State, 948 So.2d 962 (Fla. 5th DCA 2007):

Condition of trial court's written probation order prohibiting convicted sex offender from living within 1,000 feet of any school, day care center, park, playground, or any other place proscribed by court where children regularly congregated was standard condition of sex offender probation imposed by statute, and, thus, trial court was not required to orally pronounce condition at sentencing.

Convicted sex offender was not entitled to deletion from his sentence of probation condition prohibiting him from living within 1,000 feet of any school, day care center, park, playground, or any other place proscribed by court where children regularly congregated, though offender had lived in the same house for over 30 years, as trial court was required by statute to impose this condition for any violation of statute setting forth offenses of possession of a computer image and/or photograph which included the sexual conduct of a child and possession of child pornography, both of which sex offender was convicted.

Conhagen v. State, 942 So.2d 444 (Fla. 2d DCA 2006):

State failed to prove that defendant willfully violated condition of sex offender probation prohibiting him from unsupervised contact with children under 18 by attending "open house" event hosted by supplier of avionics and other aircraft equipment and provider of flight instruction. None of the evidence, including photographs of defendant seated with four adults at picnic able four parking spaces from bounce house provide by sponsor to entertain any children who might accompany their parents to open house, supported allegation that defendant had contact with children, supervised or not.

Prickett v. State, 895 So.2d 533 (Fla. 1st DCA 2005):

Error to revoke probation for violation of condition prohibiting defendant from having unsupervised contact with minors on basis of defendant speaking to a

woman under the age of eighteen while she was working as a cashier in a grocery store.

Ackerman v. State, 835 So.2d 354 (Fla. 5th DCA 2003):

Error to revoke probation based on violation of condition unilaterally imposed by probation officer that defendant have no "contact with playgrounds or other places where children congregate."

Several "child contact" instructions set forth by trial court in probation order were thorough and did not prohibit mere physical presence near day care center or playground.

Discussion: The defendant's truck got stuck on the property of a hospital. There happened to be a pre-kindergarten center on hospital grounds approximately one hundred feet from where he got stuck. The defendant argued that he was just trying to pay a bill at the hospital when he got stuck.

Perez v. State, 805 So.2d 76 (Fla. 4th DCA 2002):

Error to revoke probation for violation of condition prohibiting contact with minor, a condition set forth in section 948.03(5), where conditions contained in that statute were neither orally imposed nor included in written order of probation.

Sentence imposed without the sexual offender probation conditions contained in statute is not illegal.

Probation could not be revoked for violation of condition unilaterally imposed by probation supervisor under the general condition requiring compliance with a probation supervisor's instruction.

Discussion: The assistant state attorney needs to ensure that the judge sentences sexual offenders properly. The standard condition of sex offender probation must be either orally pronounced by the judge or contained in the written sentencing order. It is a due process violation if this is not done. In this case, the judge orally announced, "All the general conditions will be imposed," but the appellate court said that was not sufficient.

Bonner v. State, 786 So.2d 1197 (Fla. 4th DCA 2001):

Revocation of defendant's community control for violation of special condition by having contact with children under 18 years without adult supervision was improper where probation officer, who knew that defendant lived in same home with children under 18 years, heard children running inside when he knocked on door, children were in defendant's mother's bedroom when defendant answered the door, and mother was asleep.

Discussion: For some strange reason, the defendant was allowed to live in his mother's home where several children also lived. Since he was on community control, he was not allowed to leave the home. His probation officer told him that if he entered a room where children were present, and adult had to be present. The probation officer felt that the fact the mother was asleep was a reason to violate. The court disagreed.

Wilson v. State, 781 So.2d 1185 (Fla. 5th DCA 2001):

Where defendant had initially entered no contest pleas to sexual offenses involving minor, and charges involving another minor had been nolle prossed, defendant did not violate condition prohibiting him from having contact with the "victim" when he visited the mother of the minor who was involved in the charges which were nolle prossed.

Schultz v. State, 793 So.2d 986 (Fla. 2d DCA 2001):

Trial court instructed to clarify two conditions of probation which require the defendant to have no association with minors and forbidding him from living with any adult who has minor offspring, whether or not the adult is the custodial parent of the children.

Britt v. State, 775 So.2d 415 (Fla. 1st DCA 2001):

Condition prohibiting defendant from doing "volunteer work, employment, or community activity at any school, daycare center, park playground, or other place where children regularly congregate" and condition prohibiting defendant from living within 1000 feet of school, daycare center, park, playground, or other places where children regularly congregate are mandatory for individuals, like defendant, who are convicted of sexual battery upon minor or other similar offenses.

Conditions are not unconstitutionally vague because of the use of phrase "or other place where children regularly congregate."

State v. Amaro, 762 So.2d 998(Fla. 5th DCA June 30, 2000):

Evidence sufficient to support finding that defendant violated condition requiring that he have no contact with children under age sixteen unless supervised by an adult approved by judge or community control officer.

Wishes of child victim's grandmother that defendant not go to jail insufficient reason for downward departure sentence.

Discussion: This a brief opinion without much legal analysis.

Arias v. State, 751 So.2d 184 (Fla. 3rd DCA 2000):

Probation properly revoked for violation of condition prohibiting defendant from associating in any way with victim of lewd assault on minor, where defendant called victim's residence and left message for victim through victim's sister.

Matthews v. State, 736 So.2d 72 (Fla. 4th DCA 1999):

Probationer, who has accepted the conditions of his or her probation, is not permitted to challenge one of the conditions of probation after probation has been revoked for a violation of that condition; receding from Mathis v. State, 683 So.2d 634 (Fla. 4th DCA 1996).

Evidence supported conclusion that probationer willfully violated probation condition prohibiting unsupervised contact with a child under the age of 16; the probation officer witnessed defendant openly communicating with the children without a supervising adult and allowing one child to enter her home and sit next to her.

Trial court had jurisdiction to revoke probation, even though written probation order was entered after defendant violated the terms of her probation; probation was part of negotiated written plea agreement signed by defendant and recited in detail at the sentencing hearing, and probationer did not contest probation.

Manon v. State, 740 So.2d 1253 (Fla. 3rd DCA 1999):

Probation properly revoked on basis of defendant's act of engaging children in conversation in store while other adults were present in violation of special condition of probation which provides that: "the defendant shall have no unsupervised contact with minors unless explicit permission is granted in writing by his program counselor."

Condition was not overbroad and vague because of the possibility of inadvertent or unintentional violation.

Glee v. State, 731 So.2d 759 (Fla. 4th DCA 1999):

Evidence that probationer was alone with his girlfriend's three daughters and that probation officer had read every condition of probation to probationer was sufficient to support finding that probationer willfully violated condition prohibiting him from engaging in unsupervised contact with any children.

Discussion: The defendant was convicted of child abuse and the terms of his probation specified "No contact with children less than eighteen years unless supervised by an adult who knows of these charges and its disposition." The probation officer made an unannounced visit to his home and found the defendant's girlfriend's three children alone in the house with him. The defendant claimed he thought the probation order only applied to his own children. The trial court rejected this argument and sentenced him to 12 years.

Woods v. State, 711 So.2d 1182 (Fla. 2d DCA 1998):

Condition of probation prohibiting defendant from any contact with children is too broad, as it may result in unintentional violation, and should be modified to prohibit intentional contact.

Soto v. State, 727 So.2d 1044 (Fla. 2d DCA 1999):

Trial court erred in revoking probation where condition of probation prohibited defendant from having contact with child under age of sixteen, and defendant moved from approved residence with his brother upon learning that children lived in residence.

Murray v. State, 708 So.2d 1033 (Fla. 2d DCA 1998):

Special condition of probation prohibiting child abuse defendant from having custody of any children during period of probation is valid special condition.

Wagland v. State, 705 So.2d 1016 (Fla. 2d DCA 1998):

> Where evidence demonstrated that defendant's own children were dropped off unexpectedly at defendant's residence by children's nighttime caretaker and that defendant and his fiancee had been told by former probation officer that defendant was still allowed to have supervised contact with his children, defendant's contact with his children was not willful violation of probation.

Duer v. State, 701 So.2d 1273 (Fla. 5th DCA 1997):

> Condition requiring defendant convicted of indecent assault to not have contact with any child under eighteen years of age either personally, by telephone, in writing or by message delivered by others is over-broad and improper. On remand trial court ordered to refashion condition in order to minimize inadvertent violation.

Weston v. State, 694 So.2d 850 (Fla. 4th DCA 1997):

> Probation properly revoked for violation of condition prohibiting defendant from having unsupervised contact with his son who was victim of lewd assault. Error to revoke probation for violation of condition prohibiting defendant from reuniting with his family because condition was overly vague.

Inman v. State, 684 So.2d 899 (Fla. 2nd DCA 1996):

> Community control improperly revoked for violation of condition prohibiting contact with children under age eighteen where evidence failed to establish that violation was willful and substantial. Undisputed evidence established that defendant's former wife brought defendant's sons to his home unannounced at the sons' insistence and left the children there with defendant and his fiancée, although defendant informed her that children's visit would violate conditions of community control.

McCumber v. State, 682 So.2d 1214 (Fla. 2d DCA 1996):

> Defendant did not violate condition of probation prohibiting him from having contact with any female child under age of eighteen without approved adult present and without prior approval of probation officer or condition prohibiting him from initiating or having association with his daughter when he talked to his daughter after receiving a telephone call from his estranged wife with his

daughter on a third line. It was an abuse of discretion to revoke probation on basis of violation which was neither willful nor substantial.

Rowles v. State, 682 So.2d 1184 (Fla. 5th DCA 1996):

Condition of probation prohibiting defendant from having contact with female child under age sixteen unless child's parent or legal guardian is present is worded in such a manner that condition could be inadvertently violated. Remanded with instructions that trial court refashion condition in order to minimized any inadvertent violation. Suggests court add word "intentional" into order.

Benavides v. State, 679 So.2d 1195 (Fla. 3rd DCA 1996):

Sex offender was placed on probation with conditions which included participation in a mentally disordered sex offender program, no contact with minor children, and written permission from his counselor in order to live with minor children or become involved with a woman who has minor children living with her. Shortly after beginning counseling, defendant began seeing a woman with children. He told his counselor about the situation and never tried to hide the situation from anyone. The issue was eventually presented to the court and the defendant's probation was revoked and he received 25 years prison. The appellate court ruled that the violation was not substantial and reversed the revocation. The court ruled that failure to obtain *written* permission from his counselor was a mere formality based on the facts of the case.

Drab v. State, 679 So.2d 28 (Fla. 4th DCA 1996):

Condition requiring defendant to remain out of home and prohibiting unsupervised contact with children did not unambiguously give defendant notice that the could not visit his children in the home at time when his wife was present. Evidence established that defendant, his therapist, and defendant's wife all understood condition meant he could not reside in home with children, but was permitted to visit children in home so long as wife was present. Error to find that defendant visiting children in home with wife present constituted willful and substantial violation of probation.

ORDERS TO RECEIVE PSYCHOLOGICAL TREATMENT:

Oertel v. State, 2012 WL 636577 (Fla.App. 4 Dist.)

As a condition of probation, defendant was ordered to "complete successfully on the first try any recommended treatment." He was discharged from Corte program for being disruptive and not admitting guilt. Court properly revoked probation for failing to comply with condition.

Bishop v. State, 2011 WL 2268965 (Fla. 5th DCA 2011)

Trial court did not abuse its discretion by revoking defendant's probation for violation of the condition requiring him to "actively participate in and successfully complete a sex offender treatment program," where defendant was discharged from his first treatment program after displaying a "victim attitude," and discharged from his second treatment program after six months due in part to multiple absences, and in part because defendant was resistant to therapy to the point of not being amenable to treatment, and was continuing to act out both in treatment and in society.

Cheeves v. State, 27 So.3d 681 (Fla. 1st DCA 2009):

Trial court order revoking defendant's probation on the basis that defendant violated a special condition of his probation by being terminated from his psycho-sexual therapy treatment program was not an abuse of discretion, even though the probation order did not specify a deadline for defendant to complete the treatment program; defendant's therapist described defendant as disruptive, manipulative, and deceptive in the treatment program.

Smith v. State, 965 So.2d 1252 (Fla. 1st DCA 2007):

Defendant's failure to begin or take steps to begin sex-offender treatment program was not a permissible ground for revocation of defendant's probation for lewd and lascivious behavior with a girl; nothing in record suggested that program could not have been completed within two years and some nine months that remained of probationary term.

Appellate court would reverse trial court's revocation of defendant's probation for lewd and lascivious behavior with a girl and remand for further proceedings after concluding that defendant's failure to begin or take steps to begin sex-offender treatment program was not a permissible ground for revocation, even though three other specifications in violation affidavit were deemed proven,

specifically defendant's failure to report children in his residence, being in children's presence by sharing residence, and smoking a marijuana cigarette; appellate court could not say with certainty that, absent impermissible ground, trial court would have still revoked defendant's probation.

Brown v. State, 943 So.2d 899 (Fla. 5th DCA 2006):

"If defense counsel did indeed inform the defendant that he could maintain his innocence while on probation, and if, in fact, the failure to admit his guilt during sex offender treatment counseling automatically resulted in the unsuccessful completion of such counseling and, thus, constituted a probation violation, such a consequence is a direct, and not collateral, consequence of the defendant's plea. As such, it was error for the trial court to deny ground five of the defendant's motion without conducting a hearing thereon."

Adams v. State, 946 So.2d 583 (Fla. 4th DCA 2006):

Where there was competent testimony that defendant had resources to pay for treatment program, was aware that he would be accommodated if he could not pay, and simply failed to attend, there was sufficient evince for trial court to find by preponderance of the evidence that defendant willfully and substantially violated probation.

Myers v. State, 931 So.2d. 1069 (Fla. 4th DCA 2006):

Evidence was insufficient to show that defendant willfully and substantially violated condition of his sex-offender probation that required him to enter, participate in, and successfully complete a sex-offender treatment program, even though defendant was terminated from his original treatment program for two absences; defendant's probation officer initially gave defendant permission to change treatment programs and thus led defendant, who had limited means, to spend money on a treatment program that he was ultimately not permitted to attend, leaving no funds for him to attend required treatment program.

Generally, unexcused absences from required therapeutic programs constitute willful violations of probation.

Jean-Baptiste v. State, 931 So.2d 965 (Fla. 3rd DCA 2006):

Defendant waived psychotherapist-patient privilege when he pled guilty to criminal charges and was placed on probation, with the condition that he would have substance abuse evaluation performed and that he would successfully complete recommended treatment; by signing agreement he indicated that he intended subsequent communications with psychotherapists to be communicated to third person, his probation officer, and communications therefore did not constitute confidential communications to which privilege would apply.

Discussion: This is a drug case, but the ruling can be applied to our sex offenders who are ordered to get evaluations.

Stanley v. State, 922 So.2d 411 (Fla. 5th DCA 2006):

Evidence was insufficient to support trial court's finding that defendant willfully and substantially violated condition of probation as to warrant revocation; State's affidavit alleged violation "for not successfully completing the sex offender treatment program," but condition did not require "successful completion," but only "participation," and trial court based its ruling on a fact not established at the hearing, that defendant had not sought to obtain treatment in another program until after an affidavit charging him with violation of probation had been filed, which was not the case.

Eubanks v. State, 903 So.2d 1005 (Fla. 2d DCA 2005):

Abuse of discretion to find defendant violated instructions to attend weekly counseling sessions where defendant missed only tow of approximately twelve classes she was required to attend.

Discussion: This is not a sex crimes case, but the holding is still relevant.

Gessner v. State, 890 So.2d 565 (Fla. 2d DCA 2005):

State failed to establish that defendant willfully and substantially violated condition of his probation by failing to complete an out-patient sex offender treatment program; order of probation did not provide a scheduled time for defendant to successfully complete the program nor did it provide how many chances defendant would have to complete the program, and defendant had time remaining on his probation for him to successfully complete an out-patient sex offender treatment program.

<u>Centano v. State</u>, 880 So.2d 1277 (Fla. 3rd DCA 2004):

> Probation could not properly be revoked for defendant's failure to report his work and residential address monthly where order of probation did not contain such a requirement.
>
> Probation could not properly be revoked for violation of probation officer imposed condition that defendant attend TASC drug evaluation and treatment program.
>
> Error to revoke probation for violation of condition requiring that defendant complete mentally disordered sex offender program without considering defendant's proffered reason for failing to show up for program.

<u>Mitchell v. State</u>, 871 So.2d 1040 (Fla. 2d DCA 2004):

> Court erred in finding that defendant violated condition requiring that he complete sex offender program based on evidence that defendant was terminated from program due to unexcused absences, where condition did not specify that treatment had to be successfully completed on the first try or how many chances defendant would be given to complete the program.

<u>Reed v. State</u>, 865 So.2d 644 (Fla. 2d DCA 2004):

> Error to revoke probation for violation of condition requiring that defendant enter, participate, and successfully complete sex offender treatment on basis of defendant's having two absences from sex offender counseling.

<u>Woodson v. State</u>, 864 So.2d 512 (Fla. 5th DCA 2004):

> Defendant argued that the trial court abused its discretion in finding that he willfully and substantially violated his probation by failing to actively participate in the court-ordered sex offender treatment program and by failing to relay the results of his HIV test to the victim. The appellate court held that each violation was a sufficient ground to revoke defendant's probation.
>
> The trial court was obligated to impose these conditions for sex offender probation under Fla. Stat. ch. 948.03(5) (2000). The primary goals of probation would be achieved only if the offender was required to undertake immediate compliance with the mandatory conditions. The legislature never

intended for the trial court to have to expressly define the number of attempts or establish time parameters for compliance.

Willful failure to actively participate in or complete sex offender treatment, or provide test results to the victim, did not preclude revocation simply because the number of attempts at compliance were not specified or because defendant was willing to undertake another attempt at compliance within the probationary period.

Lawson v. State, 845 So.2d 349 (Fla. 2d DCA 2003):

Error to revoke probation for failure to attend and complete out-patient sex offender counseling based on defendant's early termination from counseling program where evidence was insufficient to show a willful and substantial violation.

Williams v. State, 839 So.2d 926 (Fla. 2d DCA 2003):

Error to revoke probation for violation of condition requiring that defendant successfully complete sex offender treatment within three years where defendant was terminated from sex offender treatment program prior to the expiration of three years, and there remains time in probation period to satisfy requirement.

Mills v. State, 840 So.2d 464 (Fla. 4th DCA 2003):

Defendant's refusal to admit guilt for purposes of completing court-ordered treatment program and excessive unexcused absences from program were willful violations of probation.

Under circumstances, trial court did not abuse its discretion in revoking probation for failure to complete program notwithstanding absence of specific time period within which defendant was to complete program.

Defendant did not express any interest in successfully completing program in which he should have to admit guilt, although successful completion of program was dependent on such an acknowledgment.

Further, defendant made no effort and demonstrated willingness to either be reinstated into treatment or to participate in comparable program until sentencing for probation violation.

<u>Lynom v. State</u>, 816 So.2d 1218 (Fla. 2d DCA 2002):

> Evidence was insufficient to establish willful and substantial violation of condition requiring defendant to actively participate in and successfully complete outpatient sex offender treatment program, where probation order did not require defendant to complete sex offender program by specified date, defendant was not at end of his probation period, no evidence was presented to show that defendant was unwilling to complete program, and clinical psychologist who treated defendant did not testify that defendant had been terminated from program.
>
> Evidence was sufficient to establish that defendant violated probation by moving to location within 1000 feet of a park.

<u>Knight v. State</u>, 801 So.2d 160 (Fla. 2d DCA 2001):

> Hearsay insufficient to prove violation of condition that defendant be evaluated by counselor and follow recommendations regarding sexual abuse. State did not counselor or other person with direct knowledge of violation, but relied solely on the hearsay testimony of the probation officer.

<u>Dunkin v. State</u>, 780 So.2d 223 (Fla. 2d DCA 2001):

> Error to revoke probation where evidence was insufficient to establish willful and substantial violation of probation.
>
> Where special condition of probation required defendant to complete sex offender treatment program within first three years of his supervision, but did not specify that treatment has to be successfully completed on the first try, evidence that defendant was terminated from program after unexcused absences was insufficient to prove willful and substantial violation.
>
> <u>Discussion</u>: This opinion provides a tremendous loophole for defendants.

<u>Berthiaume v. State</u>, 755 So.2d 804 (Fla. 2d DCA 2000):

> Evidence sufficient to support finding that Defendant willfully violated condition of probation requiring him to enter, participate in, and successfully complete sex offender treatment.

Discussion: This case does not give enough facts to be particularly help for research purposes.

Arias v. State, 751 So.2d 184 (Fla. 3rd DCA 2000):

Probation properly revoked on basis of failure to comply with condition that defendant complete mentally disordered sex offender program, or defendant was terminated for program because of his steadfast refusal to accept responsibility for his actions.

Probation properly revoked for violation of condition prohibiting defendant from associating in any way with victim of lewd assault on minor, where defendant called victim's residence and left message for victim through victim's sister.

Discussion: The facts of this case are somewhat different than most of the cases dealing with a violation of probation based upon failure to complete sex offender counseling. In this case the defendant had to acknowledge some level of responsibility in order to be admitted into the program. Once he was admitted into the program, he kept blaming everything on the victim and refused to accept any responsibility for himself until the counselor could go no further with the treatment. It should be noted that this is distinguishable from those cases where the defendant claims that he had not abused the child and therefore could not be expected to admit that fact in counseling. It should also be noted that when the defendant called the victim's home to speak to her he left the message with the victim's sister requesting her to tell the victim that she was beautiful and that he still loved her.

Cyr v. State, 747 So.2d 1005 (Fla. 2d DCA 1999):

Error to revoke probation on basis of defendant's failure to comply with condition requiring that he "shall continue sex offender counseling," where defendant attended some counseling sessions, but has either quit or been involuntarily terminated. His probation did not specifically require him to complete counseling or attend for a specified period.

Faulk v. State, 743 So.2d 1183 (Fla. 1st DCA 1999):

Error to revoke probation for violation of condition required for completion of psychosexual treatment course where termination of treatment report was only basis upon which court determined that defendant willfully violated probation.

The report was hearsay and thus could not be used as the only evidentiary support for the violation.

Santiago v. State, 722 So.2d 950 (Fla. 4th DCA 1998):

Probationer's positive test for controlled substances did not violate probation requirement that he undergo a psychological evaluation and successfully complete any treatment program required, where during fourth year of probation therapist ordered him to undergo random drug testing; probation order did not command random drug testing and treatment for a sex offense did not logically contemplate such tests.

Probationer's absence from group therapy sessions constituted a willful violation of probation condition to successfully complete any treatment program required where probationer offered no excuse for missing the group sessions; probationer's attendance at individual therapy sessions did not constitute reasonable effort to comply with all probation terms.

Chamness v. State, 697 So.2d 961 (Fla. 2d DCA 1997):

Trial court properly revoked defendant’s probation based on failure to attend three outpatient sex offender program treatment sessions.

Bennett v. State, 684 So.2d 242 (Fla. 2d DCA 1996):

Where defendant was charged with handling and fondling child under age sixteen and battery and entered negotiated plea of guilty to two counts of battery, defendant could not be found in violation of probation when counselor terminated him from sex offender treatment program for refusing to admit he had committed handling and fondling offense.

Condition requiring defendant to enter into and successfully complete out-patient sex offender treatment program if indicated did not require him to admit to counselor the sexual acts charged.

Defendant was never advised prior to entering plea that in order to successfully complete probation he would be required to admit the sexual acts underlying handling and fondling charge.

OTHER CONDITIONS

Blue v. State, 36 Fla. L. Weekly D2399 (Fla. 4th DCA 2011):

Jessica Lunsford Act (JLA) did not apply to probationer and thus did not authorize trial court to modify probation to include electronic monitoring following probationer's violation of probation, which was imposed upon conviction for lewd and lascivious battery on a person between the ages of 12 and 16, where JLA did not go into effect until four years after crimes were committed.

In modifying probation to impose electronic monitoring following violation of probation, which was imposed upon conviction for lewd and lascivious battery on a person between the ages of 12 and 16, trial court failed to make requisite findings under statute governing additional conditions of probation for certain sex offenses; trial court failed to make findings that probation officer and his supervisor deemed electronic monitoring necessary and that Department of Corrections made such a recommendation.

Discussion:

Since the JLA did not come into effect until September 1, 2005, only offenses committed after that date are subject to the act. In this case, the defendant's original offense was in 2001. The court noted that the trial court had authority to order electronic under 948.30(2) pursuant to recommendations from the probation officer and her supervisor, but since it is not clear that the court was going under that section, the case had to be remanded.

David v. State, 2011 WL 5965804 (Fla.App. 1 Dist.)

Defendant was placed on probation for lewd exhibition and was ordered not to possess any sexually explicit materials and not to use a computer or access the Internet until a psychological evaluation was completed. He was violated on both conditions because police officers saw him access the Internet at the public library. The police could not find evidence on the library computer that he looked at porn, but they did find a list of pornography web sites in his pocket. The appellate court ruled that this conduct was sufficient to violate the condition related to accessing the Internet, but not sufficient to violate on the condition related to possession explicit materials.

Witchard v. State, 2011 WL 3903112 (Fla.App. 4 Dist.)

It would be an ex post facto violation to apply a law that increases the penalty for a violation of probation to a probationer who committed his or her crimes before the law became effective regardless of the date of the violation of probation.

Requirement that a trial court impose electronic monitoring on certain sex offenders who violated their probation only applied to probationers whose offenses occurred on or after September 1, 2005. (*Interpreting 948.063)*

Arias v. State, 2011 WL 2493653 (Fla. 5th DCA 2011)

Trial court in which defendant pled no contest to burglary of a dwelling with an assault or battery could not impose the statutory sex offender conditions as special conditions of probation; defendant's offense was not enumerated in the statute governing imposition of the sex offender conditions, and the conditions were not related to the offense.

Edwards v. State, 2011 WL 1599576 (Fla. 2d DCA 2011.):

Court improperly violated defendant’s probation based solely upon testimony of probation officer that “bracelet gone” alert sounded on monitoring device.

“Although hearsay evidence, such as Pro Tech's report, is admissible at a probation revocation hearing, such evidence may not form the sole basis of a decision to revoke.”

“But if the rules violations result from “equipment problems or the subject's unintentional failure to operate the equipment properly,” such noncompliance does not rise to the level of a willful and substantial violation of probation.”

Discussion: The court noted that if someone from Pro Tech, the monitoring company, had testified at the hearing, the hearsay problem would have been resolved.

Smith v. State, 35 Fla. L. Weekly D2711 (Fla. 1st DCA 2010):

In order to revoke defendant's probation based on defendant's failure to comply with probation condition prohibiting him from viewing, owning, or possessing any obscene, pornographic, or sexually stimulating visual or auditory material relevant to deviant behavior patterns, the Circuit Court was required to make

findings describing the nature of the material defendant possessed, its content, and how it was related or relevant to defendant's deviant behavior pattern.

State v. Coleman, 44 So.3d 1198 (Fla. 4th DCA 2010):

Trial court that previously imposed sex offender probation on defendant who was convicted of lewd assault on a child under 16, lewd conduct in the presence of a child under 16, and using a computer service to solicit or entice a child could not modify defendant's probation to remove the requirement that he report in person every month to his probation officer; elimination of the reporting requirement was contrary to the intensive supervision expressly contemplated for sex offender probationers.

Trial court's order eliminating, from the sex offender probation imposed on defendant who was convicted of lewd assault on a child under 16, lewd conduct in the presence of a child under 16, and using a computer service to solicit or entice a child, the requirement that defendant report in person every month to his probation officer could not be justified as an order placing defendant on administrative probation; Department of Corrections, rather than trial court, was charged with transferring a defendant to administrative probation, and administrative probation was not available for offenders convicted of lewd and lascivious conduct involving children under 16.

Ruise v. State, 43 So.3d 885 (Fla. 1st DCA 2010):

State laid the foundation necessary for the admission, under the business records exception of the hearsay rule, of global positioning system (GPS) data from electronic monitoring device worn by defendant as a condition of his community control, and thus GPS data indicating that defendant was away from his approved residence was sufficient to support revocation of defendant's probation; employee of the monitoring company testified at revocation hearing as to how the monitoring system worked and how GPS data was compiled into a computer database accessible by the probation officer, and probation officer testified as to his use of the data and confirmation of its accuracy.

Trial court did not abuse its discretion in probation revocation proceeding by finding that defendant willfully and substantially violated his probation by leaving his approved residence; global positioning system (GPS) data from defendant's electronic monitoring device showed that defendant was away from his approved residence, and probation officer testified that defendant was away from his residence and wandering the neighborhood on an almost daily basis,

that officer had personally seen defendant away from his residence on at least one occasion, that defendant was aware that he was not to leave his residence, and that officer had warned defendant multiple times not to leave.

State v. Petrae, 35 Fla. L. Weekly D (Fla. 5th DCA 2010)

Trial judges are obligated to impose mandatory conditions of sex offender probation, and the statute does not allow for judicial discretion.

Electronic monitoring is a mandatory condition for sexual offenders over eighteen years old, whose victims, as in this case, are under fifteen years old, and who, like Petrae, have violated their probation or community control.

Electronic monitoring being a mandatory condition of probation, the trial court was obligated to impose the condition, and did not have the discretion to subsequently rescind it.

Hitt v. State, 35 Fla. L. Weekly D (1st DCA 2010):

A probationer who is designated a sexual predator to be subjected to electronic monitoring is not limited to probation imposed for sexual offenses.

Sellers v. State, 16 So.3d 225 (Fla. 5th DCA 2009):

Possessing pornography involving adults did not support revocation of probation imposed for possessing child pornography in the absence of evidence establishing a rational relationship between the pornographic, obscene, or sexually stimulating materials and the probationer's deviant behavior pattern; the trial court did not make any findings describing the nature of the material, its content, and how it related or was relevant to, the deviant behavior pattern.

Probation revocation statute which prohibits probationer from viewing, owning, or possessing any obscene, pornographic, or sexually stimulating material that is relevant to the offender's deviant behavior pattern unless such possession is part of a treatment plan does not prohibit a probationer from possessing any and all obscene, pornographic, or sexually stimulating materials, only those materials that are relevant to the charges for which he was placed on probation.

Materials in possession of probationer who had been convicted of possessing child pornography did not need to actually depict children in a sexually explicit manner in order to support probation revocation; material that did not actually

depict a child could still be relevant to deviant proclivities involving children if the material was sexually explicit and contained a puerile or adolescent theme.

When material in probationer's possession is not clearly or closely related to the underlying offense, there must be evidence sufficiently linking the materials to the defendant's deviant behavior pattern in order to support revocation; this will require the state to present evidence establishing a rational relationship between the pornographic, obscene, or sexually stimulating materials and the defendant's deviant behavior pattern.

Brown v. State, 12 So.3d 877 (4th DCA 2009):

Evidence was insufficient to show defendant willfully and substantially violated his probation by committing two new offenses of obstruction without violence and failure of sex offender to give notification of change of address; although prosecutor referred to probable cause affidavit and said it was "self-authenticating," no documents were ever admitted into evidence, only testimony offered by state came from probation officer who testified that defendant committed two new criminal acts while on probation, and probation officer's testimony was hearsay and not supported by competent, non-hearsay proof.

Evidence was insufficient to show defendant, previously convicted of failure to register as a sex offender, willfully and substantially violated probation by failing to produce valid identification to Department of Highway Safety and Motor Vehicles (DHSMV) for purposes of registration after being instructed to do so; defendant testified that he was told that he needed birth certificate in order to get identification card or otherwise register with DHSMV, and defendant's unrefuted testimony was that he was unable to obtain birth certificate in his home state because facility from which he could obtain copy had burned down.

State v. Lacayo, 8 So.3d 385 (Fla. 3rd DCA 2009):

Court erred in refusing to impose electronic monitoring pursuant to F.S. 948.30(3), when defendant was sentenced to probation for fleeing and eluding a law enforcement officer when defendant had previously been declared a sexual predator.

Soliz v. State, 18 So.3d 1094 (Fla. 3d DCA 2009):

> Probationer's conduct in failing to move into a residence that was farther than 1000 feet from a day care center was not a willful act, as would permit revocation of probation for conviction of lewd molestation, but was due to factors beyond his control and represented a reasonable, good faith attempt to comply with 1000-foot requirement, where probationer had found another place to live before the thirty days had expired but had not moved because the new residence needed repairs that would be completed within two weeks.
>
> Probationer's failure to comply with a probation condition is not willful where his conduct shows a reasonable, good faith attempt to comply, and factors beyond his control, rather than a deliberate act of misconduct, caused his noncompliance.
>
> Evidence was sufficient to show that probationer willfully and substantially violated probation by failing to submit to electronic monitoring because he did not carry tracking device at all times nor charge the device properly, thus, supporting revocation of probation; probationer's testimony that equipment was not working properly was contradicted by probation officer's testimony that there were insufficient battery alarms, even after probationer had been provided with a car charger, and by records' custodians' testimony that an ankle bracelet could be 125 feet from electronic box before an alarm went off.
>
> Evidence was sufficient to show that probationer willfully and substantially violated probation by failing to maintain a driving log, thus, supporting revocation of probation; probationer's testimony that he did not know he had to keep a log for personal driving was contradicted by probation officer's testimony that he told probationer to keep a driving log for all his hours.

Newton v. State, 996 So.2d 960 (Fla. 2d DCA 2008):

> Evidence at violation of probation hearing was insufficient to demonstrate that defendant willfully violated condition of his sex offender probation by changing his approved residence without consent, where county withdrew its approval of defendant's formerly-approved residence and refused to approve the alternate location he proposed, and it was not established that defendant had the ability to return to probation officer as he was ordered to do after he reported his inability to find approved housing.

Grosso v. State, 2 So.3d 362 (Fla. 4th DCA 2008):

Trial court's amendment of defendant's sexual offender probation to add the condition of electronic monitoring did not violate double jeopardy; electronic monitoring was mandatory based on defendant's prior convictions and new offense.

Where a trial court fails to impose a mandatory penalty at the original sentence, double jeopardy principles are not offended where the trial court subsequently corrects the sentence by imposing the omitted mandatory sanction.

Trial court's order sentencing defendant to sexual offender probation, which omitted the mandatory condition of electronic monitoring, was not an order affecting Department of Corrections' performance of its duties regarding sex offenders, and thus trial court lacked jurisdiction to modify the sentence more than 60 days later to add the condition, despite Department's contention that the lack of electronic monitoring affected its ability to perform its duty to supervise sex offenders and protect the public; statutes granting agencies a year to challenge orders affecting performance of their duties were intended to enforce registration requirements, rather than monitoring requirements

State v. Easterling, 989 So.2d 1285 (Fla. 1st DCA 2008):

Defendant made a good faith effort to comply with condition of his community control requiring him to register and obtain an identification card denoting his sex offender status from the Department of Highway Safety and Motor Vehicles (DHSMV) within 48 hours of his release from prison, where only reason he did not complete the registration was because he lacked $10 to obtain a new license, and defendant obtained the license after attempting to comply with the requirement three days later, as soon as he had obtained the necessary funds.

Kasischke v State, 991 So.2d 803 (Fla. 2008):

Applying the rule of lenity, the statute generally requiring a trial court, when sentencing a sex offender to probation or community control, to impose a condition prohibiting the defendant from "viewing, accessing, owning, or possessing any obscene, pornographic, or sexually stimulating visual or auditory material, including telephone, electronic media, computer programs, or computer services that are relevant to the offender's deviant behavior pattern," which statute was ambiguous regarding which prohibited materials had to be relevant to defendant's deviant behavior pattern, would be interpreted as

requiring any prohibited material to be relevant to defendant's deviant behavior pattern.

Donohue v. State, 979 So.2d 1060 (Fla. 4th DCA 2008):

Remand for resentencing was necessary for trial court to make findings necessary to support imposition of electronic monitoring as condition of probation under **Jessica** Lunsford Act, specifically whether community control or probation officer deemed the monitoring necessary and whether monitoring was recommended by the Department of Corrections; trial court appeared to believe that electronic monitoring was mandatory and that no additional factual findings were necessary.

Sturges v. State, 980 So.2d 1108 (Fla. 4th DCA 2008):

Defendant convicted of aggravated assault with deadly weapon was not eligible for sex offender probation.

Siplen v. State, 969 So.2d 1171 (Fla. 5th DCA 2007):

The court modified Appellant's probation to include electronic monitoring, a mandatory condition of probation. Because the modification did not occur within sixty days after Appellant's sentencing, the modification was erroneous.

Burrell v. State, 993 So.2d 998 (Fla. 2d DCA 2007):

Because defendant's original offense of solicitation to commit a lewd battery with a child occurred before the effective date of the Jessica Lunsford Act, the Act, requiring mandatory electronic monitoring as a condition of probation, did not apply to him.

Fields v. State, 968 So.2d 1032 (Fla. 5th DCA 2007):

Probationer who had been designated a sexual offender, and whose probation for a felony driving offense was modified, was subject to electronic monitoring mandated by statute governing violation of probation by designated sex offenders, even though her probation was not for a sexual offense; statute

applied to all designated sex offenders whose probation for any felony offense was revoked or modified. F.S. 948.063

Trial court's order subjecting probationer to electronic monitoring forty days after court initially modified probation did not violate double jeopardy; because electronic monitoring was mandatory for designated sex offenders whose probation was modified or revoked, order failing to require monitoring was incomplete, and could be properly modified within 60 days pursuant to rule of criminal procedure regarding modification of incomplete sentences.

Where a trial court fails to impose a mandatory penalty at the original sentence, double jeopardy principles are not offended where the trial court subsequently corrects the sentence by imposing the omitted mandatory sanction.

Walker v. State, 966 So.2d 1004 (5th DCA 2007):

Evidence did not establish that probationer committed offense of failing to register as a sex offender and thus violated condition of his probation that he live and remain at liberty without violating any law; while probationer, who was a sex offender, was required to report in person at the sheriff's office within 48 hours after being released from Department of Corrections, 48 hours had not expired at the time the violation of parole charges were filed.

Williams v. State, 966 So.2d 985 (Fla. 2d DCA 2007):

Remand was required to delete any reference to the Jessica Lunsford Act in defendant's sentencing documents, after defendant was sentenced following a probation violation, where the Sexual Predators Act took effect after defendant's convictions, and therefore defendant could not be designated as a sexual predator, and the Jessica Lunsford Act only applied to someone who was designated as a sexual predator.

Harroll v. State, 960 So.2d 797 (Fla. 3rd DCA 2007):

Imposition of mandatory condition of sex-offender probation of wearing global positioning system (GPS) monitor did not violate double jeopardy principles, even though condition was premised on defendant's prior, rather than current, convictions.

"Under Florida Rule of Criminal Procedure 3.800(c), the trial court may modify an incomplete sentence within sixty days of its imposition to include any

provision of chapter 948 which it failed to originally pronounce. Where the defendant's sentence is incomplete because it omits a mandatory condition of probation under chapter 948 as part of the sex-offender sentence, the trial court may properly modify the defendant's sentence within sixty days to include the condition mandated by chapter 948."

DOC v. Daughtry, 954 So.2d 659(Fla. 5th DCA 2007):

Trial court was not authorized to issue order enjoining the Department of Corrections (DOC) from automatically arresting, for violation of probation, every sex offender who failed to give an acceptable address at time of scheduled release, where DOC was not a party to proceedings, DOC was not given notice that order was within contemplation of the court, and probationer who was subject of the bond hearing out of which order issued did not file motion or seek injunctive relief.

Discussion: The court ruled for DOC, but expressed reservations about the propriety of the DOC's procedures. Specifically, the court noted, "Although the DOC's decision to re-arrest probationers like Daughtry before they can exit the prison based on DOC's statutory duty to have an acceptable address for the released prisoner is as baffling to this court as to the trial court, the provisions of the order directed to the DOC were not authorized and are hereby vacated."

Bramberg v. State, 953 So.2d 649 (Fla. 2d DCA 2007):

Search of defendant's residence by law enforcement officers pursuant to condition of defendant's probation that allowed warrantless searches was not rendered unreasonable under Fourth Amendment by investigatory, as opposed to supervisory, purpose of search, given that officers had reasonable suspicion of criminal activity.

Discussion: This is a very important case for probation cases. The general rule has been that if evidence is obtained pursuant to a probation search, it can only be used for a violation of probation, but it cannot be used to support a new criminal charge. This case presents a new twist to this law. Relying on the recent Supreme Court decision of U.S. v. Knights, 534 U.S. 112 (2001), the court ruled that if the probation order says that law enforcement can search the probationers residence, and the police officers have reasonable suspicion of illegal conduct, the police officers can conduct a warrantless search even though the probation officer is not present. The defendant has a diminished expectation of privacy that allows a search with less than probable cause.

Brown v. State, 949 So.2d 1085 (Fla. 5th DCA 2007):

> Evidence supported finding that defendant's possession of three disks that were of an obscene or pornographic nature was a willful and substantial violation of probation condition that required him from viewing, owning, or possessing any obscene, pornographic, or sexually stimulating visual or auditory material, as ground for revoking probation imposed for sexual battery; while testimony was given that the disks, which were found under defendant's bed, belonged to defendant's son, defendant failed to properly dispose of them.

Hurst v. State, 941 So.2d 1252 (1st DCA 2006):

> Trial court acted within its discretion in determining that defendant violated curfew condition of his sex-offender probation that required him to be at his permanent residence at all times between hours of 10:00 p.m. and 6:00 a.m., even though defendant testified that he had taken a double dose of cold medicine and was sleeping at home when his probation officer visited at 11:48 p.m.; probation officer testified that she knocked loudly and repeatedly and, indeed, that she woke defendant's neighbors but that defendant never responded, and trial court believed testimony of probation officer over testimony of defendant.

Hutchins v. State, 937 So.2d 799 (Fla. 5th DCA 2006):

> Probation officer's instruction to probationer, who was a registered sexual predator, not to sleep overnight at any residence other than his approved address without the officer's permission, did not impose a new condition of the probation, but was a reasonable instruction to assist the officer in his supervision of probationer; such information would enable the officer to determine whether a minor child resided at such a proposed residence, assisting officer in preventing probationer from having unsupervised contact with a minor child as prohibited by the probation terms.
>
> A probation officer may give a probationer directions which are reasonably intended to assist the officer in ensuring that the probationer complies with the conditions of probation, provided that such directions are not inconsistent with the probation order.

Bush v. State, 929 So.2d 685 (Fla. 1st DCA 2006):

Trial court acted within its discretion in revoking defendant's probation for committing a lewd and lascivious act on a child, which had condition that he not possess pornographic materials; record contained sufficient facts from which trial court could have inferred defendant's knowledge of materials' presence.

Discussion: The court does not elaborate on facts, so this is of little research value.

Morris v. State, 909 So.2d 428 (Fla. 5th DCA 2005):

DNA testing requirement as condition of probation does not violate defendant's constitutional right to be free from unreasonable searches and seizures.

Department of Corrections v. Harrison, 896 So.2d 868 (Fla. 5th DCA 2005):

Circuit court departed from essential requirements of law by entering directive in probation orders that required DOC to pay for an interpreter for hearing-impaired defendant's sex offender treatment.

Hicks v. State, 890 So.2d 459 (2d DCA 2004):

Record did not support finding that defendant willfully violated condition of his sex-offender probation prohibiting him from working at "any school, day care center, park, playground or any other place where children regularly congregate," even though defendant began to operate pet business in kiosk in center of mall near food court, where trial court and probation officer had long allowed defendant to operate retail pet store in flea market and strip mall, probation officer gave tacit approval for defendant to operate kiosk, and defendant had limited presence at kiosk under conditions similar to or more restrictive than those that applied to his other retail pet businesses.

Department of Corrections v. Grubbs, 884 So.2d 1147 (Fla. 2d DCA 2004):

Where defendant was ordered to complete sex offender treatment program as condition of sex offender probation, court improperly ordered that Department of Corrections pay for the treatment.

Order violates doctrine of separation of powers.

Statute requires that persons who are placed on community supervision participate in and successfully complete a sex offender treatment program at their own expense.

State v. Miller, 888 So.2d 76 (Fla. 5th DCA 2004):

Where defendant who entered plea of nolo contendere to lewd or lascivious battery was sentenced to probation as youthful offender, court was required to impose sex offender conditions as terms of probation.

Williams v. State, 879 So.2d 49 (Fla. 1st DCA 2004):

Special conditions of probation relating to sex offense were properly related to defendant's rehabilitation or protection of public in light of defendant' convicted offenses.

Discussion: The defendant's offense occurred in 1986, but the judge imposed probationary conditions of F.S. 948.03(5)(a) that were not enacted until 1995. The appellate court ruled that the judge had the power to impose those conditions at his discretion because they were related to the conduct.

Moore v. Nelson, 830 So.2d 918 (Fla. 4th DCA 2002):

Error to impose condition of supervision allowing defendant who was convicted of sexual activity with child to reside in foreign state without stipulating that this condition was contingent upon the approval of the receiving state interstate compact authority.

Trial court's order directing transfer of defendant's sex offender probation to foreign state without the receiving state's acquiescence quashed.

Schutte v. State, 824 So.2d 308 (Fla. 1st DCA 2002):

Trial court could not properly amend probation order three years after original order to add statutorily mandated conditions for sex offenders.

Discussion: Any such changes must be made within 60 days of the original sentencing order.

Taylor v. State, 821 So.2d 404 (Fla. 2d DCA 2002):

Condition requiring defendant to pay cost of drawing DNA blood sample is not special condition, but is instead statutory condition which need not be orally pronounced where defendant was convicted of unlawful sexual activity with minor under Chapter 794.

Condition prohibiting defendant from viewing, owning, or possessing obscene, pornographic, or sexually explicit material is general condition of probation for sexual offenses occurring on or after October 1, 1995, and need not be orally pronounced.

Condition should be more specific and relate to defendant's particular deviant behavior pattern.

Edmonson v. State, 816 So.2d 768 (Fla. 1st DCA 2002):

Trial court was erroneous in belief that it was required to impose sex offender conditions in order of probation where defendant was placed on probation for kidnapping count only, and not for sexual battery count.

Andrews v. State, 792 So.2d 1274 (Fla. 4th DCA 2001):

Imposition of sexual offender probation on resentencing does not violate double jeopardy because probation requirements of section 948.03(5) are mandatory, statue imposes no affirmative disability or restraint on defendants, and its purpose is remedial and regulatory rather than punitive.

State v. Thurman, 791 So.2d 1228 (Fla. 5th DCA 2001):

It was not improper for trial court to impose sex offender probation conditions on defendant who was convicted of attempted lewd act upon child.

Trial court had discretion to impose the conditions enumerated in section 948.03(5) although defendant was convicted only of an attempt.

Defendant agreed to imposition of conditions and waived any objection by waiting until after he had violated one of the conditions to challenge validity.

Ertley v. State, 785 So.2d 592 (Fla. 1st DCA 2001):

Sex offender probationary conditions set out in sections 948.03(5)(a) and (b) are constitutional.

Condition prohibiting viewing, owning, or possessing obscene material that is relevant to offender's deviant behavior pattern does not violate due process.

Wilcox v. State, 783 So.2d 1150 (Fla 1st DCA 2001):

Attempted sexual battery is an offense under chapter 794 and therefore, there was no error in conditions of probation imposed pursuant to section 948.03.

Discussion: The defendant objected to sex offender probation, arguing that since he was convicted of attempted sexual battery, his conviction fell under the 777 attempt statute and not the 794 sexual battery statute.

Boutwell v. State, 776 So.2d 1014 (Fla. 5th DCA 2001):

No abuse of discretion in refusing to permit defendant to withdraw nolo contendre plea to lewd or lascivious assault upon child under age sixteen on ground that defendant was unaware of strictness of sex offender probation.

There can be no merit to claim that trial court had duty to assure that defendant was aware of various components of sex offender probation prior to accepting plea where plea agreement, which earned defendant only a recommendation for sex offender probation and a promise of no departure from guidelines, allowed for punishment far greater than sex offender probation.

Williams v. State, 764 So.2d 757 (Fla. 2d DCA 2000):

No error in finding that defendant willfully and substantially violated condition requiring that he register as sex offender and condition requiring that he remain confined to his approved residence.

Thomas v. State, 760 So.2d 1138 (Fla. 5th DCA 2000):

Trial court lacked proper basis to revoke defendant's probation based on sexual battery of minor where revocation was based solely upon hearsay statements of child victim, which even if deemed reliable, were uncorroborated.

Record did not support finding of reliability where child's statements were contradictory, there was possibility of improper influence on child by his mother, who was involved in domestic dispute with defendant, and mother admitted that child had dispute with defendant, and mother admitted that child had problem with lying.

State failed to show that change in approved residence without permission of probation officer was willful where defendant moved from his current approved residence with his girlfriend back to original approved residence with his mother over a holiday weekend because of a domestic quarrel.

Discussion: The court points out that revocation of probation cannot be based solely on hearsay evidence.

Lane v. State, 762 So.2d 560 (Fla. 5th DCA 2000):

Error to revoke probation for defendant's refusal to submit to polygraph test ordered by his sex offense counselor where requirement of taking polygraph test was not a condition of probation, and defendant's offense was committed prior to enactment of statute which requires annual polygraph testing for persons placed on sex offender probation.

Discussion: Mandatory polygraph exams for persons placed on sex offender probation applies to crimes committed on or after October 1, 1997.

Greenwood v. State, 754 So.2d 158 (Fla. 1st DCA 2000):

General conditions properly imposed as long as they are rationally related to the state's need to supervise defendant, regardless of whether they are reasonably related to the defendant's offense or restrict conduct which is not itself criminal.

Discussion: The defendant challenged the constitutionality of the conditions of probation outlined in F.S.948.03(5). The appellate court ruled that since these conditions were specifically outlined in the statute that they are considered general conditions. The court noted that specific conditions must be specifically related to the offense, but general conditions do not.

Soca v. State, 673 So.2d 24 (Fla. 1996):

Evidence obtained in warrantless, probationary search of probationer's residence was not admissible against him in new criminal proceeding, but was admissible in probation revocation proceeding.

Discussion: This court relies heavily on its previous decision in Grubbs v. State, 373 So.2d 905 (Fla. 1979). The probation officer in the Soca decision searched the defendant's trailer at the request of state attorney investigator who suspected that the defendant was dealing drugs out of the trailer. Pursuant to Department of Corrections procedures, a search was conducted and cocaine was found. Therefore, if a probation officer finds child pornography pursuant to enforcing the provisions of sexual offender probation, the pornography cannot be the basis of new substantive charges. An interesting point to note, however, is the court's discussion of a federal court interpreting a similar provision in Wisconsin where the Supreme Court upheld the fruits of a search under similar circumstances, Griffin v. Wisconsin, 107 S.Ct. 3164 (1987). The reason the Wisconsin case prevailed and Florida's did not was because the Wisconsin statute requires "reasonable grounds" to believe the contraband will be contained on the premises as well as other safeguards. Since Wisconsin has a higher standard for a search, they can do more with the evidence. The trade-off here is that it is more difficult to do a probationary search in Wisconsin, but easier to use the evidence in a criminal matter.

SENTENCING:

CASTRATION:

Tran v. State, 965 So.2d 226 (Fla. 4th DCA 2007):

Order imposing medroxyprogesterone acetate injections for period of five years subsequent to defendant's consecutive sentences of imprisonment for two separate sexual batteries violated double jeopardy where penalty was imposed approximately four months after sentencing hearing.

Administration of MPA is a penalty, not a remedial treatment.

DOC v. Cosme, 917 So.2d 1049 (Fla. 5th DCA 2006):

Trial court could not order Department of Corrections (DOC) to find and pay for medical experts to evaluate whether defendants convicted of sexual battery were suitable for “chemical castration” by means of treatment with medroxyprogesterone acetate (MPA) prior to their release from prison, even though DOC was to administer the MPA treatment if ordered; statute providing for MPA treatment and mandating examination by a medical expert referred to such expert as a “court appointed medical expert,” and did not identify who was to compensate the expert.

Jackson v. State, 907 So.2d 696 (Fla. 4th DCA 2005):

Statutory directive that defendant receive medical examination within 60 days of imposition of his sentence for sexual offenses in order to determine his suitability for chemical castration, as prerequisite to imposition of sentence of medroxyprogesterone acetate (MPA) treatment, was mandatory rather than discretionary.

Sentencing court was required to specify duration of medroxyprogesterone acetate (MPA) treatment, or chemical castration, to which it sentenced defendant convicted of sexual battery.

Bruno v. State, 837 So.2d 521 (Fla. 1st DCA 2003):

Portion of sentence requiring defendant convicted under F.S. 800.04 to submit to castration is illegal and could not be imposed, even as part of negotiated plea agreement.

Castration option only applies to F.S. 794.

CRUEL AND UNUSUAL PUNISHMENT:

Cunningham v. State, 2011 WL 5554540 (Fla.App. 4 Dist.)

Constitution prohibited imposition of sentences of life without parole on juvenile offender convicted of nonhomicide offenses including attempted second-degree murder, kidnapping a child under 13 years of age, and sexual battery on a child under 12 years of age.

Gibson v. State, 721 So.2d 363 (Fla. 2d DCA 1998):

Mandatory life sentence without possibility of parole for crime of penile union with vagina of a girls less than twelve years of age when defendant has no prior criminal record is proportionate punishment and does not constitute cruel or unusual punishment.

DANGEROUS SEXUAL FELONY OFFENDER ACT

Fleming v. State, 36 Fla. L. Weekly D2656 (Fla. 5th DCA 2011):

Trial court properly stacked sentence for sexual battery with a deadly weapon, a firearm, where offense was subject to a mandatory minimum sentence under two separate and distinct statutes addressing different evils, namely Dangerous Sexual Felony Offender Act and three strikes law, and trial court imposed 25-year mandatory minimum sentence for armed sexual battery pursuant to Dangerous Sexual Felony Offender Act.

Dangerous Sexual Felony Offender Act requires a qualified defendant to be subject to sentencing under that statute rather than any other statute.

Espinoza-Montes v. State, 36 Fla. L. Weekly D2757 (Fla. 2d DCA 2011):

Trial court was not authorized, under Dangerous Sexual Felony Offender Act, to impose enhanced sentence of 25 years' imprisonment on conviction for attempted sexual battery, where jury did not make finding that defendant used or threatened to use a deadly weapon.

"On the offense of attempted sexual battery with threat of a deadly weapon or physical force, the trial court instructed the jury that it could convict based either on the threatened use of a deadly weapon or on the use of physical force likely to cause serious personal injury. Unfortunately, the verdict form did not contain a special interrogatory to allow the jury to specify whether it found that Mr. Espinoza–Montes committed the offense by the threatened use of a deadly weapon or by the use of physical force likely to cause serious personal injury."

Wright v. State, 2011 WL 2498677 (Fla. 3d DCA 2011)

Term "victimized," in provision of Dangerous Sexual Felony Offender Act requiring a 25-year mandatory minimum sentence for an offender convicted of an enumerated offense who victimized more than one person during the criminal

episode, was not unconstitutionally vague, despite contention that it could apply whenever an offender committed an unrelated misdemeanor in addition to an enumerated offense; definitions section for the statutory chapter defined a "victim" as the object of a sexual offense.

Bruce v. State, 988 So.2d 715 (Fla. 1st DCA 2008)

Defendant who was convicted of sexual battery with a deadly weapon and sentenced to 15 years of imprisonment was a dangerous sexual felony offender (DSFO) within meaning of Dangerous Sexual Felony Offender Act and, thus, was subject to a mandatory minimum sentence of 25 years of imprisonment, even though defendant had no prior sexual offense convictions; previous convictions were only one way to qualify as a DSFO under the statute, while defendant qualified by virtue of having used or threatened to use a deadly weapon during the commission of the offense.

State v. Mason, 979 So.2d 301(Fla. 5th DCA 2007):

Defendant's prior no contest plea to charge of lewd and lascivious molestation by a person eighteen years or older on a child less than twelve years of age constituted a prior "conviction" of the charge within meaning of Dangerous Sexual Felony Offender Act (794.0155), and thus trial court was required to sentence defendant to the minimum mandatory sentence set forth in the Act upon defendant's later conviction of the same charge, even though trial court in the earlier proceeding withheld adjudication of guilt.

DEPARTING FROM THE RECOMMENDED GUIDELINES:

State v. Johnson, 37 Fla. L. Weekly D289 (Fla. 4th DCA 2012):

Statute allowing a trial court to impose a downward departure sentence when the "capacity of the defendant to appreciate the criminal nature" of his conduct "was substantially impaired" did not apply to defendant who alleged that he was unaware of a change in the sex offender registration law that required him to register every three months instead of every six months, and thus such alleged ignorance was not a legal ground upon which trial court could grant a downward departure sentence after defendant was convicted of failure to properly register as a sex offender; term "capacity" referred to the mental ability to understand, rather than mere lack of knowledge.

Adorno v. State, 36 Fla. L. Weekly D2755 (Fla. 2d DCA 2011)

Evidence did not support trial court's finding that aggravating circumstance that victim was especially vulnerable due to age or physical or mental disability applied, and thus upward departure sentence following violation of probation was unwarranted regarding conviction for attempted sexual battery on a child under age of 12; state's sole proffered support for upward departure was prosecutor's unsupported assertion that victim at time was eight years old, and even assuming representation by prosecutor could be considered evidence, vulnerability could not be implied solely based on age.

State v. Sweeney, 2011 WL 3364831 (Fla.App. 2 Dist.)

While the record supported the trial court's finding that defendant was remorseful, there was no evidence that the offense was unsophisticated or that this was a single, isolated incident, and thus, evidence did not support downward departure on basis that the offense was committed in an unsophisticated manner and that it was an isolated incident for which defendant had shown remorse; record revealed that defendant had previously downloaded child pornography and traded the disks with other individuals.

While cooperation with law enforcement was a valid basis for a downward departure sentence, defendant's actions did not rise to the level of cooperation that would support a downward departure because his assistance did not result in solving any crimes or lead to the arrest of other persons.

Morrison v. State, 2011 WL 1485611 (Fla. 2d DCA 2011)

Nothing in the record indicated that evidence of vulnerability of the victim of lewd and lascivious conduct with a child under 16 was presented at either the violation of probation hearing or the plea hearings, and, thus, that factor could not support an upward departure.

State conceded that there was no escalation in defendant's conduct, and, even as questionable as defendant's unsupervised contact with children might be, it was not a crime and could not provide the basis for an upward departure from sentencing guidelines in effect at time of defendant's crimes.

Factors related to violation of probation cannot be used as grounds for departure from the sentencing guidelines.

State v. Geoghagan, 27 So.3d 111 (Fla. 1st DCA 2009):

> Open guilty plea to failure to comply with sex offender requirements was not valid basis for downward departure in sentence.
>
> Defendant's confession to failure to comply with sex offender requirements was not permissible basis for downward departure in sentence.
>
> A departure sentence cannot be based on cooperation with police where the assistance does not result in solving any crimes or the arrest of other persons.
>
> Defendant's successful completion of probation for lewd and lascivious conduct was invalid basis for granting downward departure sentence for failure to comply with sex offender requirements, in that trial court took into consideration factors that were already taken into account by sentencing guidelines.
>
> A defendant's prior record, or lack thereof is an invalid reason for a sentence departure, because the trial court lacks discretion to grant a downward departure sentence based on factors already taken into account by the sentencing guidelines.
>
> Evidence that defendant was married, had child, and was employed were not valid reasons for granting downward departure sentence for failure to comply with sex offender requirements.
>
> Trial court's finding that failure to comply with sex offender requirements was committed in unsophisticated manner in that defendant failed to do what was required, and that defendant showed remorse, did not justify statutory downward departure in sentencing for offense, where trial court did not make finding that crime was isolated offense, and could not have made such finding, since defendant had failed to register two out of three times he was required to do so.
>
> The statutory mitigating factor for a downward departure sentence that the offense was committed in an unsophisticated manner and was an isolated incident for which the defendant has shown remorse requires a showing of all three components.

> Trial court's finding that defendant had been laid off from his job and had numerous personal problems was not valid reason for imposing downward departure sentence for failure to comply with sex offender requirements.

State v. Williams, 22 So.3d 688 (5th DCA 2009):

> Petitioner's sentence of 12 years in prison followed by 10 years of sexual offender probation for attempted sexual battery was not illegal, even though the sentence was not specifically authorized by statute or rule, where petitioner agreed to the sentence through plea bargain and the sentence did not exceed the statutory maximum of 30 years.

State v. Voight, 993 So.2d 1174 (Fla. 5th DCA 2008):

> Downward departure sentence of six months in county jail for sex offender convicted of failing to report a change of address, when sentencing scoresheet mandated a minimum prison term of 18.3 months, was not justified on grounds that offender cooperated with law enforcement and served 160 days in the county jail, no restitution was involved, and the offense was not violent; none of the grounds were established by statute, and they were either legally insufficient or not supported by competent, substantial evidence.

Donohue v. State, 979 So.2d 1058 (Fla. 4th DCA 2008):

> Defendant's testimony, at trial on charge of indecent assault on a child under the age of sixteen, concerning victim's age and autism did not constitute an admission regarding victim's vulnerability, so as to permit trial court to enhance defendant's sentence above the sentencing guidelines even absent a jury finding as to vulnerability.
>
> Trial court's error in treating defendant's testimony, at trial on charge of indecent assault on a child under the age of sixteen, concerning victim's age and autism as an admission as to victim's vulnerability, so as to permit trial court to enhance defendant's sentence above the sentencing guidelines even absent a jury finding as to vulnerability, was harmless, where there was clear and uncontested record evidence, both from defendant and from other witnesses, of victim's young age and vulnerability.

Lincoln v. State, 978 So.2d 246 (Fla. 5th DCA 2008):

No error, under circumstances, in considering defendant's lack of remorse as a factor in imposing sentence.

State v. Fontaine, 955 So.2d 1248 (Fla. 4th DCA 2007):

Competent substantial evidence supported trial court's finding that, at time defendant disciplined child by striking him repeatedly with a belt, capacity of defendant to appreciate criminal nature of his conduct or to conform conduct to requirements of law was substantially impaired because of the effects of various medications defendant was taking as a result of serious accident and multiple surgeries.

Holland v. State, 953 So.2d 19 (Fla. 2d DCA 2007):

Trial court had discretion to impose downward departure sentence on defendant convicted of lewd and lascivious battery on a child twelve years of age or older but less than sixteen, based on alleged mitigating circumstance that victim was an initiator, willing participant, aggressor or provoker, even though the victim could not legally consent to the behavior.

Galindez v. State, 955 So.2d 517 (Fla. 2007):

Except for the fact of a prior conviction, a judge may not find any fact that exposes a defendant to a sentence exceeding the relevant statutory maximum, unless that fact inheres in the verdict, the defendant waives the right to a jury finding, or the defendant admits the fact.

Violation of right to jury trial at sentencing under Apprendi and Blakely was subject to harmless error analysis.

Any error in refusal to retroactively apply right to jury trial under Apprendi and Blakely at resentencing for lewd and lascivious assault on minor and child abuse with respect to trial court's assessment of victim injury points for penetration, on remand following appeal from denial of motion to correct sentence, was harmless; defendant confessed to multiple acts of sexual intercourse with victim, which resulted in impregnating victim, and victim testified that she and defendant engaged in sexual intercourse on multiple occasions over period of several months, and therefore, no reasonable jury would have returned verdict finding

that there was no penetration.

Shuler v. State, 947 So.2d 1259 (Fla. 5th DCA 2007):

Remand was required for reconsideration of defendant's sentence for engaging in unlawful sexual activity with a minor, where it was unclear whether trial court was aware of its statutory authority to impose a downward departure sentence based on upon fact that the victim had consented to engaging in sexual activity with defendant.

Donohue v. State, 925 So.2d 1163 (Fla. 4th DCA 2006):

Imposition of departure sentence for offense of indecent assault, based on aggravating circumstances not found by jury, violated defendant's Sixth Amendment right to jury; departure sentence was based on trial court's determination that child victim was especially vulnerable, but jury verdict did not reflect finding concerning vulnerability of victim.

Trial counsel's conduct in referring to, or acknowledging, child victim's age and autism did not constitute admission by defendant that victim was especially vulnerable, as would support imposition of departure sentence for indecent assault, based on child's vulnerability, in absence of jury finding that child was especially vulnerable.

Although evidence in prosecution for indecent assault established that victim's young age and autism made him especially vulnerable to defendant's sexual assault, Sixth Amendment required that jury's verdict reflect finding of victim's vulnerability to support imposition of departure sentence.

State v. Holmes, 909 So.2d 526 (Fla. 1st DCA 2005):

That undercover officer was an initiator, willing participant, aggressor, or provoker of the incident is not a proper ground in this case for downward departure.

Discussion: This is a drug case, but the case may help us with Internet solicitation cases where the undercover detective arranges to have sex with the defendant.

State v. Munro, 903 So.2d 381 (Fla. 2d DCA 2005):

Fact that defendant committed multiple acts of lewd and lascivious molestation negated finding, for sentencing purposes, that his offense amounted to single, isolated incident.

Defense counsel's representation, at sentencing in prosecution for lewd and lascivious molestation, that defendant had apologized to police for his actions, was insufficient basis for finding that defendant had shown remorse, as required to support imposition of downward departure sentence.

State v. Young, 901 So.2d 301 (Fla. 2d DCA 2005):

Judge's findings that victim was a willing participant in sexual act with her ex-boyfriend and that the defendant was too young to appreciate the consequences of his actions supported downward departure.

State v. Mann, 866 So.2d 179 (Fla. 5th DCA 2004):

Evidence insufficient to support downward departure based on need for specialized treatment for mental disorder.

Record did not support downward departure based on finding that offense was isolated incident and committed in unsophisticated manner given fact that defendant was a 39-year-old sex crimes investigator at time when he entered into ongoing sexual relationship with 14-year-old girl.

Staffney v. State, 826 So.2d 509 (Fla. 4th DCA 2002)

Record does not support downward departure based on finding that offense was committed in unsophisticated manner and was isolated incident for which defendant showed remorse.

Sexual battery was not committed in unsophisticated manner.

Record does not support finding that defendant demonstrated remorse, but instead reflects that defendant never claimed responsibility for his criminal behavior.

Even if offense was isolated incident, there must be evidence to support all three factors in order to depart downward pursuant to section 921.0026(2)(j).

Knox v. State, 814 So.2d 1185 (Fla. 2d DCA 2002):

Court can properly consider victim consent as a reason for downward departure sentence in a sexual battery on a minor charge (F.S. 794.011(8)).

State v. Coleman, 780 So.2d 1004 (Fla. 4th DCA 2001):

Competent substantial evidence supported downward departure based on finding that defendant required specialized medical psychiatric treatment for mental disorder of pedophilia and was amenable to treatment.

State v. Rife, 789 So.2d 288 (Fla. 2001):

Although willingness or consent of minor is not a defense to a crime involving sexual battery of a minor, trial courts are not prohibited as a matter of law from imposing a downward departure sentence in cases involving sexual crimes with minors based on a finding that the minor victim "was an initiator, willing participant, aggressor, or provoker of the incident."

In determining whether mitigator applies when the victim is a minor, trial court must consider victim's age and maturity and totality of facts and circumstances of the relationship between defendant and the victim.

Discussion: The facts of the case are quoted as follows:

> Ronald Rife admits having sex with the seventeen-year-old victim on numerous occasions but contends, and the victim agrees, that the sexual activities were consensual. Further, it appears that the sexual activities with this minor, who moved in with appellant because she had no other place to reside, began before the victim requested, and appellant agreed, that appellant become her guardian.

The court made its ruling based upon a statutory construction of F.S. 921.0016(4)(f), which states "Mitigating circumstances under which a departure

from the sentencing guidelines is reasonably justified include, but are note limited to:…[T]he victim was an initiator, willing participant, aggressor, or provoker of the incident." The court ruled that the legislator could have chosen to excluded sexual offenses against children from this subsection, but failed to do so. Based upon the principle of lenity, the defendant has to be given the benefit of the doubt and therefore it is within the trial court's discretion to mitigate the sentence. The court did caution, however, that the trial court should exercise this power wisely and a downward departure may not have been appropriate under different circumstances. The court basically said that it is the legislature's problem at this point. They are free to prohibit such mitigations if they choose. This decision overrules the opinions of *Hoffman, Siddal, Whiting* and *Harrell* to the extent they are inconsistent with this opinion. It should be noted that Rife scored a minimum of 24 years on the guidelines and was sentenced to 8 and a half years followed by ten years probation.

State v. Kasten, 775 So.2d 992 (Fla. 3rd DCA 2000):

Error to depart downward from guidelines on ground that defendant could pay for therapy for child victim of sexual offenses if he were not incarcerated, where there was no record testimony as to cost of future counseling, and victim was presently receiving counseling at no cost.

Discussion: The victim came to court and pleaded with the judge not to sentence her father to prison for sexually abusing her. The judge was touched and came up with this restitution argument to mitigate the sentence. It is important to note that a need for restitution is a valid basis for a downward departure, however, there needs to be record evidence to support it.

Smith v. State, 788 So.2d 279 (Fla. 4th DCA 2000):

Vulnerability of victim due to age not valid reason for departure where offense was committed prior to January 1, 1994.

Emotional or psychological trauma to victim not valid reason for departure in absence of extraordinary circumstances not inherent in offense unless victim has discernible physical manifestation resulting from trauma.

State v. Amaro, 762 So.2d 998 (Fla. 5th DCA 2000):

Evidence sufficient to support finding that defendant violated condition requiring that he have no contact with children under age sixteen unless supervised by an adult approved by judge or community control officer.

Wishes of child victim's grandmother that defendant not go to jail insufficient reason for downward departure sentence.

Discussion: This a brief opinion without much legal analysis.

State v. Stalvey, 795 So.2d 968 (Fla. 1st DCA April 12, 2000):

Willing participation cannot be basis for downward departure in cases arising under section 800.04. Conflict certified.

Discussion: This appellate court specifically rejects the 5th DCA's decision in State v. Rife, 733 So.2d 541 (5th DCA 1999) and State v. Brooks, 739 So. 2d 1223 (Fla. 5th DCA) and adopts the view expressed in State v. Harrell, 691 So. 2d 46 (Fla. 2nd DCA 1997). Accordingly, the court certified this conflict to the supreme court. It is interesting to note that the female defendant had sex with a 14 year old boy.

Brown v. State, 763 So.2d 1190 (Fla. 4th DCA 2000):

In departing from guidelines on ground that sexual battery had been crime of violence and had been especially heinous, atrocious, and cruel, trial court erroneously reweighed trial evidence which had been resolved by jury in defendant's favor.

Error to depart from guidelines on grounds that sexual battery involved emotional trauma, physical injury and cruelty.

It is illogical and inconsistent for injuries proven to qualify as moderate on sentencing scoresheet, but to be deemed extraordinary for purpose of imposing departure sentence.

Absence of evidence to support finding that emotional trauma suffered by victim is extraordinary or to support finding of cruelty.

Error to depart from guidelines on ground that offense was committed in order to effect an escape from custody where defendant was not in custody when events took place.

Discussion: The defendant was charged with five counts of armed sexual battery, one count of armed kidnapping, and one count each of attempt first degree murder and aggravated battery. The jury acquitted the defendant of all charges of armed sexual battery as well as the aggravated battery charge, but found him guilty of one count of sexual battery with threat of force as a lesser included offense of armed sexual battery, one count of false imprisonment as a lesser included offense of armed kidnapping, and simple assault as a lesser included offense of attempted first degree murder. The judge eventually aggravated the sentence based upon the excessive force that was used. The appellate court ruled that the jury had already come to the conclusion that the defendant was not armed and did not use excessive force when they decided to convict of lesser included offenses. By using these factors in the sentencing, the judge was overriding the jury's decision. This was the basic concern that resulted in a reversal of the sentence.

Block v. State, 763 So.2d 1057 (Fla. 4th DCA 1999):

Lack of any evidence that child dweller in home witnessed defendant's commission of a burglary or battery, or suffered any emotional trauma from the commission of the crime, precluded upward sentencing departure on basis of presence of minor children in the dwellings at the time of the offenses.

Upward sentencing departure based upon child's presence during attack requires either: (1) evidence of emotional trauma suffered by the child; or (2) evidence that the child actually witnessed the attack.

State v. Bernard, 744 So.2d 1134 (Fla. 2d DCA 1999):

Finding the offense was isolated incident from which the defendant had shown remorse, the defendant was in need of treatment, in that victim had expressed preference that defendant be given probation in order to attend counseling not valid reasons for downward departure in instant case.

Nothing in record demonstrates that defendant was amenable to treatment and counseling, or that he felt any remorse for his actions.

Because policy criminalizing certain sexual offenses is to protect children and to punish harshly the offenders, trial court at minimum should be required to make record findings and credibility and lack of coercion in considering young victims request for leniency.

Munguia v. State, 743 So.2d 154 (Fla. 3rd DCA 1999):

No error in departure from guidelines on basis of odious and repugnant nature of crime, where defendant committed assaults with knowledge that victim had suffered egregious earlier abuse of same nature.

State v. Hoffman, 745 So.2d 985 (Fla. 2d DCA 1999):

Finding that eleven year old victim was willing participant in sexual conduct was not valid basis for downward departure.

State v. Dunning, 742 So.2d 378 (Fla. 2d DCA 1999):

The record does not support downward departure based on finding that offense was committed in unsophisticated manner and was an isolated incident for which the defendant had some remorse.

Discussion: This was an Indecent Assault/ Unlawful Sexual Activity With A Minor Case. The female defendant invited separate teenage boys into her home and provided them with beer. She then had sexual intercourse with each of them. She did this on a number of occasions. At sentencing, her attorney kept saying how remorseful she was but all that she would say was that she was sorry she had moved down here from Maine because people down here couldn't be trusted.

State v. Hoffman, 745 So.2d 985 (Fla. 2d DCA 1999):

Finding that the eleven (11) year old victim was a willing participant in the sexual conduct was not valid basis for downward departure.

Consent to sexual activity given by eleven year olds can never serve to mitigate sentence.

State v. Brooks, 739 So.2d 1223 (Fla. 5th DCA 1999):

Although victim's consent is not defense to crime, trial court did not abuse its discretion in reducing defendant's sentence based on finding that victim, a thirteen year old prostitute whom defendant believed was over the age of consent, was the "initiator, willing participant, aggressor, or provoker of the incident".

Discussion: The 5th DCA certified this question to the Florida Supreme Court "may a reasonable mistake as to the age of the victim be considered in mitigation". The facts of this case show that the Suspect saw the 13 year old prostitute getting out of the cab of a truck at 4 o'clock in the morning. Believing her to be a prostitute and over the age of consent, he motioned her to his vehicle and inquired if she would like to earn $20 by providing him sex. She agreed and entered his vehicle and they drove to a vacant house. During the course of their sexual encounter, the Suspect was unable to achieve an erection so he asked for his money back. The victim returned his money and subsequently called the police to report that she had been sexually assaulted. The appellate court took sympathy with the Suspect and indicated that mitigation was appropriate because the punishment did not fit the severity of the crime under these circumstances.

State v. Rife, 733 So.2d 541 (Fla. 5th DCA 1999):

The willing participation of a 17-year-old female victim in a statutorily prohibited sexual relationship, although consent was not a defense, was a mitigating factor supporting downward departure from guidelines sentence for sexual battery on a minor by a person in custodial authority; receding from State v. Smith, 668 So.2d 639 (Fla. 5th DCA 1996).

Sentencing court must consider the age and maturity of the victim when considering the willingness of her action as a mitigating factor and the consequence of that willingness.

Rubin v. State, 734 So.2d 1089 (Fla. 3rd DCA 1999):

The fact that defendant induced two minors to participate in a criminal mischief offense is a valid reason for departure.

Foulds v. State, 716 So.2d 324 (Fla. 2d DCA 1998):

No error in imposing consecutive sentences for lewd and lascivious act and fondling child under age sixteen where state presented proof of two distinct criminal acts. However, consecutive sentences that exceeded maximum guidelines sentence by five years constituted reversible error requiring resentencing where court provided no written reasons to support upward departure.

State v. Harrell, 691 So.2d 46 (Fla. 2d DCA 1997):

Victim's consent did not constitute valid reason for sentencing departure on conviction for lewd and lascivious act in presence of child under 16 years of age.

Alling v. State, 671 So.2d 295 (Fla. 2d DCA 1996):

Neither psychological trauma to victim nor victim's age were valid reasons for departure under law as it existed prior to January 1, 1994.

The Legislature intended 1994 amended guidelines to overrule existing case law and as such, vulnerability due to victim's age is valid reason for departure even in cases where age is element of offense). The state, however, did not prove by a preponderance of the evidence that the offense was committed after January 1, 1994.

Capers v. State, 678 So.2d 330 (Fla. 1996):

Section 912.0016(3)(j) permits departure from sentencing guidelines based upon victim's vulnerability due to age for offenses committed after January 1, 1994, even where age of victim is an element of the offense. This case involved indecent assault and attempted sexual battery.

Discussion: This case suggests that we may have grounds to aggravate on all of our child-victim cases. The Supreme Court specifically rejected the appellant's argument that "a departure would be authorized in every case dealing with these crimes, and such a result would be contrary to the purpose of the sentencing guidelines." This case provides a good discussion of statutory construction which can serve as a source of information for many of our cases.

State v. Scaife, 676 So.2d 1035 (Fla. 5th DCA 1996):

In sentencing for indecent assault, fact the defendant and victim were in a "dating situation" and by inference were engaged in consensual sexual relationship could not support downward departure because statute provides that victim's consent is not a defense to the offense. Finding that defendant was not likely again to engage in criminal course of conduct could not support downward departure either.

Discussion: The defendant was 21 years old and the victim was 15 years old. The victim's family sanctioned the relationship between victim and defendant until defendant got her pregnant and she had an abortion. The appellate court recognized that the trial judge was trying to apply a sentence commensurate with the offense, but pointed out that the rules are the rules.

State v. Smith, 668 So.2d 639 (Fla. 5th DCA 1996):

In sentencing defendant for committing lewd acts upon a child under sixteen, fact that victim consented to sexual acts with defendant could not serve as basis for downward departure from guidelines. Fact that victim had engaged in consensual sexual acts with others immediately prior to her encounter with defendant could not serve as basis for downward departure.

Discussion: This issue was also recently addressed in *State v. Scaife*, 21 Fla. L. Weekly D1573 (Fla. 5th DCA June 28, 1996). The instant case, however, provides greater depth of discussion and case citations. Considering the court has limited discretion in its sentencing powers on these cases, it is up to the prosecutor to ensure that the resulting sentence is commensurate with the crime. You may also want to bring this case to the attention of defense attorneys who reject reasonable plea offers and express a desire to go to trial.

ENHANCEMENT BASED UPON USE OF A WEAPON:

Victor v. State, 774 So.2d 722 (Fla. 3rd DCA August 16, 2000):

Conviction of sexual battery without physical force and violence, a second degree felony, is not subject to enhancement to first degree felony on account of use of a firearm.

Discussion: The trial court just dropped the ball on this one. The defendant was charged with sexual battery using or threatening to use a deadly weapon under F.S. 794.011(3). The verdict form included sexual battery without great force as a lesser included offense under F.S. 794.011(5). The verdict form contained blocks for "with a firearm" and "without a firearm" for each. As Murphy's law would dictate, the jury came back with a guilty verdict for 794.011(5) and checked the block "with a firearm", which of course is the same as armed sexual battery. The appellate court properly noted that the firearm choice should not have been included with the lesser offense.

Traylor v. State, 710 So.2d 172 (Fla. 3rd DCA 1998):

Because it is necessary to use weapon to commit offense of attempted sexual battery with a deadly weapon, and because defendant was charged under statutory subsection that specifically refers to a deadly weapon, use of weapon was essential element of offense of conviction and offense could not be reclassified or sentence enhanced based on use of weapon.

HABITUAL OFFENDER:

Jones v. State, 779 So.2d 459 (Fla. 2d DCA October 18, 2000):

Three instances of lewd and lascivious act on child, committed on same day at same beach, but each involving separate victim and different acts, were sufficiently distinct to permit imposition of consecutive habitual offender sentences.

Biles v. State, 700 So.2d 166 (Fla. 4th DCA 1997): Lazarus

Error to sentence defendant as habitual offender for capital sexual battery upon a child.

Williams v. State, 678 So.2d 443 (Fla. 2d DCA 1996):

Sexual battery with great force is life felony which cannot be enhanced under either habitual offender statute or statute pertaining to multiple perpetrators.

HIV TESTING:

Isom v. State, 722 So.2d 237 (Fla. 5th DCA 1998):

Trial court did not depart from essential requirements of law by ordering defendant who was charged with various sexual offenses to submit to HIV testing pursuant to section 960.003.

Testing not precluded by fact that offenses allegedly occurred more than eighteen months before testing was sought.

Statute does not require that state demonstrate compelling reason why victim could not protect her health by having her own blood tested or that positive result on defendant would result in useful information to victim.

Defendant's argument that he would suffer great discrimination due to fact that he is incarcerated is purely speculative at present juncture.

LESSER INCLUDED OFFENSES:

Ramirez-Canales v. State, 35 Fla. L. Weekly D2599 (Fla. 4th DCA 2010):

The trial court erred in instructing the jury on attempted sexual battery where the evidence established and supported a verdict of guilt for the completed offense of sexual battery.

Because the trial judge granted a judgment of acquittal on the sexual battery charge in Count II when he reduced it to attempted sexual battery, double jeopardy protections preclude retrial for Count II's original sexual battery charge.

Barnett v. State, 35 Fla. L. Weekly D2269 (Fla. 3d DCA 2010):

Defendant was not entitled to jury instruction on simple battery as a lesser included offense of lewd or lascivious molestation, as the information did not include any language stating that the touching was against the will of the victim.

Aldacosta v. State, 35 Fla. L. Weekly D1861 (Fla. 2d DCA 2010)

Defendant's prior conviction for lewd or lascivious battery could not be used as a qualifying offense to transform misdemeanor battery into felony battery.

Battery is not a necessarily lesser-included offense of lewd or lascivious battery; the misdemeanor form of battery is a permissive lesser-included offense of lewd or lascivious battery.

Pittman v. State, 22 So.3d 859 (Fla. 3rd DCA 2009)

Defendant who was charged with sexual battery could not be convicted of lewd or lascivious battery as a lesser-included offense, where there was nothing in the information charging defendant with sexual battery alleging that the victim was 12 years of age or older but less than 16 years, as required for conviction of lewd and lascivious battery.

Defendant who was charged with sexual battery was prejudiced by State's announcement, on the day of trial, that it intended to seek a jury instruction on lewd or lascivious battery as a lesser-included offense; defendant intended to present a defense of consent, which could undermine a sexual battery charge, but not a lewd and lascivious battery charge.

Harrison v. State, 15 So.3d 916 (Fla. 1st DCA 2009):

Instruction allowing jury to find defendant guilty of attempted lewd and lascivious molestation was abuse of discretion, where defendant objected to instruction, and only evidence presented proved either completed lewd or lascivious molestation or no crime at all.

Double jeopardy prohibited State from retrying defendant on charge of lewd and lascivious molestation, after trial court improperly instructed jury it could find defendant guilty of attempted lewd and lascivious molestation, and jury found defendant guilty of that charge; by finding defendant guilty of attempted lewd and lascivious molestation, jury necessarily found defendant not guilty of charged lewd and lascivious molestation.

A.D. v. State, 15 So.3d 831 (Fla. 2d DCA 2009):

Contributing to the dependency or delinquency of a child is not a category one or category two lesser included offense of child abuse.

Riley v. State, 25 So.3d 1 (Fla. 1st DCA 2008):

Defendant charged with capital sexual battery was entitled to jury instruction on the lesser included offense of simple battery.

Trial court error in failing to instruct jury on simple battery, which was the lesser offense one-step removed from charged offense of capital sexual battery, required reversal

Lewd or lascivious molestation is not a permissive lesser included offense of capital sexual battery where the information does not allege that the touching was in a lewd or lascivious manner.

Brumit v. State, 971 So.2d 205 (Fla. 4th DCA 2008)

> Jury determination that defendant was guilty of aggravated child abuse, i.e., that she maliciously punished child, could not be deemed to include a jury finding that she was guilty of every element of the permissive lesser included offense of child abuse, and thus appellate court, when reversing defendant's conviction for aggravated child abuse, could not direct entry of judgment for lesser included offense of child abuse.

Williams v. State, 957 So.2d 595 (Fla. 2007):

> Lewd or lascivious battery is a permissive lesser included offense of sexual battery, under amended version of lewd or lascivious battery statute, which, unlike former version of statute, did not expressly exclude sexual battery as a means of perpetrating a lewd or lascivious crime; definition of "sexual activity" for purposes of lewd or lascivious battery was identical to definition of "sexual battery" for crimes under sexual battery statute.
>
> State was entitled to have jury instructed on lesser offense of lewd or lascivious battery in prosecution for sexual battery, as information alleged all statutory elements of lewd or lascivious battery, and there was evidence at trial establishing those elements.

Brock v. State, 954 So.2d 87 (Fla. 1st DCA 2007):

> Requested instruction on attempted sexual battery was not warranted, in prosecution for sexual battery on victim under 12 years of age, where evidence established either a completed crime or no crime at all.
>
> Prohibition against double jeopardy precluded state from retrying defendant on charge of sexual battery on victim under 12 years of age following reversal of his conviction for attempted sexual battery, where jury, in finding that defendant guilty of lesser-included offense of attempted sexual battery, necessarily found defendant not guilty of charged sexual battery.

Jackson v. State, 920 So.2d 737 (Fla. 5th DCA 2006):

> Error to deny requested jury instruction on simple battery as lesser included offense of lewd and lascivious battery.
>
> Instruction on simple battery was not precluded by fact that it was not alleged that sexual activity with minor victim was without victim's consent.

Sherrer v. State, 898 So.2d 260(Fla. 1st DCA 2005):

> Trial court was required in trial for lewd and lascivious molestation to give defendant's requested jury instruction on permissive lesser-included offense of unnatural and lascivious act; information against defendant and proof against him charged and proved unnatural and lascivious act.
>
> Error in trial court's failure in trial for lewd and lascivious molestation to give defendant's requested jury instruction on permissive lesser-included offense of unnatural and lascivious act was harmless; trial court instructed jury on other permissive lesser-included offense of simple battery, which was more severe offense than unnatural and lascivious act, and jury could have "pardoned" defendant by convicting him of simple battery based on evidence showing that he had intentionally touched victim against her will, and thus simple battery provided intervening step between molestation and unnatural act.

Belser v. State, 854 So.2d 223 (Fla. 1st DCA 2003):

> The defendant was convicted for aiding and abetting a lewd molestation for participating in an event where some boys pulled a girl into a bathroom stall and fondled her.
>
> Error to deny request for jury instruction on permissive lesser included offense of battery on ground that there was lack of evidence to support that defendant actually touched victim.
>
> Even if weight of evidenced was overwhelming in favor of state's charge, defendant is entitled to instruction on lesser offense where charging document and evidence adduced at trial could support conviction of lesser offense.
>
> Fact that defendant argued that he did not take part in offense at all does not preclude him from arguing that all that occurred during attack was lesser offense of simple battery.
>
> Fact that preponderance of evidence may have demonstrated lewd and lascivious molestation rather than simple battery does not vitiate need of instructing on lesser offense.

Youmans v. State, 846 So.2d 670 (Fla. 4th DCA 2003):

Trial court reversibly erred in denying request for jury instruction on simple child abuse as permissible lesser included offense of aggravated child abuse.

Where requested lesser included instruction is only one step removed from charged offense, failure to give requested instruction is per se reversible error.

Discussion: The court concluded its opinion by stating it is about time the Supreme Court updated the schedule of lesser included offenses for child abuse. Apparently the judge was relying on the schedule of lesser that has not been updated since the 1996 revision of the statute. Please do not fall into the same trap.

Welsh v. State, 850 So.2d 467 (Fla. 2003):

Defendant was not entitled to jury instruction on lewd and lascivious conduct as permissive lesser included offense of a capital sexual battery.

Lewd and lascivious conduct is not permissive lesser included offense of capital sexual battery.

Holding regarding permissive included offenses pertains only to 1997 versions of applicable statutes.

Discussion: Chapter 800.04 was completely revised effective October 1, 1999. Prior to that date, the statute specifically stated that sexual battery and indecent assault were mutually exclusive. Under the current statute, however, there is no such language. The court did not say one way or the other if the crimes are mutually exclusive under the current statute. This issue will create quite a quandary when the defendant asks for the lesser.

Welsh v. State, 816 So.2d 175 (Fla. 1st DCA 2002):

Trial court did not err in denying requested jury instruction on lewd and lascivious conduct as lesser offense of sexual battery.

Offenses of sexual battery and lewd and lascivious act are mutually exclusive, and crime of lewd and lascivious conduct cannot be considered any category of lesser offense to sexual battery.

Discussion: This case addresses the old indecent assault statute that was replaced by the new lewd and lascivious statute on October 1, 1999. The case

law interpreting the old statute indicated that the crimes of sexual battery and indecent assault were mutually exclusive because the old indecent assault statute contained the phrase "without committing the crime of sexual battery" at the end of the statute. The current lewd battery statute does not contain that phrase, so it is not clear whether this case would apply to the current statute. In fact, the court notes in this opinion that they are not specifically addressing that point.

Dougherty v. State, 813 So.2d 217 (Fla. 2d DCA 2002):

Error to deny requested instruction on simple child abuse as lesser included offense of aggravated child abuse where there was evidence to support the charge.

Discussion: This case has very little discussion on this issue, but it does make clear the fact that the lesser included offense was third degree felony child abuse.

Brown v. State, 802 So.2d 434 (Fla. 4th DCA 2001):

Trial court did not err when it failed to instruct jury on simple battery as a lesser included offense of child abuse.

Revised schedule of lesser included offenses provides that simple battery instruction is available for present charge only when case does not involve the discipline of child by a parent or other person in authority over the child.

No abuse of discretion in denying mother's motion for judgment of acquittal on ground that conduct was privileged.

Even if evidence in trial established a "typical spanking," parental privilege to administer corporal punishment is an affirmative defense which was waived by defendant's failure to present it at trial.

State v. Robinson, 771 So.2d 1256 (Fla. 3rd DCA 2000):

Trial court erred in granting new trial on ground that jury instructions on attempted capital sexual battery and lewd and lascivious behavior should have been given. No error in failure to give instruction on attempt where evidence showed completed offense or no offense at all.

Lewd and lascivious behavior is not a necessarily included offense of crime of sexual battery, and failure to instruct on offense of lewd and lascivious conduct could not properly form basis for order granting new trial.

Discussion: The victim claimed the defendant penetrated her vagina and it hurt. Medical evidence substantiated the penetration issue. The court ruled that all of the evidence presented showed a completed act and therefore, there was no error in refusing to instruct on attempt. The court provides us with good language for objecting to an attempt charge if we choose to take that course. The court also points out that sexual battery on a child and indecent assault are mutually exclusive crimes and therefore, one is not a lesser included offense of the other.

Mateo v. State, 757 So.2d 1229 (Fla. 2d DCA 2000):

Defendant was erroneously convicted of aggravated battery as lesser included offense of sexual battery using force likely to cause serious personal injury, where charging document alleged only that defendant used force likely to cause serious personal injury and did not charge use of a deadly weapon.

Defendant may not be convicted of offense for which charging document did not allege essential elements.

Pryor v. State, 755 So.2d 155 (Fla. 4th DCA 2000):

Error in failure to instruct jury on category II permissive lesser included offense of Unnatural and Lascivious Act was harmless wherein court instructed jury on other permissive lesser included offenses of Attempt, Assault, and Battery. Only the failure to instruct on the next immediate lesser included offense (one step removed) constitutes error that is per se reversible.

Cook v. State, 736 So.2d 739 (Fla. 5th DCA 1999):

Defendant was entitled to jury instruction on battery as lesser included offense of lewd, lascivious, or indecent act upon child under age of 16 years, since facts alleged in information and evidence presented at trial satisfied all the elements of battery.

Lowman v. Moore, 744 So.2d 1210 (Fla. 2d DCA 1999):

Defendant was improperly convicted of lewd assault upon a child when the victim was 16 years of age at the time of the offense. The age of the child is an essential element of the offense.

The case is remanded to sentence the defendant for commission of an unnatural and lascivious act, a violation of section 800.02 and impermissible as to included offense of 800.04.

Harris v. State, 742 So.2d 835 (Fla. 2d DCA 1999):

Where defendant was charged with one count for violating section 800.04(3), in that he committed an act defined as sexual battery upon a child under age 16, and the Information alleged defendant's penis penetrated or had union with the minor victim's vagina, trial court properly refused to give jury instruction on unnatural and lascivious act, as proscribed by section 800.02 as the lesser included offense.

Discussion: This opinion provides a nice little history of section 800.02 and shows how appellate courts have basically interpreted this statute to apply to just about every type of sex other than penis to vagina sex.

Generazio v. State, 727 So.2d 333 (Fla. 4th DCA 1999):

Because death penalty may not be imposed for capital sexual battery, failure to instruct jury on battery as lesser included offense of capital sexual battery is not fundamental error.

A.J. v. State, 721 So.2d 761 (Fla. 2d DCA 1998):

Misdemeanor child abuse is not a lesser included offense of aggravated child abuse and even if it were, the suspect could not properly be adjudicated for child abuse by culpable negligence where he was charged with only intentional touching or striking.

Discussion: This case concerns the law prior to the October 1, 1996 statute which makes all child abuse cases felonies. The primary relevance for current cases is the holding that a defendant cannot be convicted of child abuse by culpable negligence as a lesser of aggravated child abuse unless the information alleges every element of the lesser offense.

Overway v. State, 718 So.2d 308 (Fla. 5th DCA 1998):

With regard to count which charged defendant with aggravated child abuse by aggravated battery, trial court reversibly erred in denying request for jury instruction on permissive lesser included offense of misdemeanor child abuse where all of the elements of misdemeanor offense were alleged in the information filed against defendant, and trial evidence supported finding of guilt on charge of misdemeanor child abuse.

No error in refusing to instruct jury on misdemeanor child abuse as lesser included offense of aggravated child abuse by malicious punishment.

Biles v. State, 700 So.2d 166 (Fla. 4th DCA 1997): Lazarus

Trial court erred in denying defendant's request for jury instruction on battery as lesser included offense of lewd, lascivious, or indecent assault upon child where facts alleged in information and evidence presented satisfied the elements of battery.

Medberry v. State, 699 So.2d 857 (Fla. 5th DCA 1997):

Trial court erred in adjudicating defendant guilty of three counts of first degree felony sexual battery where jury was instructed on sexual battery as life felony and sexual battery as second degree felony and returned verdict finding defendant guilty of lesser included offense of sexual battery.

Bauta v. State, 698 So.2d 860 (Fla. 3rd DCA 1997):

No error in refusing to instruct jury on offense of lewd and lascivious assault as a lesser included offense of sexual battery. The two offenses are mutually exclusive.

Johnson v. State, 695 So.2d 787 (Fla. 1st DCA 1997):

Trial court erred in refusing defense request to instruct jury on sexual battery upon person older than 12, without force or violence likely to cause serious personal injury, where that offense was category 1 lesser included offense of sexual battery with a firearm. Failure to give requested instruction on lesser included offense only one step removed from charged offense is per se reversible error.

Jones v. State, 718 So.2d 1286 (Fla. 5th DCA 1998):

Claim that trial court erred in refusing to give instruction on committing unnatural and lascivious act as lesser included offense of lewd and lascivious assault was waived where defense counsel apparently abandoned request for instruction and agreed to the proposed instructions.

Tolbert v. State, 679 So.2d 816 (Fla. 4th DCA 1996): (Judge Eade)

Jury was improperly instructed on aggravated battery causing great bodily harm as permissible lesser included offense of sexual battery using actual force to cause serious personal injury where information did not allege great bodily harm. Instruction was not fundamental error and was waived by failure to object.

Chapman v. State, 677 So.2d 46 (Fla. 2d DCA 1996):

Contention that trial court erred in instructing jury on attempted capital sexual battery where evidence showed only completed crime waived by failure to object to instruction.

O'Neal v. State, 678 So.2d 922 (Fla. 1st DCA 1996):

On an indecent assault charge, it was reversible error to refuse to give requested instruction on permissive lesser offense of simple battery where pleadings and evidence supported the instruction.

The determination of whether an instruction on a permissive lesser included offense should be given cannot be made by the trial court without considering the accusatory pleading and the supporting evidence at trial. The instruction must be given when the pleadings and the evidence demonstrate that the lesser offense is included in the offense charged.

Kolaric v. State, 616 So.2d 117 (Fla. 2d DCA 1993).

Trial court should have instructed jury on permissive lesser offense of lewd and lascivious act in prosecution of defendant for offense of sexual activity with child by custodial adult, as under information and evidence presented, jury could have found that conduct did not involve familial or custodial authority.

Hoover v. State, 530 So.2d 308 (Fla. 1988):

Acceptance of defendant's plea of nolo contendere to crime of sexual battery of child over 11 by a person in a position of familial or custodial authority over victim, where undisputed evidence before court proved victim was eight years old did not constitute fundamental error.

Discussion: Defendant was charged with sexual battery on a child less than 12 years of age. The defendant negotiated a plea to sexual battery familial or custodial authority. When the defendant did not like the sentence the judge gave him, he argued that the original plea was fundamental error because the elements of the offense did not exist. The court followed its previous ruling in Ray v. State, 403 So.2d 956 (Fla. 1981) where it ruled that if a defendant requested an improper lesser included offense at trial, he could not later complain that the jury convicted him of it.

MANDATORY MINIMUMS

Montgomery v. State, 35 Fla. L. Weekly D1322 (Fla. 2d DCA 2010):

Lewd molestation of a child under 12 years of age requires a sentence of at least 25 years, but not a mandatory minimum of 25 years.

MULTIPLE PERPETRATOR ENHANCEMENTS:

Roca v. State, 2011 WL 1331547 (Fla.App. 2 Dist.)

Defendant's second degree felony sexual battery convictions should not have been reclassified as first-degree felonies on ground of multiple perpetrators; at the time of conviction, multiple perpetrator statute was penalty enhancement statute, not reclassification statute.

Newman v. State, 782 So.2d 462 (Fla. 2d DCA 2001):

No error in scoring victim injury points for multiple perpetrators where defendant was charged as principal on each count.

Bellicourt v. State, 745 So.2d 1120 (Fla. 2d DCA 1999):

Defendant does not have constitutional right to counsel on appeal from order designating him a sexual predator.

Keaton v. State, 744 So.2d 1235 (Fla. 5th DCA 1999):

> Error to classify 2nd decree felony of sexual battery, to first degree felony on basis of statute authorizing increased penalty for sexual battery by multiple perpetrators and then to sentence defendant to life imprisonment under habitual violent felony offender statute. The statute is not a felony reclassification statute.

Cuevas v. State, 741 So.2d 1234 (Fla. 5th DCA 1999):

> The jury's decision declining to apply the multiple perpetrator enhancer did not negate any element of the offense of sexual battery or otherwise diminish the integrity of the jury's verdict.
>
> Generally, Florida courts permit inconsistent jury verdicts to be entered in criminal cases thereby allowing for jury lenity because such verdicts do not speak to the guilt or innocence of the defendant.
>
> Truly inconsistent verdicts are those verdicts in which an acquittal on one count negates a necessary element for conviction on another count.
>
> Discussion: Two bikers raped a woman in their tent at Bike Week. The defendant was charged with one count of sexual battery for anally penetrating the victim and another count as a principle in the vaginal penetration performed by his buddy. The jury convicted him of both counts, but did not find that the multiple perpetrators enhancement applied. The defendant argued that the failure to make a finding that there were multiple perpetrators on the first count negated the second count. The appellate court disagreed.

Hartline v. State, 743 So.2d 90 (Fla. 5th DCA 1999):

> Where defendant was convicted of indecent assault upon a child by commission of an act defined as sexual battery, trial court erred in reclassifying convictions from second degree felony to first degree felony on the ground that there were multiple perpetrators. Enhancement statute does not apply to section 800.04(3).
>
> Error to declare defendant sexual predator based on first degree felony conviction for sexual battery on child with multiple perpetrators.

Gifford v. State, 744 So.2d 1046 (Fla. 4th DCA 1999):

Error to enhance attempted sexual battery from third degree felony to second degree felony on basis of statute which permits enhancement on sexual batteries committed by more than one person. Language of statute does not provide for an enhancement of a third degree felony.

Johnson v. State, 740 So.2d 51 (Fla. 2d DCA 1999):

For purposes of determining whether defendant could be designated a sexual predator, defendant's nolo contendere plea would be treated as plea to attempted sexual battery by a defendant under the age of 18, despite discrepancy as to defendant's age at time of plea due to alleged scrivener's error, where record did not contain amended information charging defendant with capital felony, nor did it contain plea agreement.

Newman v. State, 738 So.2d 981 (Fla. 2d DCA 1999):

Florida Statute 794.023 which provides that, if a defendant participated in a sexual battery involving multiple perpetrators, 2nd degree felony offense "shall be punishable as if it were a felony in the 1st degree" is a penalty enhancement statute. When a defendant is sentenced under this provision he can be punished as if he had committed a first degree felony but the felony shall remain a second degree felony.

Williams v. State, 678 So.2d 443 (Fla. 2d DCA 1996):

Sexual battery with great force is life felony which cannot be enhanced under either habitual offender statute or statute pertaining to multiple perpetrators.

Velasquez v. State, 657 So.2d 1218 (Fla. 1st DCA 1995):Velasquez v. State, 657 So.2d 1218 (Fla. 1st DCA 1995)

Attempted sexual battery of fourteen year old victim improperly scored as first degree felony. Statute providing for enhancement in cases of sexual battery by multiple perpetrators does not apply to attempt.

OVERLAPPING TIME PERIODS

Holt v. State, 2011 WL 2462818 (Fla. 4th DCA 2011)

> Sentence of natural life for sexually battery on a child under 12 years of age by a person 18 years of age or older did not conform to the statutory sentence; crime was classified as a capital felony punishable by life imprisonment with a minimum mandatory sentence of 25 years before defendant became eligible for parole.
>
> Where the time period for the offense straddles different sentencing guidelines, the defendant is entitled to the benefit of the most lenient sentencing guideline.

McDonald v. State, 15 So.3d 695 (Fla. 5th DCA 2009):

> Defendant who entered an open plea of no contest to lewd or lascivious molestation was not entitled to be sentenced under the most lenient version of statute in effect during the nine-year period alleged in information, that being the version classifying offense as a second-degree felony, where there was ample evidence that defendant molested child several times when amended statute classifying the offense as a first-degree felony was in effect, defendant stipulated to the facts in the charging affidavit and was fully aware of the nature and consequences of his plea, and defendant in fact believed he was pleading to a first-degree felony punishable by life, as set forth in a second statutory amendment.

RESTITUTION:

Peters v. State, 704 So.2d 736 (Fla. 5th DCA 1998):

> Error to direct defendant to pay for indecent assault victim's renewed psychological therapy where record did not contain evidence establishing that victim's current need for therapy was directly or indirectly related to defendant's criminal conduct.

Drye v. State, 691 So.2d 1168 (Fla. 1st DCA 1997):

> Trial court could properly order appellant to pay the cost of the rape kit used to examine the victim directly to the medical facility that performed the examination.
>
> Trial court could properly order appellant to pay for the victim's future counseling costs, however, it is error for the trial court to order restitution in an

amount to be determined by the probation officer, since this constitutes an unlawful delegation of judicial responsibility to a nonjudicial officer.

OUT OF STATE PRIORS:

Rager v. State, 720 So.2d 1134 (Fla. 5th DCA 1998):

Out-of-state convictions for sexual battery were improperly scored as level nine offenses where it was impossible to determine, without looking to underlying facts, which subsection of Florida's sexual battery statute was analogous to foreign law which, unlike Florida law, did not assign different felony degrees based upon age of victim and circumstances surrounding commission of crime.

Only elements of out-of-state offense, and not the underlying facts, may be considered in deciding whether an offense is analogous to one of Florida's statutes.

Uncertainty in scoring prior record must be resolved in defendant's favor and thus, a severity level 1 should be assigned to the offense.

SCORESHEET LEVELS:

Wilson v. State, 913 So.2d 1277 (Fla. 2d DCA 2005):

Sexual battery offenses for which defendant was convicted should have been scored as level 7 as opposed to level 9 offenses, thus requiring remand to calculate correct scoresheet and to determine appropriate relief as result of that scoresheet; under previous sentencing guidelines, offense was ranked as level 9 and carried higher presumptive sentencing range, whereas under prior, constitutional guidelines, offense was ranked as level 7 and carried lower presumptive sentencing range, and no evidence established when defendant's offenses had occurred, or which sentencing guidelines applied to defendant.

Discussion: This case involves a glitch in Chapter 921 that existed in 1995. Since the range of conduct occurred both during and after the glitch, the court says he should have been sentenced at the lower level. This issue will be rare in your current cases.

Robinson v. State, 826 So.2d 1061 (Fla. 2d DCA 2002):

Error to assign aggravated child abuse conviction a level eight ranking, rather than a level 4 ranking, where information charged defendant with aggravated child abuse by malicious punishment or, in the alternative, by committing an aggravated battery on child, and jury verdict merely found defendant guilty as charged of aggravated child abuse without specifying that he violated the subsection of the statute which would warrant level eight ranking .

Chatfield v. State, 814 So.2d 1217 (Fla. 1st DCA 2002):

Primary offense of sexual battery on child age twelve or older but less than eighteen by familial custodian should have been scored as level 7 rather than level 9 under 1994 guidelines.

Holt v. State, 808 So.2d 290 (Fla. 1st DCA 2002):

Where offense of sexual battery of child twelve years of age or older but less than eighteen years of age by a familial custodian was committed on January 1, 1994, offense should have been scored as level seven offense rather than level nine offense.

Chavis v. State, 796 So.2d 607 (Fla. 2d DCA 2001):

In determining whether sentence imposed under unconstitutional guidelines could have been imposed under 1994 guidelines without departure, trial court incorrectly calculated 1994 scoresheet by scoring offense as level nine offense.

Sexual activity with child in familial or custodial relationship is first degree felony which was not listed in ranking chart and, accordingly, should have been ranked as level seven offense under applicable law.

Argument that omission of offense from ranking chart was not intended by legislature has been rejected by sister courts.

Resentencing required where sentence imposed exceeded correctly calculated 1994 guidelines range.

Mitchell v. State, 791 So.2d 1257 (Fla. 5th DCA 2001):

Error to classify sexual conduct with minor in custodial authority as level 9 offense rather than level 7 offense because at time of offense it was not listed in sentencing ranking charge.

State's contention that because it was an oversight that the legislature did not properly list the offense, the court should consider the issue as though it had been listed, is rejected.

Jackson v. State, 793 So.2d 117 (Fla 2d DCA 2001):

Error to assess injury points for attempted lewd act conviction.

Trial court properly scored attempted lewd act as level five offense.

Offense of attempted lewd act should be designated as third degree felony.

Holt v. State, 781 So.2d 498 (Fla. 5th DCA 2001):

Conviction for aggravated child abuse based on violations of sections 827.03(1)(b) and (c) was improperly classified as level 8 rather than level 4, offense under sentencing guidelines in effect at time of offense.

Discussion: The defendant committed his crime on July 7, 1995, prior to the October 1, 1996 change in the child abuse laws. He should have been sentenced as a level 4 under the guidelines. He initially received probation, but when he violated and got a stiff sentence, he objected to his original classification.

Rouse v. State, 720 So.2d 584 (Fla. 4th DCA 1998):

Trial court properly classified 1995 conviction for aggravated child abuse as level 8 offense.

Roberts v. State, 715 So.2d 302 (Fla. 5th DCA 1998):

Convictions for engaging in sexual battery with a child (familial or custodial authority) should have been scored as level seven offenses rather than as level nine offenses because F.S. 921.0013(3) provides that a first degree felony not listed in the offense severity ranking chart must be ranked as a level seven offense.

Gibson v. State, 691 So.2d 544 (Fla. 2d DCA 1997):

Aggravated battery on child as defined in section 827.03(1)(b) should have been assigned severity level four under section 921.0013, rather than severity level eight under section 921.0012 where aggravated battery on a child as defined in section 827.03(1)(a) was only form of aggravated child abuse specifically listed in applicable version of section 921.0012. Subsequent amendment to section 921.0012 does not apply to instant case.

Ducharme v. State, 690 So.2d 1358 (Fla. 2d DCA 1997):

If you have ever been confused as to whether aggravated child abuse is a level 4 or level 8 on the sentencing guidelines, read this opinion. A complete statutory analysis was done on the issue.

VICTIM INJURY POINTS:

Allen v. State, 2011 WL 3903163 (Fla.App. 4 Dist.)

Since the jury verdict form in sexual battery case did not distinguish the findings that substantiated the verdict between “penetration” and “union” with the victim's sexual organ, sentencing court erred in assessing sexual penetration points, and this error was reversible because, although the sentence imposed fell within the permitted range of a properly prepared scoresheet, appellate court could not conclude with certainty that defendant's sentence would have been the same if sentencing court had used a properly prepared scoresheet.

Brooks v. State, --- So.3d ----, 2011 WL 611847 (Fla. 4th DCA 2011):

Defendant was charged with sexual battery on a child, but pled to an attempt to avoid mandatory sentence. He accepted the factual basis by the State that he performed oral sex on victim. Defendant subsequently argued that victim injury points could not be scored on attempt charge. Appellate court ruled that the points could be scored because he accepted the factual basis.

Mann v. State, 974 So.2d 552 (5th DCA 2008):

Defendant who pleaded guilty as charged to three counts of lewd or lascivious battery and one count of lewd or lascivious molestation could not be sentenced pursuant to sentencing guidelines scoresheet that scored victim injury points for penetration as to all four counts, absent a specific finding that penetration occurred, where information charged defendant on three counts with union or, in the alternative, penetration or union.

Frederic v. State, 975 So.2d 1264 (Fla. 4th DCA 2008):

> Any error in failure to submit to jury question of whether sexual battery offense involved penetration as to warrant enhanced sentence, as was required under Apprendi, was harmless, as evidence showed a 99.9-percent certainty that defendant was the father of victim's child, and victim herself also testified to multiple penetrations by defendant.

Bennett v. State, 971 So.2d 196 (Fla. 1st DCA 2007):

> Nature of conviction for attempted sexual battery required a jury finding of sexual contact, as necessary for assessment of victim-injury points when sentencing defendant; defendant was charged with sexual battery based on sexual penetration or union with his penis, jury heard evidence that defendant put his penis in contact with victim's vagina, defendant admitted digitally penetrating victim once or twice and touching her vagina, such that jury had to find that defendant somehow put his penis in contact with victim's vagina, in order to convict him of attempted sexual battery.
>
> Trial court did not increase defendant's sentence for attempted sexual battery beyond statutory maximum when it assessed 40 victim-injury points for sexual contact, as would violate *Blakely* and Apprendi, where statutory maximum was 30 years imprisonment and trial court sentenced defendant to 225 months imprisonment.

Companioni v. State, 971 So.2d 883 (Fla. 3rd DCA 2007):

> Amended rule of criminal procedure allowing for the scoring of victim injury points regardless of whether the injury was an element of the crime did not apply to sentencing on crimes committed prior to adoption of amendment. (July 1, 1987)
>
> Upon reversal of sentence based on incorrect sentencing scoresheet calculation following defendant's negotiated plea to a reduced charge, appellate court would remand to the trial court for correction of defendant's scoresheet, and would further instruct the trial court to give the State the option of allowing defendant to move to vacate the judgment and sentence and reinstate the original charges, or vacating only that portion of the sentence imposed which was excessive in light of the corrected guidelines scoresheet.

Rogers v. State, 963 So.2d 328 (2d DCA 2007):

> "The assessment of penetration points is not limited to circumstances where penetration was an element specifically charged in the information. An offense can be one "involving sexual contact that includes sexual penetration" regardless of whether penetration was an element of the offense alleged in the information."
>
> In lewd or lascivious battery prosecution, penetration was neither required to be found by the jury nor required to be alleged in the information.

Peterson v. State, 962 So.2d 367 (Fla. 4th DCA 2007):

> There was no evidence of actual victim injury presented at the original sentencing hearing, and in fact, the charge was reduced to attempted sexual battery rather than sexual battery. Therefore, we find it was error for the trial court to add forty points for victim injury.

Robles v. State, 952 So.2d 1210 (Fla. 5th DCA 2007):

> Trial court that imposed eight-year sentence for sexual battery could add 80 points to defendant's sentencing scoresheet for sexual penetration, even absent a specific jury finding of penetration; additional points increased the minimum possible sentence, but did not affect the statutory maximum of 15 years, so as to implicate *Apprendi* and *Blakely*.

Chatman v. State, 943 So.2d 327 (Fla. 4th DCA 2006):

> Trial court's assessment of 160 sentencing score points for "victim penetration" against defendant convicted of sexual activity with a minor violated *Blakely* requirement that facts increasing the penalty beyond the prescribed statutory maximum be found by a jury beyond a reasonable doubt, and thus defendant was entitled to be resentenced without assessment of the victim penetration points; information charged defendant with penetration or union, jury verdict was a general verdict finding defendant guilty "as charged in the information" without specifying which alternative was found, and penetration was not necessary for a finding of guilt.

Nune v. State, 944 So.2d 1173 (Fla. 5th DCA 2006):

> Summary denial of postconviction motion that challenged enhanced sentence for unlawful sexual activity with minor was inappropriate, where defendant's claim that sentence of 80.235 months for third-degree felony exceeded statutory maximum for offense and was based on inclusion of 80 points for penetration, which fact was not admitted to or found by jury, in violation of *Apprendi*, was not refuted by record.

Glennon v. State, 937 So.2d 1149 (Fla. 5th DCA 2006):

> Defendant is not entitled to relief on claim that his sentence was improperly enhanced by inclusion of sexual penetration points without requisite findings by jury where sentence could have been imposed without additional findings.

Daniels v. State, 929 So.2d 710 (Fla. 1st DCA 2006):

> Separate sentencing scoresheets were to be prepared for offenses committed under different versions of sentencing guidelines.
>
> Continuing offenses are sentenced under guidelines in effect on the first date of the offenses.
>
> Sentencing court's improper assessment of 80 victim injury points, for penetration, rather than 40, for sex contact, did not constitute *Apprendi* violation at sentencing in prosecution for sexual battery, where the 40 additional victim injury points did not cause sentence to exceed the prescribed statutory maximum as calculated under a corrected scoresheet.
>
> Sentencing court is required to assess victim injury points for each injury, even when the same victim is involved.
>
> Sexual contact, for purposes of offense of lewd and lascivious molestation, may include the touching of a child's buttocks.

Leveille v. State, 927 So.2d 1008 (Fla. 4th DCA 2006):

> Trial court could not assess sexual contact points in sentencing for committing unnatural and lascivious act as lesser included offense of lewd and lascivious battery, for which latter offense defendant was acquitted, where unnatural and lascivious act did not require proof of sexual contact, and jury was never asked to determine whether sexual contact occurred.

Carter v. State, 920 So.2d 735 (Fla. 5th DCA 2006):

> Error to assess points for sexual penetration where information alleged that unlawful act was committed by "union with" victim's vagina.

Gisi v. State, 909 So.2d 531 (Fla. 2d DCA 2005):

> "On the sentencing issue, the State concedes that penetration points should not have been added to Gisi's sentencing scoresheet because the jury was not asked to, and did not, make findings of penetration. Therefore, we reverse the sentences and remand for resentencing without penetration points."

Galindez v. State, 910 So.2d 284 (Fla. 3rd DCA 2005):

> Right to jury trial under *Apprendi* and *Blakely v. Washington* did not apply retroactively to sentencing for multiple sex offenses based on trial court's assessment of points for penetrations, which sentences were final at time decisions were issued.

Lewis v. State, 898 So.2d 1081 (Fla. 4th DCA 2005):

> Victim injury points can be assessed on criminal punishment code scoresheet when imposing sentence for sexual misconduct by a county or municipal detention facility employee.

Behl v. State, 898 So.2d 217 (Fla. 2d DCA 2005):

> Sentence for sexual battery by a person in familial or custodial authority, which included trial court's assessment of 80 points for sex penetration, did not violate Blakely v. Washington, which held that state's sentencing procedures violate constitutional rights if facts essential to sentence were not proven to jury or admitted; defendant had been charged with respect to count at issue with commission of offense by placing his finger into vagina of victim, and thus jury's guilty verdict had necessarily been based on jury's factual determination that commission of this count had involved penetration.

> Sentence for sexual battery by a person in familial or custodial authority, which included trial court's assessment of 80 points for sex penetration, violated defendant's rights under Sixth Amendment, pursuant to Blakely v. Washington; defendant had been charged with respect to count at issue with committing offense by placing his mouth "into or in union with the vagina" of victim, although

act of placing his mouth into victim's vagina would have involved penetration, act of union with child's vagina would not have involved penetration, and thus jury's guilty verdict did not embody factual determination by jury that this count had involved sex penetration. Contact points could properly be scored.

Whalen v. State, 895 So.2d 1222 (Fla. 2d DCA 2005):

The Supreme Court's Blakely v. Washington decision, under which defendant's sentence could not be enhanced unless factor that supported enhancement was reflected in specific finding by jury, precluded assessment of penetration points in prosecution for handling and fondling a child and lewd and lascivious battery, where jury did not make specific findings of penetration.

McMillan v. State, 896 So.2d 873 (Fla. 2d DCA 2005):

Number of sexual penetrations suffered by 16-year old child whom defendant videotaped engaging in sexual acts with another individual could not be included in criminal score, for purposes of sentencing for promoting sexual performance by child, where physical injury suffered by child was not direct result of offense.

Discussion: Even though the victim was penetrated by another person during the filming of the performance, the penetration points could not be scored because the defendant is not the one who actually penetrated her.

Knarich v. State, 866 So.2d 165 (Fla. 2d DCA 2004):

Conviction based on fondling a child’s buttocks in a lewd and lascivious manner supports scoring of victim injury points for sexual contact.

Where addition of victim injury points is a factor which causes a sentence to be increased beyond the statutory maximum, specific finding of sexual contact by jury is required.

If jury was properly instructed, it necessarily had to find sexual contact as an element of the offense in order to find defendant guilty of handling or fondling child under sixteen in a lewd and lascivious manner.

Anthony v. State, 854 So.2d 744 (Fla. 2d DCA 2003):

Court should have made a specific finding of penile penetration at violation of community control hearing when defendant contested scoresheet. Because

sexual battery covers both union and penetration, the judge should have made the finding.

Beamon v. State, 852 So.2d 352 (Fla. 1st DCA 2003):

Error to assess victim injury points for sexual contact where defendant was convicted of attempted lewd or lascivious battery.

Altman v. State, 852 So.2d 870 (Fla. 4th DCA 2003):

Defendant's act of lying on top of victim with clothed genitals pressed against victim's and touching, rubbing, or moving his body and/or pelvic area against the victim's' constituted sexual contact for which victim injury points were appropriately scored.

Defendant's act of French kissing victim comes within definition of sexual contact for which victim injury points were appropriately scored.

No merit to argument that determination of victim injury sexual contact points should have been submitted to jury and proven beyond reasonable doubt, as required by *Apprendi v. New Jersey*, because defendant's sentence did not exceed statutory maximum penalty.

State v Williams, 854 So.2d 215 (Fla. 1st DCA 2003):

Victim injury points were properly assessed for each injury even though offenses involved a single victim. (one count penile penetration and one count digital penetration)

Gisi v. State, 848 So.2d 1278 (Fla. 4th DCA 2003):

Defendant entitled to relief on claim that appellate counsel was ineffective in failing to argue that trial court erred in sentencing him above the statutory maximum on basis of victim injury without submitting issue of victim injury to jury in violation of *Apprendi v. New Jersey*.

Defendant entitled to relief on claim that appellate counsel was ineffective for failure to argue that trial court erred in denying motion for judgment of acquittal as to counts for which there was no evidence that the offenses occurred on the dates specified by state in statement of particulars.

Fretwell v. State, 852 So.2d 292 (Fla. 4th DCA 2003):

Sexual contact was properly scored as in lewd molestation conviction based upon defendant touching victim's clothed buttocks.

Discussion: The court reasoned that under the current version of the statute, the legislature specifically included the "clothed buttocks" as a manner of committing the offense. Therefore, it is sexual contact. The case law interpreting the statue prior to it's 1999 revision is not applicable.
Grant v. State, 28 Fla. L. Weekly D1484 (Fla. 4th DCA 2003):

Jury not required to make specific finding of penetration in order to assess 80 points for penetration. Question certified.

Figarola v. State, 841 So.2d 576 (Fla. 4th DCA 2003):

No error in denying motion in which defendant argued that assessment of points for sexual penetration resulting in sentence beyond statutory maximum, violated U.S. Supreme Court's decision in *Apprendi v. New Jersey* because ruling announced in that case does not apply retroactively. Question certified.

Key v. State, 837 So.2d 535 (Fla. 2d DCA 2003):

Jury's acquittal of aggravated child abuse and conviction for child abuse precludes finding of great bodily harm.

Rejection of "great bodily harm" necessarily precludes a finding of "severe victim injury."

Galindez v. State, 831 So.2d 780 (Fla. 3rd DCA 2002):

Error to assess 80 victim injury points for conviction on count charging sexual union without penetration.

Jupiter v. State, 833 So.2d 169 (Fla. 1st DCA 2002):

Because *Hudson* failed to recognize the effect of the clear language of the applicable rule of criminal procedure requiring that victim injury points be scored for each offense even if only a single victim is involved, we recede from that decision.

Discussion This decision overrules Hudson v. State, 765 So.2d 273 (Fla. 1st DCA 2000), which held:

> *Error to assess 80 victim injury points for each of the three counts of sexual battery where offenses were committed on the same victim.*

Reynolds v. State, 827 So.2d 356 (Fla. 1st DCA 2002):

Error to summarily deny claim that victim injury points were improperly assessed in sexual abuse case without a showing that victim suffered physical injury or trauma where offense occurred in 1989.

Summary denial of claim should be reversed where record does not show evidence of physical injury.

Claim is not barred by law of the case doctrine where same claim was raised before, trial court's ruling on earlier motion was procedural in nature, and defendant did not appeal that decision.

Discussion: This case discusses an old line of cases that no longer apply. This issue will only arise on appellate issues or cases lingering for several years.

Miller v. State, 820 So.2d 1056 (Fla. 4th DCA 2002):

Addition of points for penetration of victim of lewd and lascivious battery does not violate Supreme Court's *Apprendi* decision because addition of points did not increase sentence beyond the prescribed statutory maximum.

West v. State, 823 So.2d 174 (Fla. 2d DCA 2002):

Claim that defendant should have been assessed 18 points for sexual contact rather than 40 points for sexual penetration.

Defendant is entitled to complain about inclusion of points on original scoresheet at sentencing for violation of probation.

Further proceedings required on issue of whether penetration points were properly scored where defendant's plea agreement did not mention penetration

points and it cannot be discerned whether factual basis recited at plea hearing included penetration.

Aponte v. State, 810 So.2d 1008 (Fla. 4th DCA 2002):

Where defendant entered nolo contendere plea pursuant to plea agreement which called for downward departure sentence, and victim injury points were assessable at time of original sentence but were not assessed because of the agreement for downward departure sentence, trial court could assess victim injury points when sentencing defendant upon violation of probation.

Kiser v. State, 810 So.2d 1038 (Fla. 2d DCA 2002):

Error to assess forty points for injury to victim of attempted sexual battery where state failed to establish physical injury to victim.

Discussion: This opinion only applies to offenses committed prior to April 8, 1992.

McCloud v. State, 803 So.2d 821 (Fla. 5th DCA 2002):

In Florida, for purposes of determining a constitutional violation under U.S. Supreme Court's decision in *Apprendi v. New Jersey*, which held that any fact, other than the fact of prior conviction, that increases penalty for crime beyond statutory maximum must be submitted to jury and proved beyond reasonable doubt, the relevant ``statutory maximum'' is found in section 775.082.

So long as statutory maximum applicable to crime is not exceeded, sentencing judge may determine sentencing factors by a greater weight of the evidence factor.

Apprendi rule does not apply to require that the determination of victim injury be submitted to a jury and proved beyond a reasonable doubt.

Because inclusion of victim injury points for ``sexual penetration'' on 1994 guidelines scoresheet will not cause imposition of sentence more severe than the statutory maximum for the second-degree felony of sexual battery established by jury's verdict, those points may be included in calculating defendant's sentence.

State v. Spioch, 802 So.2d 1140 (Fla. 2001):

This case involves the scoring of victim injury points in a sex offense.

"Based on our recent decision in Seagrave v. State, 26 Fla. L. Weekly S481 (Fla. July 12, 2001), we quash the Fifth District's decision in Spioch and remand for proceedings consistent with that opinion.

The excerpt from the quashed case is as follows:

Spioch v. State, 742 So.2d 817 (Fla. 5th DCA 1999):

Error to assess victim injury points where defendant fondled victim's penis through victim's clothing, and there was no physical trauma.

"Contact" means the union of the sexual organ of one person with the oral, anal or vaginal opening of another". Thus, in the absence of physical trauma, victim injury points are appropriately assessed only in cases involving sexual battery, either by penetration or union.

Frederick v. State, 814 So.2d 1123 (Fla. 4th DCA 2001):

Case remanded for evidentiary hearing to reconsider whether it was appropriate to score victim injury points where offense occurred "on or between December 31, 1991 and September 27, 1995" when there was no physical evidence of injury to victim's sexual organ.

Discussion: Prior to April 8, 1992, a finding of actual injury to the victim had to be made before points could be scored for sexual penetration. Since the charged offense spanned time periods both prior to April 8, 1992 and after, the court would have to make a finding of sexual penetration after that date in order to score it.

Routenburg v. State, 802 So.2d 361 (Fla. 2d DCA 2001):

Karchesky claim that victim injury points were improperly assessed in absence of physical injury to victim can be raised for the first time in rule 3.800(a) motion even after violations of probation.

Remand for evidentiary hearing to determine if victim sustained any physical injury.

If state cannot prove actual physical injury, defendant must be resentenced under corrected scoresheet.

Sommers v. State, 796 So.2d 608 (Fla. 2d DCA 2001):

Claim that sentences imposed upon violation of probation were illegal because they were entered pursuant to a scoresheet which incorrectly assessed victim injury points for penetration of sexual battery victim without evidence of victim injury.

If on remand trial court determines that sexual batteries were committed before May 12, 1992, victim injury points should not have been scored based solely on penetration absent other evidence of physical injury or trauma.

Discussion: Please note that this opinion is only relevant to offenses that were committed prior to May 12, 1992.

Clark v. State, 808 So.2d 231 (Fla. 4th DCA 2001):

Touching of victim's buttocks cannot be scored as sexual contact. Question certified.

Jackson v. State, 793 So.2d 117 (Fla 2d DCA 2001):

Error to assess injury points for attempted lewd act conviction.

Trial court properly scored attempted lewd act as level five offense.

Offense of attempted lewd act should be designated as third degree felony.

Gilson v. State, 795 So.2d 105 (Fla. 4th DCA 2001):

Where penetration was not used to depart from maximum sentence allowed by law for crime for which defendant was convicted, it was merely "sentencing factor" that trial court considered in its broad discretion to sentence within the range prescribed by state.

Where defendant was convicted of lewd and lascivious battery, and trial court found by preponderance of the evidence that penetration occurred, trial court did not err in assessing points for penetration without jury finding penetration.

Discussion: This case provides a discussion of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). As long as the sentence does not exceed the statutory maximum, the *Apprendi* opinion does not apply.

Seagrave v. State, 802 So.2d 281 (Fla. 2001)

For purposes of assessing victim injury points, "sexual contact" is not limited to criminal acts that constitute sexual battery.

Discussion: The court analyzes this issue quite thoroughly. The defendant argued that the court improperly scored sexual contact points against him based upon fondling the victim's buttocks and causing her hand to touch his penis. The defendant argued that only acts that would constitute a sexual battery should be scored as contact. The Florida Supreme Court ruled that a plain reading of F.S. 921.0011(7)(b)(2) suggested otherwise. After its excruciating analysis of the history of the law, the court would only acknowledge that the contact did not have to fit under the definition of sexual battery. In footnote two, the court said it was declining to rule on exactly what types of touching would qualify. Therefore, even though fondling the victim's buttocks was involved in this case, the court refused to rule whether this type of fondling was indeed sexual contact.

Borjas v. State, 790 So.2d 1114 (Fla. 4th DCA 2001):

Victim injury points can be assessed for fondling a child's breasts.

Victim injury cannot be assessed for fondling a child's buttocks.

Question certified.

Rowan v. State, 791 So.2d 40 (Fla. 2d DCA 2001):

This case discusses the procedure to be utilized when a proper factual basis has not been provided to justify the inclusion of victim injury points and the defendant subsequently files a motion pursuant to Rule 3.800 challenging the guidelines.

Fredette v. State, 786 So.2d 27 (Fla. 5th DCA 2001):

> No error in assessing victim injury points for "sex contact" based upon defendant's having touched victim's vaginal area.

Grant v. State, 783 So.2d 1120 (Fla 1st DCA 2001)

> Where defendant was charged with lewd and lascivious act upon a child, and convicted of lesser-included offense of attempted lewd and lascivious act upon a child, trial court erred in including on guidelines scoresheet 40 points for sex contact as victim injury.
>
> Based on charging document and verdict, it must be concluded that jury found that no sex contact occurred, and judge's finding of sexual contact conflicted with verdict.

Shaw v. State, 780 So.2d 188 (Fla. 2d DCA 2001):

> Sexual penetration may be scored for victim injury regardless of physical injury.

Green v. State, 765 So.2d 910 (Fla. 2d DCA 2000):

> No merit to claim that sexual battery statutes are unconstitutional as violations of equal protection because they require that male defendant who engages in sexual intercourse with female victim under age 16 be assessed 80 points for victim injury while female defendant who engages in sexual intercourse with male victim under age 16 is assessed only 40 points for sexual contact. Assessment of victim injury points if required regardless of whether it is the male or female who commits the offense of sexual battery by sexual intercourse. Defendant improperly interpreted statutes to mean that female defendants do not receive victim injury points for penetration.

Louis v. State, 764 So.2d 930 (Fla. 4th DCA 2000):

> Victim's statement that she was undressed by one of perpetrators and touched "over my chest, through my shirt, on my stomach, on my genital area" sufficient to establish sexual contact and thus victim injury under relevant statutes and guidelines.

Evidence sufficient to establish attempted sexual battery by digital penetration as charged in the information.

Discussion: Most of this case discusses the scoring of victim injury points and follows the rationale of 5th DCA in *Kitts v. State*. The issue of attempted sexual battery is not thoroughly discussed.

Hudson v. State, 765 So.2d 273 (Fla. 1st DCA 2000): *overruled by Jupiter v. State, 27 Fla. L. Weekly D2488 (Fla. 1st DCA 2002).*

Error to assess 80 victim injury points for each of the three counts of sexual battery where offenses were committed on the same victim.

Discussion: The offense occurred on March 22, 1997. The appellate cited Burroughs v. State, 649 So.2d 902, 904, for the proposition that "Victim injury points may not be assessed for each count of sexual battery where the offenses were committed on the same victim." However, please see the following entry from the Sentencing section of my Manual:

Lowe v. State, 742 So.2d 350 (Fla. 5th DCA 1999):

Where defendant sexually battered victim four times over a four-hour time span, trial court properly assessed points for penetration for each sexual battery.

Discussion: This case provides a very good, concise history of the laws relating to scoring victim injury points in sexual battery cases. If you ever confront a case where there is confusion as to how many times you can score victim injury and penetration, you should refer back to this case for a historical perspective.

Seagrave v. State, 768 So.2d 1121 (Fla. 1st DCA 2000):

Court properly assessed 40 points for sexual contact on basis of act of fondling victim's buttocks. *Question certified based on conflict with 5th DCA.*

State v. Milanes, 762 So.2d 572 (Fla. 5th DCA 2000):

Victim injury points can be assessed when defendant is adjudicated guilty of fondling victim.

Discussion: This case involves fondling the victim's penis.

Blackburn v. State, 762 So.2d 989 (Fla. 5th DCA 2000):

No error in assessing victim injury points for sexual contact based on incident in which defendant approached victim from rear in department store and rubbed his erect penis on victim's clothed back.

Discussion: This case interpreted the indecent assault statute which existed prior to October 1, 1999.

Walker v. State, 758 So.2d 743 (Fla. 5th DCA 2000):

Where defendant was convicted of sexual battery of child by a person in familial or custodial authority, court could properly assess points for penetration without jury finding of penetration.

Kitts v. State, 766 So.2d 1067 (Fla. 5th DCA 2000):

Where Defendant was convicted of lewd and lascivious act on child, for kissing and fondling child victim's breasts, trial court properly assessed points for victim injury.

Kissing and fondling a child's breasts is deemed to be sexual contact.

Discussion: This case was decided on a motion for rehearing *en banc* and it replaced the original opinion at 24 Fla. L. Weekly D2144. The court receded from two of its previous decisions in *Spioch v. State*, and *Reyes v. State*. The appellate court notes that there is nothing in the case law or statutes which expressly defines sexual contact or answers the basic question in this case. To reach its conclusion, the appellate court discussed relevant Florida Statutes which include the breasts as "intimate parts". The various statutes they discussed indicate that the legislature, by implication, considers the female breast in connection with prohibited behavior.

Altman v. State, 756 So.2d 148 (Fla. 4th DCA 2000):

Trial court erred in refusing to allow defendant to object to the scoring of contact points at resentencing after remand on ground that defendant had waived claim by failing to raise it on initial appeal. Defendant is allow to object to the guideline score sheet for the first time after remand on appeal.

Horn v. State, 736 So.2d 728 (Fla. 2d DCA 1999):

Contemporaneous objection was unnecessary in order to preserve challenge to a sentencing error that was apparent from the face of the record (scoresheet incorrectly assigned 116 points to sexual battery on a child under the age of 12 by a person less than 18 and the judgment mistakenly listed the degree of the crime as a capital), where rule requiring sentencing error to be brought to the attention of the trial court took effect after the sentencing.

Marcado v. State, 735 So.2d 556 (Fla. 3rd DCA 1999):

Victim injury points for sexual contact were properly assessed against defendant following violation of his probation for attempted sexual battery.

Defendant's consent is not required to assess victim injury points at sentencing proceeding; burden is on defendant to object if he contends that victim injury points have been inappropriately assessed.

Kitts v. State, 766 So.2d 1067 (Fla. 5th DCA 1999):

Where defendant was convicted of lewd and lascivious act upon a child by kissing and fondling the victim's breasts, the court properly assessed points for victim injury.

Kissing and fondling a female breast is sexual contact within the meaning statute.

Lowe v. State, 742 So.2d 350 (Fla. 5th DCA 1999):

Where defendant sexually battered victim four times over a four hour time span, trial court properly assessed points for penetration for each sexual battery.

Discussion: This case provides a very good, concise history of the laws relating to scoring victim injury points in sexual battery cases. If you ever confront a case where there is confusion as to how many times you can score victim injury and penetration, you should refer back to this case for a historical perspective.

Wright v. State, 739 So.2d 1230 (Fla. 1st DCA 1999):

Error to score 80 victim injury points for sexual penetration where a victim testified that penetration did not occur, jury acquitted the defendant of sexual

battery, offense for which defendant was convicted did not necessarily involve penetration, and verdict failed to specify whether penetration occurred.

Barnum v. State, 738 So.2d 960 (Fla. 2d DCA 1999):

Barnum was found guilty as charged by a jury of count I of the second amended information, which count charged Barnum with penetrating the vagina of the victim with his finger. Under these facts, the trial court erred in scoring victim injury as contact rather than penetration.

McCloud v. State, 741 So.2d 512 (Fla. 5th DCA January 8, 1999):

On sentencing defendant after conviction for sexual battery, defendant was not constitutionally entitled to have jury make predicate factual determination for the scoring of penetration, even where proof of penetration was not required for conviction.

All issues pertaining to the assessment of points on the sentencing scoresheet are to be determined by the court, not the jury.

State v. Wilford, 720 So.2d 617 (Fla. 1st DCA 1998):

Competent substantial evidence supported trial court's assessment of points for sexual contact rather than penetration. Conviction of defendant under 794.011(4)(h) does not prove that penetration occurred because statute defines sexual battery in terms of either union or penetration.

Lowman v. State, 720 So.2d 1105 (Fla. 2d DCA 1998):

Completed act of fellatio must be scored as penetration and not as sexual contact.

Special verdict not required before trial court can impose points for penetration.

Victim injury points are properly assessed based on a factual determination by the trial court.

Ladd v. State, 715 So.2d 1012 (Fla. 1st DCA 1998):

Trial court properly scored sexual penetration points on sexual performance by a child count where the facts clearly show that the girl in the video was penetrated.

Vural v. State, 717 So.2d 65 (Fla. 3rd DCA 1998):

Where defendant forced victim to handle and masturbate him, sexual contact occurred, and for that points must be assessed.

Wright v. State, 707 So.2d 385 (Fla. 2d DCA 1998):

Where defendant pled guilty to lewd and lascivious conduct and was placed on probation, upon revocation of probation, court erred in scoring forty points for sexual penetration rather than eighteen points for sexual contact in the absence of evidence that defendant agreed, as part of original plea, to forty points for victim injury.

Woods v. State, 711 So.2d 1182 (Fla. 2d DCA 1998):

No error in adding forty victim injury points to scoresheet for injury based upon fellatio.

Reyes v. State, 709 So.2d 181 (Fla. 5th DCA 1998):

Error to include victim injury points for "sex contact" based upon defendant's fondling of female breast and making sexually suggestive comment in the course and commission of attempted sexual battery.

The legislature, in requiring points for sexual contact in F.S. 921.001(8) appears to be referring only to the contact occurring in a sexual battery by union without penetration.

Luhrsen v. State, 702 So.2d 596 (Fla. 2d DCA 1997):

Error for court to score points for penetration in indecent assault case where neither verdict form nor charging document reflected that fact.

Schloesser v. State, 697 So.2d 942 (Fla. 2d DCA 1997):

Trial court erred in including victim injury points under applicable law where there was no showing of physical injury or trauma to sexual abuse victim

resulting from defendant's actions. Where state failed to prove defendant's acts occurred after effective date of statute which provided for harsher terms, rule of lenity requires harsher terms not be applied when calculating scoresheet.

Discussion: This case refers to the old *Karchesky* opinion which stated that victim injury could not be scored absent a showing that the victim suffered physical injury or trauma as a result of the abuse. The Florida legislature responded to that decision by enacting F.S. 921.001(8) which permits the addition of victim injury points in sexual abuse cases where penetration or sexual contact is an element of the offense, regardless of whether physical injury or trauma occurred. The statute became effective on April 8, 1992. The problem in this case was that the state charged that the suspect sexually battered the victim between July 1, 1991 and August 31, 1993. The victim could not remember when the acts first began, so the state never proved that any of the acts were done prior to the new law.

Dickinson v. State, 693 So.2d 55 (Fla. 5th DCA 1997):

Trial court properly scored points for penetration rather than mere contact based on fellatio performed by defendant on victim and performed by victim on defendant.

Baker v. State, 687 So.2d 64 (Fla. 5th DCA 1997):

Error to assess points for penetration for count which involved contact only.

Clawson v. State, 670 So.2d 1086 (Fla. 2d DCA 1996):

Amended statute requiring scoring of victim injury points when sexual offense involves penetration or sexual contact, regardless of whether state presented evidence of physical injury, does not apply retroactively.

Error to asses victim injury points for conviction which was based on incident which occurred prior to effective date of statute where state failed to prove additional physical trauma.

Discussion: In *Karchesky v. State*, 591 So.2d 930 (Fla. 1992), the supreme court held that victim injury points for penetration in sexual offenses could not be scored absent a showing of additional physical trauma. The Florida Legislature overcame this holding by enacting section 921.001(8). *See Chapter 92-135, sec. 1, Laws of Florida.*

Terrell v. State, 668 So.2d 656 (Fla. 2d DCA 1996):

> Under law in effect at time of offense, points for injury to victim of sexual abuse could be scored only if there was physical injury.

Rodriguez v. State, 678 So.2d 454 (Fla. 2d DCA 1996):

> Where defendant was convicted of committing a lewd act upon a child in 1990, court erred in adding points under victim injury for "moderate or penetration" in the absence of evidence that the victim suffered any physical injury or trauma.

Burrows v. State, 649 So.2d 902 (Fla. 1st DCA 1995):

> Victim injury points may not be assessed for each count of sexual battery where the offenses were committed on the same victim. Weekley v. State, 553 So.2d 239 (Fla. 3d DCA 1989); Carter v. State, 573 So.2d 426 (Fla. 5th DCA 1991).

WITHDRAWAL

Moraes v. State, 967 So.2d 1100 (Fla. 4th DCA 2007):

> Change in law enhancing the reporting requirements and penalties for sexual offenders, after plea was accepted but before sentencing, constituted "good cause" supporting defendant's pre-sentence motion to withdraw nolo contendere plea to a charge of lewd or lascivious exhibition in the presence of a child under sixteen.