# Chapter 3: Punishment and Sentencing

Note: All statutes were retrieved from Florida Statutes Annotated. Only relevant portions thereof were placed in the text. All cases were retrieved from Westlaw. Cases were edited for relevance, clarity and readability. See original cases for complete text. Information in chapter overviews is obtained from the original text by Matthew Lippman.

## Chapter Overview:

Chapter three of the text concerns criminal sentencing and punishment for crimes. There are a variety of purposes for punishing the violation of criminal laws. These include retribution, deterrence, rehabilitation, incapacitation, and restoration. Retribution is based on the idea that an offender deserves punishment for bad behavior and so the punishment is proportional to the severity of the crime. Deterrence can mean either special deterrence, by which the punishment is intended to discourage the individual from recidivism, or general deterrence, by which the punishment is intended to discourage the general population from committing the same crime. The question of whether or not punishment successfully deters is a controversial subject.

The other three purposes of punishment each serve the interests of a specific person or group. The idea behind rehabilitation is that the punishment imposed could help the perpetrator of the crime turn their life around and change their criminal behavior. Incapacitation, on the other hand, serves the purposes of the community at large, to remove criminals from society and protect others from victimization. Restoration is intended to serve the interests of the victims themselves, requiring that criminals make some degree of monetary contribution to the victim or community harmed in the crime.

There are numerous types of punishment available for judges to impose in a criminal sentence. These are imprisonment, fines, probation, intermediate sanctions, and death. Assets forfeiture is also allowed when the prosecutors of the case show by a preponderance of the evidence that certain assets are linked to specific illegal activities. In determining whether a sentence is fair, there are several different concepts that can be examined. Proportionality, for example, suggests that a sentence should fit the crime. Along the same lines, disparity is the idea that similar crimes should be punished with similar sentences.

Governments typically approach sentencing in one of four ways. The first is determinate sentencing, which is a system by which the legislature sets strict guidelines for how different crimes are to be sentenced, giving judges little discretion and requiring them to justify any decisions to increase or decrease the recommended sentence. Giving judges a little more discretion, mandatory minimum sentences require that criminals serve no less than a specified sentence dependent upon their crime, but judges have authority to determine how much more than the minimum an offender must serve based upon the unique elements of the case. Judges also maintain discretion in indeterminate sentencing, by which the judge defines a minimum and maximum sentence. A little closer to determinate sentences, presumptive sentencing guidelines are determined by a legislative

commission and take several factors into consideration but requiring judges to justify their decisions to depart from the presumptive sentence, which will also allow the guilty party the right to an appeal.

The concept of cruel and unusual punishment is also discussed in this chapter, with looks at capital punishment, the juvenile death penalty, and status offenses, which punish people for their status, as opposed to any action. An example of this would be to punish someone for his or her status as a homeless person or drug addict. Finally, this chapter looks at the concept of equal protection as an important element of fairness in sentencing. In this chapter of the supplement you will learn about the specifics of Florida's sentencing guidelines and read some cases to show you how the courts apply those statutes.

## I. Punishment:

Section Introduction: Punishment for criminal action is imposed to further the goals of retribution, deterrence, rehabilitation, incapacitation, and/or restoration. The following Florida statute, called The Criminal Punishment Code, seeks to clarify various aspects of punishment. The case that follows provides an example of the importance of fair punishment.

**Florida Statute, section 921.002 - The Criminal Punishment Code.**
The Criminal Punishment Code shall apply to all felony offenses, except capital felonies, committed on or after October 1, 1998.

> (1) The provision of criminal penalties and of limitations upon the application of such penalties is a matter of predominantly substantive law and, as such, is a matter properly addressed by the Legislature. The Legislature, in the exercise of its authority and responsibility to establish sentencing criteria, to provide for the imposition of criminal penalties, and to make the best use of state prisons so that violent criminal offenders are appropriately incarcerated, has determined that it is in the best interest of the state to develop, implement, and revise a sentencing policy. The Criminal Punishment Code embodies the principles that:
>
> (a) Sentencing is neutral with respect to race, gender, and social and economic status.
>
> (b) The primary purpose of sentencing is to punish the offender. Rehabilitation is a desired goal of the criminal justice system but is subordinate to the goal of punishment.
>
> (c) The penalty imposed is commensurate with the severity of the primary offense and the circumstances surrounding the primary offense.
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> (d) The severity of the sentence increases with the length and nature of the offender's prior record.
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> (e) The sentence imposed by the sentencing judge reflects the length of actual time to be served, shortened only by the application of incentive and meritorious gain-time as provided by law, and may not be shortened if

the defendant would consequently serve less than 85 percent of his or her term of imprisonment as provided in s. 944.275(4)(b)3. The provisions of chapter 947, relating to parole, shall not apply to persons sentenced under the Criminal Punishment Code.
(f) Departures below the lowest permissible sentence established by the code must be articulated in writing by the trial court judge and made only when circumstances or factors reasonably justify the mitigation of the sentence. The level of proof necessary to establish facts that support a departure from the lowest permissible sentence is a preponderance of the evidence.
(g) The trial court judge may impose a sentence up to and including the statutory maximum for any offense, including an offense that is before the court due to a violation of probation or community control.
(h) A sentence may be appealed on the basis that it departs from the Criminal Punishment Code only if the sentence is below the lowest permissible sentence or as enumerated in s. 924.06(1).
(i) Use of incarcerative sanctions is prioritized toward offenders convicted of serious offenses and certain offenders who have long prior records, in order to maximize the finite capacities of state and local correctional facilities.

(2) When a defendant is before the court for sentencing for more than one felony and the felonies were committed under more than one version or revision of the former sentencing guidelines or the code, each felony shall be sentenced under the guidelines or the code in effect at the time the particular felony was committed. This subsection does not apply to sentencing for any capital felony.

(3) A court may impose a departure below the lowest permissible sentence based upon circumstances or factors that reasonably justify the mitigation of the sentence in accordance with s. 921.0026. The level of proof necessary to establish facts supporting the mitigation of a sentence is a preponderance of the evidence. When multiple reasons exist to support the mitigation, the mitigation shall be upheld when at least one circumstance or factor justifies the mitigation regardless of the presence of other circumstances or factors found not to justify mitigation. Any sentence imposed below the lowest permissible sentence must be explained in writing by the trial court judge.

### ***Johnson* v. *State*, 720 So.2d 232 (1998)**

Procedural History: Defendant was convicted in the Circuit Court, Duval County, Hugh A. Carithers, Jr., J., of first-degree murder, attempted first-degree murder, armed robbery, attempted armed robbery, and burglary with an assault, and he appealed. The Supreme Court held: (1) denial of motion for severance was warranted; (2) evidence was sufficient to support convictions; (3) circuit court judge had power to impose mandatory minimum sentences; and (4) sentence of death was disproportionate sentence for convictions.

Issue(s): Did defendant's actions constitute premeditated first-degree murder?

Facts: Willie Gaines was shot numerous times on December 30, 1994, and died one week later. Calvin Johnson, his brother Anthony Johnson, and Chiffon Bryant were indicted for first-degree murder and other crimes. Chiffon pleaded guilty to robbery and accessory to murder and was sentenced to time served. Calvin's motions to sever were denied, and he and Anthony were tried together.

The trial record reflects the following facts. "Big" Gaines testified that on the morning of December 30, 1994, he and his father, Willie, were repairing his car. The car was parked in front of the Gaineses' residence. Big Gaines was sitting in the driver's seat of the car and Willie was standing by the trunk of the vehicle. Big Gaines testified that Anthony appeared next to him with a gun and asked, "[W]here the money at, where the dope at?" Big Gaines claimed that Anthony ordered him to surrender his gun and cellular phone. Big Gaines stated that he informed Anthony that he did not have a gun or drugs, but that he gave Anthony approximately $1,400 and his cellular phone. Big Gaines asserted that he was ordered to get out of the car and place his hands on the top of the vehicle. Big Gaines testified that when he got out of the car he witnessed a tall man stick an object into his father's back and escort him into the Gaineses' house. Big Gaines stated that soon thereafter he heard two or three shots fired in the house and his mother scream, "[D]on't kill my husband." Big Gaines said that he watched his mother run out of the front door of the house.

He testified that, immediately after hearing the shots, he attempted to grab the barrel of Anthony's gun, but was shot in the leg after Anthony wrestled the weapon away from him. Big Gaines also testified that he was shot a second time in the left side of his torso. Big Gaines stated that he watched the second man lead his father by the arm out of the house and onto the front porch. Big Gaines said that the second man stood over his father for five or six seconds, then shot his father in the jaw after Anthony yelled, "[L]et's go." Finally, Big Gaines denied that he owed Anthony a gambling debt or that he was selling drugs at the time of the attack.

Chiffon Bryant testified that on December 30, 1994, Calvin, Anthony, and her boyfriend, Shirea Hickson, were helping her move into a new residence. While she was driving the group across town, Chiffon noticed a man on the side of the road working on an automobile and overheard Calvin say to Anthony, "[T]here is Big Gaines right there." Chiffon recalled that Anthony had mentioned that Big Gaines owed him money. Upon seeing Big Gaines, Anthony allegedly said to Chiffon, "[P]ull over, pull over. I can get my money from him now." Chiffon testified that she told Anthony that Big Gaines would not give him any money and Anthony replied that he was broke and Big Gaines was going to pay him. Chiffon claimed that she then said to Anthony, "What are you going to do, rob him?"

Chiffon testified that she stopped her car and Calvin and Anthony exited the vehicle carrying their guns. Chiffon stated that she proceeded to drive around the block and

when she returned she heard shots and saw Big Gaines lying on the ground. Chiffon said that she drove away after she saw Calvin and Anthony flee the scene. Chiffon claimed that she picked up Calvin and Anthony after they intercepted her vehicle. Chiffon testified that while the group was leaving the scene, Anthony confessed that he shot Big Gaines. Chiffon further testified that "[Calvin Johnson] said that [Willie Gaines] pulled a gun on him and he had the nerve to try and shoot him and he had to fire him up." Calvin allegedly told Chiffon that he shot the victim "everywhere." At the time of her testimony, Chiffon had pleaded guilty to robbery and accessory to murder. Chiffon explained to the jury that she hoped for a favorable sentencing recommendation from the State in return for her truthful testimony.

Amanda Gaines testified that she observed a man with a gun enter her house with her husband, Willie. Amanda stated that the armed assailant set her husband in a chair in the living room. Amanda said that the chair was located near an area where Willie stored a handgun. Amanda said that the man saw her and ordered her to come into the living room. Amanda stated that she screamed, "[D]on't kill us, don't kill us. We don't have drugs. We don't have money," and ran to the back of the house. Amanda testified that she returned to the front of the house after hearing a shot and the front door open. Amanda stated that her husband's keys and handkerchief were on a table in the living room and those items had not been there prior to the gunman entering her home. Amanda testified, however, that no money or jewelry was missing from her house. At trial, Amanda twice identified Anthony as the shooter, but admitted that she was very upset at the time of the attack.

Lindsey Walker lived one block away from the Gaineses' house. Walker testified that, when he drove by the Gaineses' residence on December 30, he saw Anthony shoot Big Gaines and run away. Walker testified that he also witnessed Calvin run from the Gaineses' house. Walker claimed that he pursued Calvin and Anthony in his car, but ended the chase after the men aimed their guns at him. Shea Brookins worked at a gas station near the Gaineses' residence. Brookins testified that, while returning from lunch on December 30, he saw two tall men exit a car near the Gaineses' house. Brookins stated that he subsequently heard shots and saw Calvin exit the Gaineses' house.

Three fired bullets and thirteen shell casings were recovered from the Gaineses' yard and residence. The bullets and casings were from .380 and .45 caliber handguns. The medical examiner for Duval County, Dr. Bonifacio Floro, testified that Willie was shot five times. Dr. Floro recovered three .380 caliber bullets from Willie's body. Willie was shot once in his left jaw, three times in his chest, and once in his right hand. Dr. Floro testified that Willie died from pneumonia resulting from the gunshot wounds. Dr. Floro stated that the accumulation of the wounds caused Willie to be immobilized, and that the immobilization and damage to the body predisposed him to pneumonia.

Edward Mason testified that, in January 1995, Calvin showed him an article in the Florida Star regarding the robbery and shootings and admitted that he participated in the crimes. Mason alleged that on a later date Calvin gave him a .380 and a .45 caliber handgun and told him to keep one of the guns and sell the other. Mason's testimony

regarding this transaction with Calvin was corroborated by Woodrow Allen, who testified that he was with Mason when Calvin gave Mason the guns. Mason said that he eventually sold both guns. The guns were never recovered by the police. Mason testified that Calvin called him from jail and confessed that he committed the crimes with the guns that he had given to Mason. Mason also testified that Calvin said he shot the victim after he had resisted the robbery and that he would not be convicted if Mason remained quiet about the guns.

Anthony testified in his own defense. Anthony claimed that Big Gaines owed him money from gambling. Anthony stated that only he, Chiffon, and Hickson were at the Gaineses' residence on the day of the crimes. Anthony testified that he and Hickson exited Chiffon's car to speak with Big Gaines. Anthony admitted that he had a .45 caliber handgun in his possession at the time he confronted Big Gaines. Anthony claimed that Big Gaines voluntarily gave him $300 and his cellular phone as payment on the debt. Anthony stated that he saw Willie exit the house and then heard shots. Anthony further stated that he saw Willie point a gun at Hickson. Anthony said that he subsequently took cover behind Big Gaines' vehicle and heard more shots. Anthony claimed that he shot Big Gaines in self-defense after Big Gaines had attempted to retrieve a gun.

The jury convicted Calvin of first-degree murder, attempted first-degree murder, armed robbery, attempted robbery, and burglary. The jury recommended the death penalty by a vote of nine to three and the trial judge imposed the death sentence. The judge found the following aggravating circumstances: (1) Calvin was previously convicted of four violent felonies; (2) Calvin committed the murder while he was engaged in the commission of a burglary; and (3) Calvin committed the murder for pecuniary gain. The trial judge merged the burglary and pecuniary gain aggravators. The judge found the statutory mitigator of age (Calvin was twenty-two years of age at the time of the crime) and assigned very little weight to this factor. As to nonstatutory mitigation, the judge found: (1) Calvin surrendered to the police; (2) Calvin had a troubled childhood; (3) Calvin was previously employed; (4) Calvin was a good son and neighbor; (5) Calvin has a young child; and (6) Calvin earned a high school graduate equivalency degree and participated in high school athletics. Calvin's school background was given substantial weight and the other factors were assigned very little to slight weight. Codefendant Anthony was also convicted of first-degree murder and other crimes, but was sentenced to life in prison. In this appeal, Calvin raises two claims pertaining to the guilt phase of his trial and four claims pertaining to the penalty phase.

Calvin raises the following guilt-phase claims: (1) the trial judge erred in denying Calvin's motions to sever the trials of the defendants; and (2) the trial judge erred in admitting testimony relating to the discovery of a handcuff key in Anthony's possession. Calvin raises the following penalty-phase claims: (1) the trial judge erred in imposing the mandatory minimum sentence as to three convictions; (2) the trial judge erroneously found the prior violent felony aggravating circumstance; (3) the trial judge erroneously found the aggravating circumstance that the crime was committed during the course of a burglary; and (4) the imposition of the death penalty is disproportionate in this case.

Holding: Convictions affirmed; sentence of death vacated and remanded.

Opinion: PER CURIAM.

Calvin Jerome Johnson, Jr., appeals his convictions for the first-degree murder of Willie Gaines, the attempted first-degree murder of Calvin "Big" Gaines, armed robbery, attempted armed robbery, and burglary with an assault, and his sentences for those convictions, including his death sentence for the first-degree murder conviction. We have jurisdiction. [Art. V, § 3(b)(1), Fla. Const.] We affirm the convictions and prison sentences, but reduce the sentence of death to life in prison without possibility of parole.

In his first guilt phase claim, Calvin argues that the trial judge abused his discretion in denying his motions to sever the trial. Calvin alleges that the judge's error resulted in the jury's considering certain prejudicial testimony that was applicable only to Anthony as evidence of guilt against Calvin. We find no error in the judge's refusal to sever the trials. Under Florida Rule of Criminal Procedure 3.152(b)(1)(A), a severance of defendants may be ordered when it is appropriate to promote a fair determination of the guilt or innocence of the defendants. A severance is not necessary when the evidence is "presented in such a manner that the jury can distinguish the evidence relating to each defendant's acts, conduct and statements, and can then apply the law intelligently and without confusion to determine the individual defendant's guilt or innocence." [*Coleman v. State*, 610 So.2d 1283, 1285 (Fla.1992)(quoting *McCray v. State*, 416 So.2d 804, 806 (Fla.1982)] This Court has previously upheld a trial judge's refusal to order a severance when the codefendants did not blame one another for the crimes or confess to the crimes, but merely raised alibi defenses. [See *Coleman*, 610 So.2d at 1285]

Similar to the defendants in *Coleman*, Calvin and Anthony did not blame one another for the crimes or confess to the crimes, and Calvin's conviction was not dependent upon the use of antagonistic evidence by Anthony. To the contrary, Anthony's testimony suggested that someone other than Calvin was responsible for shooting Willie. The trial judge ensured that the evidence in this case was presented to the jury in a manner designed to eliminate juror confusion. For example, immediately following corrections officer Tracy Hawes' testimony regarding Anthony's possession of a handcuff key while he was incarcerated, the judge instructed the jury that such testimony could only be considered as evidence of guilt against Anthony and not Calvin. The judge did not abuse his discretion by denying Calvin's motions for severance.

In his second claim, Calvin argues that the trial judge erred in allowing Officer Hawes to testify regarding his discovery of a handcuff key in Anthony's jail cell because such testimony was irrelevant and prejudicial as to Calvin. This claim is without merit. At Calvin's request, the judge instructed the jury as follows: "Ladies and gentlemen, the evidence you just heard should be considered only in the case against Anthony Johnson and not in the case against Calvin Johnson." We find no error regarding this issue. [See *Jones v. State*, 580 So.2d 143, 146 (Fla.1991)(defendant suffered no undue prejudice from presentation of evidence against codefendant where trial judge instructed jury that evidence went solely to the codefendant)]

Finally, although Calvin does not challenge the sufficiency of the evidence, we have reviewed the record and found competent substantial evidence to support his convictions. The jury returned a general verdict of guilt. Regarding Calvin's first-degree murder conviction, the evidence is sufficient to uphold the conviction based on a theory of premeditation or felony murder. The record reveals that during the course of a burglary Calvin shot Willie multiple times in the house. Calvin then led Willie onto the porch and stood over him for five or six seconds before, without provocation, shooting him in the jaw. The medical examiner's testimony reflects that the accumulation of the wounds to Willie's body caused his death by pneumonia.

In his first penalty phase claim, Calvin argues that the trial judge erroneously imposed three-year mandatory minimum sentences under section 775.087(2), Florida Statutes (1995), for his convictions for attempted first-degree murder, attempted robbery, and robbery with a firearm. To be subject to the three-year mandatory minimum sentence under section 775.087(2), a defendant must have possessed a firearm or destructive device during the commission of an enumerated felony. Calvin contends that the mandatory minimum sentences could not be imposed by the judge because the jury, in rendering a general verdict, did not find that he possessed a firearm during the commission of the crimes. We reject Calvin's claim. It is not essential to the judge's power to impose a mandatory minimum sentence that the jury find in a special verdict that the defendant possessed a firearm during the commission of an enumerated felony. We have held that "before a trial court may enhance a defendant's sentence or apply the mandatory minimum sentence for use of a firearm, the jury must make a finding that the defendant committed the crime while using a firearm either by finding him guilty of a crime which involves a firearm or by answering a specific question of a special verdict form so indicating." [*State v. Overfelt*, 457 So.2d 1385, 1387 (Fla.1984)] In the present case, each of the relevant counts of the indictment charged Calvin with violating section 775.087. In convicting Calvin as charged, the jury necessarily found that Calvin had possessed a firearm during the commission of the crimes. Therefore, the judge had the power to impose the mandatory minimum sentences as to the three challenged convictions.

In his second penalty phase claim, Calvin argues that the trial judge erred in finding the prior violent felony aggravating circumstance. The prior violent felony aggravator attaches only "to life-threatening crimes in which the perpetrator comes in direct contact with a human victim." [*Lewis v. State*, 398 So.2d 432, 438 (Fla.1981)] Regarding the trial judge's finding, the sentencing order reads as follows:

> On April 21, 1989, the Defendant was convicted of aggravated assault for shooting a firearm at his brother, Anthony Wayne Johnson. On October 19, 1989, he was convicted of aggravated battery for shooting one David Greenwall. In addition, the Defendant was convicted in this cause of the contemporaneous crimes of the robbery with a firearm and the attempted murder of a separate victim, Calvin Gaines. This aggravating circumstance has been proven beyond a reasonable doubt.

We have reviewed the record and we find that the judge committed no error in finding this aggravating circumstance.

In his next claim, Calvin asserts that the trial judge erred in finding that the murder was committed in the course of a burglary. In discussing the merged burglary/pecuniary gain aggravator, the sentencing order states in relevant part:

> The Defendant and his co-defendant, Anthony Wayne Johnson, originally went to the residence of Willie Gaines for the purpose of robbing his son, Calvin Gaines, who also resided there. In doing so, Calvin Johnson and Anthony Johnson carried loaded pistols with them. At the residence, they found Calvin Gaines and Willie Gaines working together in front of the house on the automobile of Calvin Gaines. While Anthony Johnson initiated the armed robbery of Calvin Gaines, then, the Defendant took Willie Gaines at gunpoint and forcibly entered the residence. Once inside, the Defendant attempted to rob Willie Gaines. He also fired the first of the gunshots which led to the death of Willie Gaines. (The last bullet fired into Willie Gaines was shot on the front porch of the house after the Defendant had removed the wounded but conscious Willie Gaines from his house to that front porch following the attempted robbery.)

Under section 810.02(1), Florida Statutes (1993), the crime of burglary is defined as "entering or remaining in a structure or a conveyance with the intent to commit an offense therein." The record reveals that Calvin forcibly entered the Gaineses' residence with the intent to commit, at a minimum, an aggravated assault therein. The evidence further reveals that Calvin wounded Willie during the commission of the burglary. Chiffon testified that Calvin and Anthony each carried a firearm when they exited her car to confront Big Gaines and Willie. The testimony of Big Gaines and Amanda demonstrates that Calvin led Willie at gunpoint into the Gaineses' residence. The evidence reveals that Willie was likely forced to empty his pockets once inside the home. Big Gaines and Amanda also testified that they heard shots fired inside the house. Amanda stated that she witnessed her husband's hand bleeding immediately after hearing the shots fired. Chiffon testified that Calvin confessed to her that he shot Willie "everywhere." Moreover, Mason testified that Calvin admitted to shooting Willie while he was committing a robbery. We find that the evidence supports the finding of this aggravator.

In his final penalty-phase claim, Calvin contends that his death sentence is disproportionate. In deciding whether death is a proportionate penalty, we must consider the totality of the circumstances of the case and compare the case with other capital cases. [See *Urbin v. State*, 714 So.2d 411, 416-17 (Fla.1998); *Tillman v. State*, 591 So.2d 167, 169 (Fla.1991)] We also must remain mindful that the death penalty is reserved for the most aggravated and least mitigated of first-degree murders. [See *State v. Dixon*, 283 So.2d 1, 7 (Fla.1973)] The present case involves a horrible, senseless and indefensible first-degree murder, and it poses a close question on whether the sentence of death is warranted. Upon reviewing the record and similar capital cases, however, we conclude

that this crime is not among those for which the death penalty is specifically reserved under *State v. Dixon*.

The circumstances of this case support vacating the death sentence. The prior violent felony aggravating circumstance, although properly found to be present, is not strong when the facts are considered. The aggravator is based in part on an aggravated assault committed by Calvin upon his brother, Anthony. Anthony testified in the present case that he was not injured in the confrontation with his brother and that the entire incident occurred because of a misunderstanding. The aggravator is also based in part on Calvin's two contemporaneous convictions as principal to crimes against Big Gaines simultaneously committed by codefendant Anthony.

This prior violent felony aggravator and the burglary/pecuniary gain aggravator are balanced against the following statutory and nonstatutory mitigation: (1) Calvin was twenty-two at the time of the crime; (2) Calvin voluntarily surrendered to the police; (3) Calvin had a troubled childhood; (4) Calvin was previously employed; (5) Calvin was respectful to his parents and neighbors; (6) Calvin has a young daughter; and (7) Calvin earned a GED and participated in high school athletics. The trial judge accorded substantial weight to the final mitigating circumstance. In addition to the totality of the circumstances supporting the vacation of the death sentence, we find that this case is similar to other capital cases in which we have vacated imposed death sentences. [See *Terry v. State*, 668 So.2d 954 (Fla.1996)(death sentence disproportionate where facts surrounding homicide were unclear and the aggravating circumstances were not extensive); *Thompson v. State*, 647 So.2d 824 (Fla.1994)(death sentence disproportionate where only one valid aggravator and significant nonstatutory mitigation exist)]

For the reasons expressed, we affirm Calvin Jerome Johnson's convictions. We also affirm Calvin's sentences for attempted first-degree murder, attempted robbery, and robbery with a firearm. We vacate Calvin's sentence of death and direct that upon remand he be sentenced to life imprisonment without possibility of parole.

Critical Thinking Question(s): Do you believe the defendant in this case deserved the death penalty? How much weight should be given to “nonstatutory mitigators” verses statutory mitigators? Can you come up with a simple equation for the death sentence?

**II. Purpose of Punishment:**

Section Introduction: Punishment for a crime is intended to serve one or more of the purposes listed in the section above. The following case asks the question of what level of action against a defendant furthers such goals enough to be deemed punishment.

***Davidson* v. *MacKinnon*, 656 So.2d 223 (1995)**

Procedural History: After his driver's license was suspended based on his failure to submit to breathalyzer test, motorist petitioned for writ of prohibition seeking to prohibit subsequent criminal prosecution for driving under influence (DUI) based on grounds of

double jeopardy. The District Court of Appeal, W. Sharp, J., held that administrative remedy of suspension of driver's license for DUI or other related behavior is primarily for purpose of enhancing safe driving on public highways and does not bar subsequent criminal prosecution for DUI.

Issue(s): Does license revocation constitute punishment and create an issue of double jeopardy for a subsequent criminal trial?

Facts: After Davidson refused to submit to a breathalyzer test, an administrative proceeding was conducted pursuant to section 322.2615, Florida Statutes (1995), and his driver's license was suspended. He asks this court to prohibit his subsequent criminal prosecution for driving under the influence of alcohol, which arises out of the same conduct, on the ground that his constitutional double jeopardy rights not to be punished twice for the same offense will be violated by the criminal prosecution.

Davidson argues that the suspension of his driver's license, which arose out of the same drunk driving conduct for which he is now being prosecuted, was a punitive action. He relies on language found in the 1989 Final Staff Analysis of section 322.2615, which was prepared by the staff for the Criminal Justice Committee of the House of Representatives. It states that section 322.2615 is consistent with the state's comprehensive plan in that it seeks to "prevent, punish and discourage criminal behavior."

Holding: Writ denied.

Opinion: W. SHARP, Judge.

The courts of this state have consistently held that the suspension of a driver's license in an administrative proceeding does not bar a subsequent prosecution of the driver for DUI. [See *Smith v. City of Gainesville*, 93 So.2d 105 (Fla.1957) (revocation of driver's license based on defendant's conviction for DUI does not violate the prohibition against double jeopardy); *State v. Murray*, 644 So.2d 533 (Fla. 4th DCA 1994) (prosecution for DUI does not violate double jeopardy principles when defendant's driver's license has been suspended pursuant to F.S. § 322.2615); *Gomez v. State*, 621 So.2d 578 (Fla.3d DCA 1993) (no double jeopardy violation is involved in the prosecution of a DUI charge after a driver's license has been seized under F.S. § 322.2615 because of the same conduct); *Freeman v. State*, 611 So.2d 1260 (Fla.2d DCA 1992), rev. denied, 623 So.2d 493 (Fla.), cert. denied, 510 U.S. 957, 114 S.Ct. 415, 126 L.Ed.2d 361 (1993) (revocation of driver's license upon conviction for DUI does not preclude DUI prosecution). All of these cases rely on the principle enunciated in *Smith* that the protection of the public justifies the revocation of a driver's license upon the commission of certain offenses. Although the loss of such a valuable privilege may be painful, the primary purpose of the law is to protect the public from the sometimes fatal consequences of allowing those who cannot or do not choose to control their drinking habits, to continue to drive on the public roadways.

Nonetheless, Davidson contends that the legislative history articulated by the House Criminal Justice Committee Staff Report when section 322.2615 was enacted, which indicates its purpose is to "punish," overcomes any prior judicial determination that the purpose of Florida's driver's license suspension or revocation laws is the protection of the public. Petitioner argues that this distinction is vital because in *United States v. Halper*, [490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989)], the United States Supreme Court held that a civil sanction which is imposed not solely for remedial purposes, but which also serves either retributive or deterrent purposes, constitutes punishment which bars further prosecution for the same conduct. [See also *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994)]

In *Freeman v. State*, the Second District considered the applicability of *Halper* to Florida's license suspension and revocation statutes. Although acknowledging that suspension of a driver's license for refusal to take a chemical test is not remedial in the sense used in *Halper*, the court in *Freeman* held that neither was the purpose of the law punitive. The court concluded that the purpose of the statute providing for revocation of a driver's license upon conviction for driving while intoxicated is "to provide an administrative remedy for public protection and not for punishment of the offender." [*Freeman* at 1261]

*Freeman* is consistent with the position taken by a majority of other state courts which have considered the issue. As stated in *Ellis v. Pierce*, [230 Cal.App.3d 1557, 282 Cal.Rptr. 93 (1991)], although a driver's license revocation for failure to submit to a breathalyzer test does not compensate any injured party for any loss, and therefore cannot be characterized as remedial, such a provision is not for deterrence or retribution, but rather serves the immediate purpose of obtaining the best evidence of blood alcohol content and the long range goal of reducing highway injuries, thereby protecting the public. The court in *Ellis* concluded that a license suspension does not violate the double jeopardy clause when imposed after a conviction of DUI. [See also *Johnson v. State*, 95 Md.App. 561, 622 A.2d 199 (1993) (purpose of license suspension is to protect other drivers and fact that suspension may carry the sting of punishment does not alter its civil character); *Butler v. Dept. of Public Safety and Corrections*, 609 So.2d 790 (La.1992) (driver's license suspension is civil, not punitive in nature, and was enacted to promote public safety, so criminal prosecution is not barred by suspension under double jeopardy clause); *State v. Strong*, 158 Vt. 56, 605 A.2d 510 (1992) (suspension of a driver's license is not punishment for purpose of double jeopardy analysis)]

Since 1967, Florida law has provided for the suspension of a driver's license for refusal to take a breath test. [Ch. 67-308, Laws of Fla., enacting § 322.261, Fla.Stat. (1967)] Davidson's argument that the language in the 1989 House Staff Analysis changed the legislative intent for this law, which has been in effect in a similar form for more than 20 years, places far too much importance on the report. We note that the Senate Staff Analysis of the same law lists the "state's compelling interest in highway safety" as the basis for the legitimate exercise of the state's police power in enacting this law. The conflicting language in these two reports illustrates the questionable validity of relying on staff reports as proof of legislative intent.

We conclude that the administrative remedy of suspending a driver's license because of drunk driving or other related behavior was and continues to be primarily for the purpose of enhancing safe driving on the public highways. Its effect is remedial in a general or universal sense, because it removes dangerous drivers from the highways. And, it can also be viewed as remedial for the individual driver involved, since in an intoxicated state, a driver poses a serious danger to him or herself, as well as to others. As such, it is no more punitive than denying a person who is legally blind a driver's license. Both will live longer and healthier lives if they do not drive.

Critical Thinking Question(s): This is an issue that affects many people as the inability to drive severely limits one's options for work and recreation. Is the requirement that a person submit to a test a violation of the 5th Amendment against self incrimination? Should the Court have to wait until a person is convicted and sentenced before applying the revocation? If the person is not convicted, then wouldn't s/he be within her rights not to have submitted to the test?

**III. Sentencing:**

Section Introduction: There are many different types of penalties that can be imposed on a guilty defendant during the sentencing phase of a trial. The state statutes listed below describe the punishments available to judges in Florida. The cases that followed look at the issue of whether certain types of sentencing may violate other laws.

**Florida Statute, section 775.083 - Fines**

(1) A person who has been convicted of an offense other than a capital felony may be sentenced to pay a fine in addition to any punishment described in s. 775.082; when specifically authorized by statute, he or she may be sentenced to pay a fine in lieu of any punishment described in s. 775.082. A person who has been convicted of a noncriminal violation may be sentenced to pay a fine. Fines for designated crimes and for noncriminal violations shall not exceed:

(a) $15,000, when the conviction is of a life felony.
(b) $10,000, when the conviction is of a felony of the first or second degree.
(c) $5,000, when the conviction is of a felony of the third degree.
(d) $1,000, when the conviction is of a misdemeanor of the first degree.
(e) $500, when the conviction is of a misdemeanor of the second degree or a noncriminal violation.
(f) Any higher amount equal to double the pecuniary gain derived from the offense by the offender or double the pecuniary loss suffered by the victim.
(g) Any higher amount specifically authorized by statute.

Fines imposed in this subsection shall be deposited by the clerk of the court in the fine and forfeiture fund established pursuant to s. 142.01. If a defendant is unable to pay a fine, the court may defer payment of the fine to a date certain.

(2) In addition to the fines set forth in subsection (1), court costs shall be assessed and collected in each instance a defendant pleads nolo contendere to, or is convicted of, or adjudicated delinquent for, a felony, a misdemeanor, or a criminal traffic offense under state law, or a violation of any municipal or county ordinance if the violation constitutes a misdemeanor under state law. The court costs imposed by this section shall be $50 for a felony and $20 for any other offense and shall be deposited by the clerk of the court into an appropriate county account for disbursement for the purposes provided in this subsection. A county shall account for the funds separately from other county funds as crime prevention funds. The county, in consultation with the sheriff, must expend such funds for crime prevention programs in the county, including safe neighborhood programs under ss. 163.501-163.523.

(3) The purpose of this section is to provide uniform penalty authorization for criminal offenses and, to this end, a reference to this section constitutes a general reference under the doctrine of incorporation by reference.

**Florida Statute, section 775.089 - Restitution**

(1) (a) In addition to any punishment, the court shall order the defendant to make restitution to the victim for:

1. Damage or loss caused directly or indirectly by the defendant's offense; and
2. Damage or loss related to the defendant's criminal episode,

unless it finds clear and compelling reasons not to order such restitution. Restitution may be monetary or nonmonetary restitution. The court shall make the payment of restitution a condition of probation in accordance with s. 948.03. An order requiring the defendant to make restitution to a victim does not remove or diminish the requirement that the court order payment to the Crimes Compensation Trust Fund pursuant to chapter 960. Payment of an award by the Crimes Compensation Trust Fund shall create an order of restitution to the Crimes Compensation Trust Fund, unless specifically waived in accordance with subparagraph (b)1.

(b) 1. If the court does not order restitution, or orders restitution of only a portion of the damages, as provided in this section, it shall state on the record in detail the reasons therefor.

2. An order of restitution entered as part of a plea agreement is as definitive and binding as any other order of restitution, and a statement to such effect must be made part of the plea agreement. A plea agreement may contain provisions that order restitution relating to criminal offenses committed by the defendant to which the defendant did not specifically enter a plea.

(c) The term "victim" as used in this section and in any provision of law relating to restitution means each person who suffers property damage or loss, monetary expense, or physical injury or death as a direct or indirect result of the defendant's offense or criminal episode, and also includes the victim's estate if the victim is deceased, and the victim's next of kin if the victim is deceased as a result of the offense.

(2) (a) When an offense has resulted in bodily injury to a victim, a restitution order entered under subsection (1) shall require that the defendant:

1. Pay the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a recognized method of healing.
2. Pay the cost of necessary physical and occupational therapy and rehabilitation.
3. Reimburse the victim for income lost by the victim as a result of the offense.
4. In the case of an offense which resulted in bodily injury that also resulted in the death of a victim, pay an amount equal to the cost of necessary funeral and related services.

(b) When an offense has not resulted in bodily injury to a victim, a restitution order entered under subsection (1) may require that the defendant reimburse the victim for income lost by the victim as a result of the offense.

(3) (a) The court may require that the defendant make restitution under this section within a specified period or in specified installments.

(b) The end of such period or the last such installment shall not be later than:

1. The end of the period of probation if probation is ordered;
2. Five years after the end of the term of imprisonment imposed if the court does not order probation; or
3. Five years after the date of sentencing in any other case.

(c) Notwithstanding this subsection, a court that has ordered restitution for a misdemeanor offense shall retain jurisdiction for the purpose of enforcing the restitution order for any period, not to exceed 5 years, that is pronounced by the court at the time restitution is ordered.

(d) If not otherwise provided by the court under this subsection, restitution must be made immediately.

If the restitution ordered by the court is not made within the time period specified, the court may continue the restitution order through the duration of the civil judgment provision set forth in subsection (5) and as provided in s. 55.10.

(4) If a defendant is placed on probation or paroled, complete satisfaction of any restitution ordered under this section shall be a condition of such probation or parole. The court may revoke probation, and the Parole Commission may revoke parole, if the defendant fails to comply with such order.

(5) An order of restitution may be enforced by the state, or by a victim named in the order to receive the restitution, in the same manner as a judgment in a civil action. The outstanding unpaid amount of the order of restitution bears interest in accordance with s. 55.03, and, when properly recorded, becomes a lien on real estate owned by the defendant. If civil enforcement is necessary, the defendant shall be liable for costs and attorney's fees incurred by the victim in enforcing the order.

(6) (a) The court, in determining whether to order restitution and the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense.

(b) The criminal court, at the time of enforcement of the restitution order, shall consider the financial resources of the defendant, the present and potential future financial needs and earning ability of the defendant and his or her dependents, and such other factors which it deems appropriate.

(7) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense is on the state attorney. The burden of demonstrating the present financial resources and the absence of potential future financial resources of the defendant and the financial needs of the defendant and his or her dependents is on the defendant. The burden of demonstrating such other matters as the court deems appropriate is upon the party designated by the court as justice requires.

(8) The conviction of a defendant for an offense involving the act giving rise to restitution under this section shall estop the defendant from denying the essential allegations of that offense in any subsequent civil proceeding. An order of restitution hereunder will not bar any subsequent civil remedy or recovery, but the amount of such restitution shall be set off against any subsequent independent civil recovery.

(9) When a corporation or unincorporated association is ordered to make restitution, the person authorized to make disbursements from the assets of such corporation or association shall pay restitution from such assets, and such person may be held in contempt for failure to make such restitution.

(10) (a) Any default in payment of restitution may be collected by any means authorized by law for enforcement of a judgment.

(b) The restitution obligation is not subject to discharge in bankruptcy, whether voluntary or involuntary, or to any other statutory or common-law proceeding for relief against creditors.

(11) (a) The court may order the clerk of the court to collect and dispense restitution payments in any case.

(b) The court may order the Department of Corrections to collect and dispense restitution and other payments from persons remanded to its custody or supervision.

**Florida Statute, section 775.091 - Public service**

In addition to any punishment, the court may order the defendant to perform a specified public service.

**Florida Statute, section 775.21 - The Florida Sexual Predators Act**

(6) (e) If the sexual predator is not in the custody or control of, or under the supervision of, the Department of Corrections, or is not in the custody of a private correctional facility, and establishes or maintains a residence in the state, the sexual predator shall register in person at an office of the department, or at the sheriff's office in the county in which the predator establishes or maintains a residence, within 48 hours after establishing permanent or temporary residence in this state. Any change in the sexual predator's permanent or temporary residence or name, after the sexual predator registers in person at an office of the department or at the sheriff's office, shall be accomplished in the manner provided in paragraphs (g), (i), and (j). If a sexual predator registers with the sheriff's office, the sheriff shall take a photograph and a set of fingerprints of the predator and forward the photographs and fingerprints to the department, along with the information that the predator is required to provide pursuant to this section.

(7) (a) Law enforcement agencies must inform members of the community and the public of a sexual predator's presence. Upon notification of the presence of a sexual predator, the sheriff of the county or the chief of police of the municipality where the sexual predator establishes or maintains a permanent or temporary residence shall notify members of the community and the public of the presence of the sexual predator in a manner deemed appropriate by the sheriff or the chief of police. Within 48 hours after receiving notification of the presence of a sexual predator, the

sheriff of the county or the chief of police of the municipality where the sexual predator temporarily or permanently resides shall notify each licensed day care center, elementary school, middle school, and high school within a 1-mile radius of the temporary or permanent residence of the sexual predator of the presence of the sexual predator. Information provided to members of the community and the public regarding a sexual predator must include:

1. The name of the sexual predator;
2. A description of the sexual predator, including a photograph;
3. The sexual predator's current address, including the name of the county or municipality if known;
4. The circumstances of the sexual predator's offense or offenses; and
5. Whether the victim of the sexual predator's offense or offenses was, at the time of the offense, a minor or an adult.

This paragraph does not authorize the release of the name of any victim of the sexual predator.

(10) (a) Except as otherwise specifically provided, a sexual predator who fails to register; who fails, after registration, to maintain, acquire, or renew a driver's license or identification card; who fails to provide required location information or change-of-name information; who fails to make a required report in connection with vacating a permanent residence; who fails to reregister as required; who fails to respond to any address verification correspondence from the department within 3 weeks of the date of the correspondence; or who otherwise fails, by act or omission, to comply with the requirements of this section, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

### *Goad* v. *Florida Department of Corrections*, 845 So.2d 880 (2003)

Procedural History: Inmate filed civil action against Department of Corrections for injuries sustained when attacked by another prisoner. The Department filed a responsive motion for summary judgment and counterclaim to recover costs of inmate's incarceration. The Circuit Court, Leon County, P. Kevin Davey, J., granted summary judgment motion, but ruled for inmate on motion for judgment on the pleadings as to Department's counterclaim. Department appealed. The First District Court of Appeal reversed, 754 So.2d 95. Granting defendant's petition for review, the Supreme Court, Quince, J., held that: (1) statutes that made a defendant incarcerated for an offense that was neither a capital offense nor a life felony offense liable for $50 per day for portion of sentence remaining after effective date of statutes did not violate ex post facto principles; disapproving *Gary v. State*, [669 So.2d 1087]; *Alberts v. State*, [711 So.2d 635]; and (2) those statutes did not violate substantive due process.

Issue(s): Whether sections 960.293 and 960.297 of the Florida Civil Restitution Lien and Crime Victims' Remedy Act violate the constitutional prohibition against ex post facto laws; and, whether these same sections violate the right to substantive due process

Facts: Ollie James Goad has been an inmate in the custody of the Department of Corrections since February 1991. Mr. Goad initiated a civil action against the Department in 1995, for injuries he sustained when he was attacked by another inmate. In response to this claim, the Department filed a motion for a summary judgment and a counterclaim under sections 960.293 and 960.297, Florida Statutes (Supp.1994) to recover the costs of Mr. Goad's incarceration. Section 960.293 provides that a defendant who is incarcerated for an offense that is neither a capital offense nor a life felony offense is liable to the state in the amount of $50 per day for the costs of incarceration. By the terms of section 960.297, the state may recover these costs for the portion of the offender's remaining sentence after July 1, 1994, the effective date of the law.
The trial court granted the Department's motion for summary judgment on the cause of action asserted in the complaint, and Mr. Goad then filed a motion for judgment on the pleadings as to the counterclaim. He argued that the application of section 960.297 would violate the ex post facto clauses of the state and federal constitutions, because the statute was not in effect at the time he committed the criminal offenses resulting in his incarceration. The trial court agreed and held that section 960.297 could not be applied retroactively. [754 So.2d at 96-97] The First District reversed the trial court's decision, concluding that sections 960.293 and 960.297 " afford civil remedies that are not the equivalent of criminal punishment," and therefore do not violate the ex post facto clauses of the state and federal constitutions. [Id. at 100]

Holding: Decision of First District Court of Appeal approved.

Opinion: QUINCE, J.

We have for review the decision of the First District Court of Appeal in *State Department of Corrections v. Goad*, [754 So.2d 95 (Fla. 1st DCA 2000)], which certified conflict with *Gary v. State*, [669 So.2d 1087 (Fla. 4th DCA 1996)], and *Alberts v. State*, [711 So.2d 635 (Fla. 2d DCA 1998)]. We have jurisdiction. [Art. V, § 3(b)(4), Fla. Const.] For the reasons expressed below, we approve the First District's decision and hold that sections 960.293 and 960.297, Florida Statutes (Supp.1994), do not violate the constitutional prohibition against ex post facto laws, nor do sections 960.293 and 960.297 violate the right to substantive due process.

Goad now raises two issues for review: first, whether sections 960.293 and 960.297 of the Florida Civil Restitution Lien and Crime Victims' Remedy Act (the Act) violate the constitutional prohibition against ex post facto laws; and second, whether these same sections violate the right to substantive due process.

Goad claims the Act violates the constitutional ban on ex post facto laws. A law violates the ex post facto clauses of the United States and Florida Constitutions when it increases the punishment for a criminal offense after the crime has been committed. [See U.S.

Const. art. 1, § 9, cl. 3; U.S. Const. art. 1, § 10, cl. 1; art. I, § 10, Fla. Const.] Goad contends the Act is an ex post facto law in that it increases his punishment for a criminal offense which occurred before the law took effect. Because the constitutional prohibition on ex post facto laws applies only to criminal legislation and proceedings, we initially address the nature of the Act. [See *Westerheide v. State*, 831 So.2d 93, 99 (Fla.2002)]

"The categorization of a particular proceeding as civil or criminal 'is first of all a question of statutory construction.' " [*Kansas v. Hendricks*, 521 U.S. 346, 361, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997) (quoting *Allen v. Illinois*, 478 U.S. 364, 368, 106 S.Ct. 2988, 92 L.Ed.2d 296 (1986)] "We must initially ascertain whether the legislature meant the statute to establish 'civil' proceedings. If so, we ordinarily defer to the legislature's stated intent." [*Hendricks*, 521 U.S. at 361, 117 S.Ct. 2072] When attempting to discern legislative intent, courts must first look at the actual language used in the statute. [See *Joshua v. City of Gainesville*, 768 So.2d 432, 435 (Fla.2000)] Here, the Florida Legislature specifically set out its intent in section 960.29:

The Legislature finds that former approaches to the problem of compensating crime victims through restitution have proven inadequate or have been inconsistently applied in many cases. The Legislature also finds that there is an urgent need to alleviate the increasing financial burdens on the state and its local subdivisions caused by the expenses of incarcerating convicted offenders. (1) To remedy these problems, consistent with the preservation of all citizens' constitutional rights, the Legislature intends:

> (a) To provide a legal mechanism, in the form of a civil restitution lien, that will enable crime victims, the state, and other aggrieved parties to recover damages and losses arising out of criminal acts. The civil restitution lien shall be imposed against the real and personal property owned by the convicted offender who has committed an offense causing such damages and losses.
>
> (b) To prevent convicted offenders from increasing their assets after conviction, while their crime victims and the state and local subdivisions remain uncompensated for their damages and losses. To further this legislative purpose, the civil restitution lien shall attach not only to the offender's current assets but also, should these assets fail to satisfy the lien, to any future assets or "windfall" proceeds which may accrue to the defendant, up to the full amount of the lien.
>
> (c) To provide a schedule of liquidated damages, based on the type of crime committed, in order to facilitate swift and uniform determinations of the amounts of civil restitution liens, and to facilitate judicial convenience in entering restitution lien orders. To further these legislative purposes, a schedule of liquidated damages, based on the type of crime committed, shall be employed to assess the amounts of civil restitution liens. The schedule of liquidated damages shall also serve to ensure that the amount of each civil restitution lien bears a rational relation to the amount of actual damages incurred as a result of the crime.

> (d) To impose a long-term civil liability for the costs of incarceration, by means of the civil restitution lien, against a convicted offender, regardless of the offender's financial status at the time of conviction.

(2) The Legislature also finds that crime victims, the state, and its local subdivisions are entitled to rough remedial justice and they may demand compensation for damage and losses. (3) The Legislature declares that:

> (a) The intent of the statute is rationally related to the goal of fully compensating crime victims, the state, and its local subdivisions for damages and losses incurred as a result of criminal conduct.
>
> (b) This act rests upon the principle of remediation and not punishment, which is meted out by criminal sanctions afforded by law.

(4) The Legislature recognizes that, in many individual cases, the liquidated damage amount provided does not fully compensate crime victims for their actual damages and losses. It is the legislative intent that the liquidated damages authorized in this act bear a rational relation to the damages and losses a crime victim incurs as a result of a convicted offender's conduct, and the state and its local subdivisions incur as a result of implementation of a convicted offender's sentence. [§ 960.29, Fla. Stat. (Supp.1994)] The plain language of this statute clearly sets forth the Legislature's intent to afford a civil remedy to address the State's need to recover the incarceration costs of convicted offenders. Nothing on the face of the statute suggests otherwise.

While "the civil label is not always dispositive," the Legislature's stated intent should only be rejected where the challenging party presents " 'the clearest proof' that 'the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention' that the proceeding be civil." [*Allen*, 478 U.S. at 369, 106 S.Ct. 2988 (quoting *United States v. Ward*, 448 U.S. 242, 248-49, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980)). See also *Hudson v. United States*, 522 U.S. 93, 100, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997) (noting that " 'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty")] We find that Goad has failed to present the proof necessary to meet this burden, and base our decision on a review of seven factors used by the Supreme Court to decide whether a statute is so punitive as to transform what was intended as a civil remedy into a criminal penalty.

In determining whether a civil statute is in reality punitive in nature, we must consider: (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment - retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned. [*Hudson*, 522 U.S. at 99-100, 118 S.Ct. 488 (relying on *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168- 169, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963)] Goad concedes that factors (1), (6), and (7) point to the civil nature of the Act,

and we agree. Also, the sanction in this case does not come into play on a finding of scienter, and although the potential imposition of a lien may have some deterrent effect, the Supreme Court has recognized that "all civil penalties have some deterrent effect," and "deterrence may serve civil as well as criminal goals." [*Hudson*, 522 U.S. at 102, 105, 118 S.Ct. 488] The sanction applies to a convicted offender's status as an inmate, not to a particular behavior that is already a crime. Finally, the statute does not seek recovery beyond the government's actual costs of incarceration. [See *Ilkanic v. City of Fort Lauderdale*, 705 So.2d 1371, 1373 (Fla.1998) (finding the amount of $50 per day to be "reasonably related to the costs of incarceration")]

Our decision in *Ilkanic* further supports the conclusion that the Act is a civil remedy and thus cannot violate the prohibition against ex post facto laws. In rejecting due process and equal protection challenges to section 960.239, this Court in *Ilkanic* noted that the "order imposing the incarceration charges [is] enforced in the same manner as a judgment in a civil action" and the "lien created upon the imposition of a per diem charge has the same effect as the lien created by the entry of a civil judgment." [Id. at 1373] Therefore, we hold that imposing a civil restitution lien pursuant to sections 960.293 and 960.297 to recover the incarceration costs of convicted offenders is a civil remedy that is not so punitive in nature as to constitute criminal punishment. Goad has failed to present clear proof that the Act actually operates as a criminal sanction that is capable of violating the prohibition against ex post facto laws.

Goad claims that the Act violates his substantive due process rights because sections 960.293 and 960.297 attach new legal consequences to events completed prior to the enactment of the law. "Substantive due process under the Florida Constitution protects the full panoply of individual rights from unwarranted encroachment by the government." [*Department of Law Enforcement v. Real Property*, 588 So.2d 957, 960 (Fla.1991)] To determine whether the encroachment can be justified, courts have considered, among other things, the propriety of the State's purpose, the nexus between the means chosen by the State and the goal it intended to achieve, and whether individuals are ultimately being treated in a fundamentally unfair manner in derogation of their substantive rights. [See id.] In *Ilkanic*, this Court rejected a substantive due process challenge to section 960.293(2)(b):

> We conclude that imposing a per diem charge on convicted offenders clearly relates to a permissive legislative objective of reimbursing public bodies for the costs expended in incarcerating these persons. Furthermore, we believe that the flat charge of $50 per day is reasonably related to the costs of incarceration. [705 So.2d at 1372-73]

We find that this reasoning applies equally to section 960.297, the mechanism for imposing the $50 per day reimbursement.

For offenders convicted before July 1, 1994, section 960.297(2), Florida Statutes (Supp.1994), provides that the State may recover incarceration costs, up to $50 per day, for the portion of the offender's sentence remaining after July 1, 1994. Goad contends

that the statute violates his right to substantive due process because section 960.297 attaches a new penalty to conduct completed before the statute's enactment. We disagree because in essence, Goad is claiming that at the time he was convicted he had a vested right to free room and board while incarcerated. This is where Goad's argument fails because there simply is no such vested right. Goad is not being treated in a fundamentally unfair manner in derogation of his substantive rights because there is no substantive right in not having to pay for the costs of one's incarceration. Moreover, we find that the State's purpose for the Act - the urgent need to alleviate the increasing financial burdens on the State and its local subdivisions caused by the expenses of incarcerating convicted offenders - is proper. [See *Ilkanic*, 705 So.2d at 1372-73 (concluding "that imposing a per diem charge on convicted offenders clearly relates to a permissive legislative objective of reimbursing public bodies for the costs expended in incarcerating these persons")]

Accordingly, we approve the First District's decision below and disapprove Gary and Alberts to the extent that those cases find that sections 960.293 and 960.297 violate the constitutional prohibition against ex post facto laws.

Critical Thinking Question(s): Do you believe it is fair to subject defendant's to pay a per diem after they have already been sentenced and the law was not in place at the time? How does the Court justify its decision on the matter? What kind of sanctions could be imposed on prisoners that do not or cannot pay?

### ***Givens* v. *State*, 851 So.2d 813 (2003)**

Procedural History: Defendant appealed the judgment and sentence entered by the Circuit Court, Pinellas County, John A. Schaefer, J., for failure to register as a sexual offender. The District Court of Appeal, Silberman, J., held that: (1) sexual offender registration and notification statute did not violate defendant's procedural due process rights, and (2) retroactive application of sexual offender registration statute did not violate ex post facto principles.

Issue(s): Appellant contends that the sexual offender registration and notification requirements are unconstitutional as a violation of due process and that application of the registration statute to him violates the Ex Post Facto Clause.

Facts: Robert Givens appeals his judgment and sentence for failure to register as a sexual offender. He contends that the sexual offender registration and notification requirements are unconstitutional as a violation of due process and that application of the registration statute to him violates the Ex Post Facto Clause.

Holding: Affirmed.

Opinion: SILBERMAN, Judge.

Givens argues that the sexual offender registration and notification requirements in sections 943.0435 and 944.607, Florida Statutes (2001), violate procedural due process because he was not afforded a hearing to determine whether he was a danger to the public before being subject to the statutory requirements. After the parties filed their briefs, this court in *Milks v. State*, [848 So.2d 1167 (Fla. 2d DCA 2003)], held that the Florida Sexual Predators Act, section 775.21, Florida Statutes (2000), does not violate procedural due process and declined to follow *Espindola v. State*, [28 Fla. L. Weekly D222, --- So.2d ----, 2003 WL 118634 (Fla. 3d DCA Jan.15, 2003)]. Givens states in his brief that his argument is the same as in *Espindola*, and he relies on that case to support his position. In *Milks* this court recognized that the United States Supreme Court had recently held in *Connecticut Department of Public Safety v. Doe*, [538 U.S. 1, 123 S.Ct. 1160, 155 L.Ed.2d 98 (2003)], that under a Connecticut sexual offender statute, procedural due process "did not entitle the defendant to a hearing to establish whether he or she was dangerous, as that fact was not material under the statute." [*Milks*, 848 So.2d at 1169]. The relevant fact is whether the defendant has been convicted of a specific crime, and the defendant is entitled to procedural due process before that conviction is entered. [See id.]

Although *Milks* dealt with the sexual predator, not sexual offender, designation, we note that the sexual predator requirements are more onerous than the sexual offender requirements. Furthermore, the Fifth District has specifically held that the sexual offender registration and notification requirements do not violate procedural due process. [See *Johnson v. State*, 795 So.2d 82, 89 (Fla. 5th DCA 2001)] We agree and hold that Givens' procedural due process rights were not violated.

Givens also contends that the sexual offender registration statute violates ex post facto principles because section 943.0435 was enacted after Givens began serving his sentence. Again, after the parties filed their briefs, the United States Supreme Court held in *Smith v. Doe*, [538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003)], that the Alaska Sex Offender Registration Act is nonpunitive and that, therefore, its retroactive application does not violate the Ex Post Facto Clause. In addition, the First and Fourth Districts have held that section 943.0435 is procedural in nature and does not violate the Ex Post Facto Clause. [See *Freeland v. State*, 832 So.2d 923 (Fla. 1st DCA 2002); *Simmons v. State*, 753 So.2d 762 (Fla. 4th DCA 2000)] We agree and hold that the application of section 943.0435 to Givens does not violate ex post facto principles. Accordingly, we affirm Givens' judgment and sentence for failure to register as a sexual offender. Affirmed.

Critical Thinking Question(s): The Court held that the statute was “nonpunitive.” Do you believe there is a punitive aspect to this statute? Is having to “wear a scarlet letter” an informal sanction that could adversely affect the defendant’s quality of life? Should such laws be applied ex post facto?

**IV. Approaches to Sentencing:**

Section Introduction: In addition to standard sentencing guidelines, Governors and President may grant clemency to an offender to reduce his or her sentence. Following is the Florida statute regarding clemency by the Governor of Florida.

**Florida Statute, section 940.01 - Clemency; suspension or remission of fines and forfeitures, reprieves, pardons, restoration of civil rights, and commutations**

> (1) Except in cases of treason and in cases when impeachment results in conviction, the Governor may, by executive order filed with the Secretary of State, suspend collection of fines and forfeitures, grant reprieves not exceeding 60 days, and, with the approval of two members of the Cabinet, grant full or conditional pardons, restore civil rights, commute punishment, and remit fines and forfeitures for offenses.
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> (2) In cases of treason, the Governor may grant reprieves until adjournment of the regular session of the Legislature convening next after the conviction, at which session the Legislature may grant a pardon or further reprieve; otherwise the sentence shall be executed.

**V. Victims' Rights:**

Section Introduction: In certain cases sentencing may take into account certain aspects of a victim's experience of a crime. The involvement of victims in criminal proceedings necessitates the clarification of a victim's rights with regard to such proceedings. These Florida statutes involve the rights of victims and the case that follows looks at some possible effects of a victim's involvement in a trial.

**Florida Statute, section 960.001 - Guidelines for fair treatment of victims and witnesses in the criminal justice and juvenile justice systems**

> (1) The Department of Legal Affairs, the state attorneys, the Department of Corrections, the Department of Juvenile Justice, the Parole Commission, the State Courts Administrator and circuit court administrators, the Department of Law Enforcement, and every sheriff's department, police department, or other law enforcement agency as defined in s. 943.10(4) shall develop and implement guidelines for the use of their respective agencies, which guidelines are consistent with the purposes of this act and s. 16(b), Art. I of the State Constitution and are designed to implement the provisions of s. 16(b), Art. I of the State Constitution and to achieve the following objectives:
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> > (a) Information concerning services available to victims of adult and juvenile crime. As provided in s. 27.0065, state attorneys and public defenders shall gather information regarding the following services in the geographic boundaries of their respective circuits and shall provide such information to each law enforcement agency with jurisdiction within such geographic boundaries. Law enforcement personnel shall ensure, through

distribution of a victim's rights information card or brochure at the crime scene, during the criminal investigation, and in any other appropriate manner, that victims are given, as a matter of course at the earliest possible time, information about:

1. The availability of crime victim compensation, when applicable;
2. Crisis intervention services, supportive or bereavement counseling, social service support referrals, and community-based victim treatment programs;
3. The role of the victim in the criminal or juvenile justice process, including what the victim may expect from the system as well as what the system expects from the victim;
4. The stages in the criminal or juvenile justice process which are of significance to the victim and the manner in which information about such stages can be obtained;
5. The right of a victim, who is not incarcerated, including the victim's parent or guardian if the victim is a minor, the lawful representative of the victim or of the victim's parent or guardian if the victim is a minor, and the next of kin of a homicide victim, to be informed, to be present, and to be heard when relevant, at all crucial stages of a criminal or juvenile proceeding, to the extent that this right does not interfere with constitutional rights of the accused, as provided by s. 16(b), Art. I of the State Constitution;
6. In the case of incarcerated victims, the right to be informed and to submit written statements at all crucial stages of the criminal proceedings, parole proceedings, or juvenile proceedings; and
7. The right of a victim to a prompt and timely disposition of the case in order to minimize the period during which the victim must endure the responsibilities and stress involved to the extent that this right does not interfere with the constitutional rights of the accused.

(d) Notification of scheduling changes. Each victim or witness who has been scheduled to attend a criminal or juvenile justice proceeding shall be notified as soon as possible by the agency scheduling his or her appearance of any change in scheduling which will affect his or her appearance.

(f) Information concerning release from incarceration from a county jail, municipal jail, juvenile detention facility, or residential commitment facility. The chief administrator, or a person designated by the chief administrator, of a county jail, municipal jail, juvenile detention facility, or residential commitment facility shall, upon the request of the victim or the appropriate next of kin of a victim or other designated contact of the victim of any of the crimes specified in paragraph (b), make a reasonable attempt to notify the victim or appropriate next of kin of the victim or

other designated contact prior to the defendant's or offender's release from incarceration, detention, or residential commitment if the victim notification card has been provided pursuant to paragraph (b). If prior notification is not successful, a reasonable attempt must be made to notify the victim or appropriate next of kin of the victim or other designated contact within 4 hours following the release of the defendant or offender from incarceration, detention, or residential commitment. If the defendant is released following sentencing, disposition, or furlough, the chief administrator or designee shall make a reasonable attempt to notify the victim or the appropriate next of kin of the victim or other designated contact within 4 hours following the release of the defendant. If the chief administrator or designee is unable to contact the victim or appropriate next of kin of the victim or other designated contact by telephone, the chief administrator or designee must send to the victim or appropriate next of kin of the victim or other designated contact a written notification of the defendant's or offender's release.

(j) Notification of right to request restitution. Law enforcement agencies and the state attorney shall inform the victim of the victim's right to request and receive restitution pursuant to s. 775.089 or s. 985.231(1)(a)1., and of the victim's rights of enforcement under ss. 775.089(6) and 985.201 in the event an offender does not comply with a restitution order. The state attorney shall seek the assistance of the victim in the documentation of the victim's losses for the purpose of requesting and receiving restitution. In addition, the state attorney shall inform the victim if and when restitution is ordered. If an order of restitution is converted to a civil lien or civil judgment against the defendant, the clerks shall make available at their office, as well as on their website, information provided by the Secretary of State, the court, or The Florida Bar on enforcing the civil lien or judgment.

(k) Notification of right to submit impact statement. The state attorney shall inform the victim of the victim's right to submit an oral or written impact statement pursuant to s. 921.143 and shall assist in the preparation of such statement if necessary.

**Florida Statute, section 960.0015 - Victim's right to a speedy trial; speedy trial demand by the state attorney**

(1) The state attorney may file a demand for a speedy trial if the state has met its obligations under the rules of discovery, the charge is a felony or misdemeanor, the court has granted at least three continuances upon the request of the defendant over the objection of the state attorney, and:

(a) If a felony case, it is not resolved within 125 days after the date that formal charges are filed and the defendant is arrested or the date that notice to appear in lieu of arrest is served upon the defendant; or

(b) If a misdemeanor case, it is not resolved within 45 days after the date that formal charges are filed and the defendant is arrested or the date that notice to appear in lieu of arrest is served upon the defendant.

(2) Upon the filing of a demand for a speedy trial, the trial court shall schedule a calendar call within 5 days, at which time the court shall schedule the trial to commence no sooner than 5 days or later than 45 days following the date of the calendar call. The court may, however, grant whatever further extension may be required to prevent deprivation of the defendant's right to due process.

### ***Martinez* v. *State*, 664 So.2d 1034 (1996)**

Procedural History: Defendant was convicted in the Circuit Court, Broward County, Robert B. Carney, J., of attempted manslaughter with firearm. Defendant appealed. The District Court of Appeal, Klein, J., held that: (1) fact that potential jurors had been charged with crime was race-neutral reason for excluding them, and (2) trial judge's error in allowing victim to hear defense counsel's opening statement was harmless.

Issue(s): Were the preemptory challenges of two blacks race-biased? Did the victim's presence in courtroom prevent fair trial for the defendant?

Facts: These charges arose out of an altercation between the defendant and Timothy Bedwell which culminated in the defendant shooting Bedwell. During jury selection, after the state excused two black jurors with peremptory challenges, the defendant asked the court to inquire whether there were race-neutral reasons for the strikes. The state responded that the first juror's brother had been arrested for drugs and that the second juror had himself been arrested. The court determined that these peremptory challenges were reasonable.

Holding: Affirmed.

Opinion: KLEIN, Judge.

Appellant argues that his conviction for attempted manslaughter with a firearm should be reversed because the state's use of peremptory challenges to remove any prospective juror who previously had been arrested impermissibly discriminates against blacks since they are arrested proportionately more often than whites. He also argues that the court erred in giving priority to the constitutional right of a victim to be present in the courtroom over the defendant's right to a fair trial by having the witnesses sequestered. We affirm.

Defendant argues that using peremptory challenges to exclude persons who have been arrested or whose family members have been arrested is not race-neutral, because the percentage of blacks who have been arrested is higher than the percentage of whites who have been arrested. As authority for this proposition defendant cites *Gregory v. Litton Systems, Inc*., [316 F.Supp. 401 (C.D.Cal.1970), modified 472 F.2d 631 (9th Cir.1972)],

an employment discrimination case. In *Gregory* the court ruled that an employer's policy of excluding from employment people who had been arrested had the effect of denying black applicants an equal opportunity since blacks comprised only 11% of this country's population, but 27% of all reported arrests. [Id. at 403] Although those statistics are twenty-five years old, since Gregory was decided in 1970, defendant cites statistics showing the percentages were approximately the same in 1988.

The fact that a juror has a relative who has been charged with a crime has been determined to be a race-neutral reason for excusing the juror. [*Fotopoulos v. State*, 608 So.2d 784 (Fla.1992); *Bowden v. State*, 588 So.2d 225 (Fla.1991)] Although the opinions in those cases do not discuss the specific argument made here, which is that based on statistics, the striking of such jurors does in fact discriminate, we cannot agree with defendant that the statistics make this case distinguishable. For example, no one would question the right of the plaintiff to strike nurses in a medical malpractice case even though the vast majority of nurses are female. Yet we know from *J.E.B. v. Alabama*, [511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994)] and *Abshire v. State*, [642 So.2d 542 (Fla.1994)], that peremptory strikes cannot be based on gender. In the absence of any authority other than Gregory, the employment discrimination case relied on by defendant, we cannot agree that these strikes were improper.

Defendant also argues that his conviction should be reversed because the trial court erroneously allowed the victim, Bedwell, who was a key witness, to be present during opening statements. The trial court allowed Bedwell to be present over defendant's objection because of article I, section 16(b) of the Florida Constitution, which provides:

> Victims of crime ... are entitled to the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused.

In *Gore v. State*, [599 So.2d 978, 986 (Fla.1992)], our supreme court held that the victim's rights under the Constitution "must yield to the defendant's right to a fair trial." In the present case the trial court, because of the constitutional provision, announced that the victim/witness would be allowed in the courtroom unless the defendant could establish prejudice. We are not prepared to say that the court was wrong in putting the burden of showing prejudice on the defendant, since the analysis has to have a starting point. We do, however, interpret Gore as meaning that any doubts should be resolved in favor of the defendant receiving a fair trial.

In the present case the defendant argued to the trial court that the victim/witness, who testified first, should not have been permitted in the courtroom during opening statement because he could have been affected by defense counsel's explanation of the defendant's version of the incident. The trial court rejected that argument, stating that it was insufficient to overcome the victim's constitutional right to be in the courtroom. We disagree. Where, as here, the facts were hotly disputed, the defendant's right to a fair trial outweighed the victim's right to be in the courtroom. The exclusion of this victim during

opening statement, which was all he would have missed since he testified first, would have been a small price to pay to insure that the defendant got a fair trial.

We have concluded, however, that the error was harmless, after reviewing defense counsel's opening statement outlining defendant's version of the events leading up to the shooting, and the testimony of the victim, who categorically denied all of the facts which defendant alleged justified the shooting. Affirmed.

Critical Thinking Question(s): Naturally, the defendant does not want the victim of the crime in front of the jury, but courts proceedings are a matter of public record.

- Under what circumstances would a victim be caused to excuse him/herself from the courtroom during criminal proceedings?
- How would you balance the rights of the defendant and the victim in such a case.