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Changing Florida's "Dazed and Confused" Past: How Recent Legislation Provides More Options for Sentencing Drug Addicted Offenders

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CHANGING FLORIDA'S "DAZED AND CONFUSED" PAST: HOW RECENT LEGISLATION PROVIDES MORE OPTIONS FOR SENTENCING DRUG ADDICTED OFFENDERS

LINDSAY TIMARI*

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I. INTRODUCTION

It is widely accepted that drugs lead to crime. Many crimes are drug-motivated, even when the crime itself has nothing to do with drugs, because the defendant either needs money for drugs or is in an altered state due to his or her drug use or addiction.¹ Furthermore, an increasing amount of crimes occur because of the drug addict's continuous need for drug money that is required to keep his or her body functioning.² In Florida, drug offenders account for more than twenty-nine percent of the total prison population³ and cost Florida's taxpayers \$20,108 a year per offender in order to provide health treatment, educational services, and supervision while in prison.⁴ In a struggling economy, prison alternatives, such as drug court and drug offender probation, look more and more pleasing to the eye of legislators, especially in Florida where drug courts thrive.⁵ Such prison alternatives save money in two ways: First, the state avoids sending another person to prison; second, the low rate of recidivism indicates that successful completion of these programs prevents future crime and incarceration.⁶

Florida continued its efforts to rehabilitate rather than incarcerate drug offenders when, on May 27, 2009, Governor Charlie Crist signed Senate Bill 1726 into law.⁷ The act amends various statutes, including section 921.0026(3) of *Florida Statutes*, which formerly read that a defendant's drug addiction or dependency could not, under any circumstances, be a valid rea-

1. See OFFICE OF DRUG CONTROL, EXECUTIVE OFFICE OF THE GOVERNOR, FLORIDA'S DRUG CONTROL STRATEGY 39 (2009), available at <http://www.flgov.com/drugcontrol/pdfs/DRUGCONTROLSTRATEGY.pdf> [hereinafter FLORIDA'S DRUG CONTROL STRATEGY]. The report further states that over "the past decade, the single largest category of prison admissions has been drug offenders." *Id.* at 41.

2. See JAMES P. GRAY, WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT: A JUDICIAL INDICTMENT OF THE WAR ON DRUGS 29 (2001).

3. See 2007-2008 FLA. DEP'T OF CORR. ANN. REP. 33, available at http://www.dc.state.fl.us/pub/annual/0708/pdfs/Annual_Report_0708.pdf.

4. *Id.* at 16.

5. See FLORIDA SUPREME COURT TASK FORCE ON TREATMENT-BASED DRUG COURTS, REPORT ON FLORIDA'S DRUG COURTS 5 (2004), available at http://www.flcourts.org/gen_public/family/drug_court/bin/taskforcereport.pdf [hereinafter REPORT ON FLORIDA'S DRUG COURTS].

6. *Id.* at 11.

7. Act effective July 1, 2009, ch. 2009-64, 2009 Fla. Laws 585 (codified as amended in FLA. STAT. §§ 397.334, 921.0026, 948.06, .08, .16, .20, 985.345). While this bill is now currently Florida law, this article will refer to the law as "Senate Bill 1726" for identification purposes.

son for a downward departure from the sentencing guidelines.⁸ Therefore, if an offender scored mandatory prison time, a judge was not permitted to consider drug abuse or addiction and send the offender to drug court or drug offender probation instead, even if the judge believed prison was not the best answer for the offender.⁹ However, chapter 2009-64, Florida Laws, states that a judge may now consider the defendant's substance abuse as a mitigating factor and depart from the minimum sentence accordingly, giving judges more discretion in allowing those who require rehabilitation, rather than imprisonment, get the personalized attention they need.¹⁰ The new law also made changes to the qualifications of drug offender probation and postadjudicatory treatment-based drug court programs by adding that an offender need not have been charged with possession or purchase of a controlled substance alone in order to qualify for drug offender probation or drug court.¹¹ While the act clearly made strides in expanding judicial discretion over sentencing, there are still certain parts of the amended laws which continue to place undeserving addicts in jail rather than treatment centers.¹²

This article will discuss Florida's previous limitations on the court's ability to sentence drug addicts to probation or treatment programs and how Senate Bill 1726's amendments expanded judicial discretion in this area. Part II provides background history on the drug war and the effects Nixon's statement had on the courts' and lawmakers' approach to drug offenders and addicts. Part II also discusses the two main problems with sentencing guidelines: mandatory minimums and downward departures. Part III's case analysis sheds light on the problems with the statutes prior to the amendments. It explains how Florida courts interpreted the statutes and how the statutes treated defendants who were chronic drug abusers or had a history of drug problems. The purpose of this section is to highlight the importance of the new amendments. Part IV begins with an in-depth look at the effects that the new law has on the statutes in place. Furthermore, Part IV explains the purpose and requirements of drug courts, downward departures, and drug offender probation. Part IV ends with a cultural and social look on the need for a change and how society's view of drug addicts influences the legislature.

8. FLA. STAT. § 921.0026(3) (2008).

9. *Id.*; see Aaron M. Clemens & Hale R. Stancil, *Unhandcuffing Justice: Proposals to Return Rationality to Criminal Sentencing*, 83 FLA. B.J. 54, 56 (Feb. 2009).

10. Ch. 2009-64, 2009 Fla. Laws at 580 (reading that a departure based on a defendant's substance abuse or addiction is permitted when the "defendant's offense is a nonviolent felony . . . and the court determines that the defendant is amenable to the services of a postadjudicatory treatment-based drug court program").

11. *See id.* at 583.

12. *Id.* at 580-81, 583 (stating that in order to qualify for drug offender probation, the defendant must not score over fifty-two points on the state scoresheet).

Part V applies the new amendments to the cases discussed in Part III in order to show how the changes will affect future defendants. Part VI asks if the amendments are good enough to solve the problem of sending drug addicts to jail rather than treatment centers. Finally, Part VII concludes this article.

II. THE COURT AND THE DRUG WAR

A. *The “War on Drugs” and Mandatory Minimums*

In 1971, President Nixon declared war on drugs and named drug abuse “public enemy number one in the United States.”¹³ Eleven years later, citizens in Miami lobbied the White House for help with the city’s escalating drug crisis.¹⁴ President Reagan responded by creating the Vice President’s Task Force of South Florida, which was headed by then-Vice President George Bush.¹⁵ The Task Force combined efforts from different agencies, such as the DEA and FBI, in order to guard against the increasing amount of drug trafficking in the city.¹⁶ It was created in response to both Nixon’s remarks and the increasing attention to the drug crisis in America.¹⁷ In 1983, the war on drugs thrived under Reagan’s presidency and took a different turn, focusing on the effects drugs were having on the workforce in America.¹⁸ Florida followed suit in July 1983, when state troopers began surveillance on the Florida Turnpike, “pull[ing] over and arrest[ing] sixty-four people for drug-trafficking charges, four times as many as the month before.”¹⁹ The influx was a direct result of the new “drug courier profiles” used by the Florida State Police which “included such characteristics as ‘scrupulous obedience to traffic laws,’ ‘wearing lots of gold,’ and . . . ‘ethnic groups associated with the drug trade.’”²⁰ The stops made by Florida State Police also consisted of “circl[ing] the car with a drug-sniffing dog.”²¹ Of course,

13. *Frontline: Drug Wars, Thirty Years of America’s Drug War* (PBS television broadcast), available at <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/cron/> (last visited Nov. 10, 2009).

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. DAN BAUM, *SMOKE AND MIRRORS: THE WAR ON DRUGS AND THE POLITICS OF FAILURE* 187 (1996).

19. *Id.* at 194.

20. *Id.*

21. *Id.*

the only reason for the increased vigilance of Florida's roads was Reagan's aggressive war on drugs.²²

Not surprisingly, United States legislators responded by proposing mandatory minimum sentences for drug crimes in accordance with the continuing war on drugs.²³ It follows that, though the number of violent offenders in the nation's prisons "has doubled since 1980, the number of drug prisoners has increased sevenfold."²⁴ Also, Florida currently enforces mandatory minimum sentences for a variety of drug-related crimes, such as trafficking or possession of large amounts of cannabis, cocaine, oxycodone, hydrocodone, methamphetamine and others.²⁵ These statutes only concern themselves with the weight and the type of drug possessed or sold and do not take into account any previous offenses.²⁶ Other states, such as New York, have similar harsh statutes.²⁷ However, earlier this year, New York made strides to eliminate "mandatory minimum sentences for first-time, nonviolent drug offenders."²⁸ The Rockefeller Drug Laws were originally created in response to the drug war declared in the 1970s and have not been changed since.²⁹ Lawrence Cipolione, Jr. provided a startling example of the effects of the Rockefeller Drug Laws when he was "sentence[d] [to] fifteen years to life for selling 2.34 ounces of cocaine to an undercover officer. Meanwhile, in the same prison, Amy Fisher was to be released after serving only four years and ten months for shooting a woman in the head."³⁰ The proposed reform in New York would allow judges broader discretion over sentencing, "would allow some among a group of 1500 prisoners to apply for release, if they are nonviolent and have not been convicted of other crimes,"³¹ and would curtail harsh and inequitable sentences, like that handed down to Anthony Papa, a twenty-six year old who was sentenced to fifteen years in prison in 1985 for carrying an envelope which contained 4.5 ounces of cocaine.³²

22. *See id.*

23. Christopher Mascharka, Comment, *Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences*, 28 FLA. ST. U. L. REV. 935, 936 n.3 (2001).

24. GRAY, *supra* note 2, at 29.

25. *See* Mascharka, *supra* note 23, at 937–38; FLA. STAT. § 893.135 (2008) (stating that most drug trafficking violations carry a mandatory minimum sentence between three and fifteen years).

26. *See* FLA. STAT. § 893.135 (2008).

27. Mascharka, *supra* note 23, at 937.

28. Keith B. Richburg, *N.Y. Governor, Lawmakers Agree to Soften Drug Sentencing Laws*, WASH. POST, Mar. 28, 2009, at A2.

29. *See id.*

30. GRAY, *supra* note 2, at 32.

31. Richburg, *supra* note 28.

32. *See id.* The trial judge in Papa's case claimed he was "handcuffed because of the law" and was forced to sentence Papa to prison, though the judge felt that he deserved proba-

B. *Downward Departures*

A downward departure occurs when a court imposes “a sentence more lenient than the standard guidelines propose, as when the court concludes that a criminal’s history is less serious than it appears.”³³ In Florida, a downward departure from the lowest sentence, or mandatory minimum, a defendant scores³⁴ is only permissible under certain “reasonably justified” mitigating circumstances.³⁵ After giving instances where a court would be allowed to depart from the mandatory minimum sentence, the previous version of the statute warned that under no circumstances should a defendant’s addiction to or abuse of drugs be considered cause to provide for a more lenient sentence, one which could include drug abuse treatment or drug offender probation.³⁶ While the statute left some room for interpretation,³⁷ the Legislature made sure that subsection (5) could not be left to the judge’s discretion, as it singled out the one ground which can never be a “reasonably justified” reason for departure.³⁸ Conversely, a judge had—and still has—much more discretion to give a person more time in prison, even if the defendant does not score prison time.³⁹ For example, a judge may sentence a person up to the maximum allowed by statute consecutively or concurrently,

tion as it was Papa’s first offense. *Id.* Papa was eventually released early by Governor Pataki after serving twelve years. *Id.*

33. BLACK’S LAW DICTIONARY 502 (9th ed. 2009).

34. A defendant’s score is based upon a scoresheet created by the legislature for the State Attorney’s use. *See* FLA. STAT. § 921.0014(1)(a) (2008). The scoresheet ranks crimes from one to ten and allots points for each category of crime. FLA. STAT. § 921.0014(1)(b). Furthermore, the scoresheet takes into account the defendant’s prior crimes, primary offense for the current charge, as well as additional offenses for the current charge. *Id.* The score may also increase if there is restitution or victim injury as a result of the crime. *See id.* For example, if there is slight physical injury, the score is increased by four points per slight injury. *See id.* In addition to these points, the statute also assesses points for prior serious felonies (thirty points for a level eight, nine, or ten felony) and possession of a firearm (eighteen sentence points). *Id.* The statute also calls for “sentence multipliers” which also increase the score depending on the type of primary offense committed. FLA. STAT. § 921.0014(1)(b).

35. FLA. STAT. §§ 921.0026, .0016(4) (2008).

36. FLA. STAT. § 921.0026(3) (2008); *see* FLA. STAT. § 948.20 (2009) (discussing drug offender probation).

37. FLA. STAT. § 921.0026(1) (2008) (“Mitigating factors to be considered include, but are not limited to . . .”).

38. *See* Clemens & Stancil, *supra* note 9, at 56 (addressing FLA. STAT. § 921.0016(5) (2008)).

39. *See id.* at 55; *see* FLA. STAT. § 921.0014(2) (2008) (stating that where a defendant scores less than or equal to forty points—which means the defendant does not score mandatory prison time—“the court, in its discretion, may increase the total sentence points by up to, and including, 15 percent”).

giving the judge more leeway and more ability to make the sentence as harsh as possible if he deems the defendant worthy.⁴⁰ However, under the old version, if an addicted defendant committed a crime which—taken together with his previous offenses or taken alone—scored him mandatory prison time, the judge could not, even if the judge thought it best, send the defendant to a drug treatment program.⁴¹ These laws prohibiting downward departures, based on the defendant's addiction, lead to such instances where a forty-five year-old father of three received a mandatory minimum sentence of twenty-five years in prison for drug trafficking because he purchased 1200 pills of prescription painkillers.⁴² While the Defendant was eventually pardoned by Governor Charlie Crist, the fact still remains that a judge is severely limited by current downward departure and mandatory minimum laws in Florida.⁴³

With the new amendments, however, such events will be less likely to occur since the Legislature added paragraph m of subsection 2 to section 921.0026 of the *Florida Statutes*.⁴⁴ In this amended version, the statute now allows the judge to depart from the lowest permissible prison sentence so long as the offense is a nonviolent felony and the court finds that the defendant is amenable to the drug treatment services available through drug courts or drug offender probation.⁴⁵

III. CASE LAW UNDER THE PREVIOUS VERSIONS OF THE *FLORIDA STATUTES*

The amendments proposed by Senate Bill 1726 affected a number of Florida statutes, all of which reference sentencing options for drug offenders.⁴⁶ These former versions of the statutes created difficulties for trial judges who could not sentence a particular offender to treatment rather than prison.⁴⁷ Because all of these statutes relate to how a judge chooses to sen-

40. See Clemens & Stancil, *supra* note 9, at 55 (giving an example of a judge who sentenced a defendant to ten years in state prison for “a felony habitual driving while license revoked . . . possessing a small amount of cocaine.” The sentence for each charge was five years and the judge decided to run the sentence consecutively rather than concurrently).

41. See *id.* at 56.

42. *Id.* at 57.

43. *Id.* (noting that a pardon like this is rare, and that there are not enough pardons to “prevent the number of injustices that trial court judges could if they had retained traditional sentencing discretion”).

44. See Act effective July 1, 2009, ch. 2009-64, 2009 Fla. Laws 580 (codified as amended in FLA. STAT. §§ 397.334, 921.0026, 948.06, .08, .16, .20, 984.345).

45. *Id.* at 583.

46. CS for SB 1726, § 2, 2009 Leg. Reg. Sess. (Fla. 2009) (first engrossed).

47. See *State v. Crews*, 884 So. 2d 1139, 1140 (Fla. 2d Dist. Ct. App. 2004) (stating that the trial judge's only reason for giving the defendant probation, when the defendant scored

tence drug offenders, judges must be careful to “‘give full effect to *all* statutory provisions and construe related statutory provisions in harmony with one another.’”⁴⁸ For this reason, the following cases point to these specific statutes and indicate ways in which the courts decided to interpret them together. Furthermore, these cases illustrate the problems posed by former subsection 3 of section 921.0026 of *Florida Statutes*, as well as the former versions of sections 948.20 and 948.01.

A. Jones v. State

The Supreme Court of Florida’s decision in *Jones v. State*⁴⁹ highlights the positive effects of drug offender probation and other treatment-based drug programs for offenders.⁵⁰ However, the case is also proof that the court splits in its interpretation of statutes concerning the sentencing guidelines for drug offenders, as *Jones* was decided by a four-to-three majority, with the Chief Justice at the time, Justice Wells, dissenting.⁵¹ The case revolves around an appeal from a defendant who was denied a downward departure by the appellate court.⁵² The defendant, a chronic drug abuser, was charged with possession of crack cocaine.⁵³ The Supreme Court of Florida reversed the appellate court’s ruling, finding that section 948.01(13) of the *Florida Statutes* allowed the judge the discretion to “place the defendant on drug offender probation [if] the defendant is a chronic [drug] abuser whose criminal conduct is in violation of chapter 893” of the *Florida Statutes* dealing with drug crimes.⁵⁴ The Court noted that the plain language of the statute indicated that the legislature meant section 948.01(13) as “an alternative sen-

mandatory prison time, was because of the defendant’s drug addiction. However, noting that the statutes did not allow such a reason to be valid for the purposes of departures, the appellate court overruled the trial court’s sentencing).

48. *State v. Langdon*, 978 So. 2d 263, 264 (Fla. 4th Dist. Ct. App. 2008) (quoting *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992)).

49. 813 So. 2d 22 (Fla. 2002).

50. *See id.* at 25–26.

51. *Id.* at 27 (Wells, C.J., dissenting).

52. *Id.* at 24 (majority opinion).

53. *Id.* at 23.

54. *Jones*, 813 So. 2d at 24. When *Jones* was decided in 2002, section 948.01 included subsection 13, which concerned itself with drug offender probation. *See* Fla. Stat. § 948.01(13) (2002). However, in 2004, the Legislature renamed subsection 13 to section 948.20, and titled it “Drug Offender Probation.” *See* FLA. STAT. § 948.20 (2009). In the new section 948.20, a defendant may only qualify for drug offender probation if he or she violated section 893.13(2)(a)—prohibiting the purchase of certain controlled substances—or section 893.13(6)(a)—prohibiting the possession of certain controlled substances. *See State v. Roper*, 915 So. 2d 622, 624 (Fla. 5th Dist. Ct. App. 2005).

tencing scheme for drug abusers that is outside the sentencing guidelines.”⁵⁵ By implementing statutes such as section 948.01(13), the legislative intent clearly supported policy favoring treatment over incarceration and the importance of “breaking the revolving door cycle of drugs and crime.”⁵⁶ In his dissent, Chief Justice Wells focused on section 921.0026(3) of the *Florida Statutes* and its explicit bar on downward departures based on the defendant’s drug addiction.⁵⁷ Wells argued “that the majority fail[ed] to recognize and follow . . . existing precedent in which this Court made clear that sentencing alternatives [such as drug offender probation] should not be used to thwart sentencing guidelines.”⁵⁸ The majority and minority opinions speak to the difficulty present in determining legislative intent and interpreting seemingly conflicting statutes regarding the appropriate sentencing of drug abusers.⁵⁹

B. *State v. Crews*

In *State v. Crews*,⁶⁰ the defendant was charged and convicted of delivery of cocaine within 1000 feet of a school, which carried a mandatory minimum sentence of three years in state prison, as well as one charge of possession of cocaine.⁶¹ However, the trial court sentenced the defendant to 18 months imprisonment for the first charge, followed by 18 months of probation for the second charge.⁶² While “section 893.13(1)(c)(1) provides that a person who commits the crime of delivering cocaine within 1000 feet of a school ‘must be sentenced to a minimum term of imprisonment of 3 calendar years,’” the trial court judge departed from the minimum sentence because of the defendant’s drug addiction.⁶³ In this case, the appellate court focused on the application of section 948.01 of the *Florida Statutes* to the defendant’s circumstances.⁶⁴ Section 948.01 states that a court may place a defendant on probation if the defendant is “not likely again to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require

55. *Jones*, 813 So. 2d at 24.

56. *Id.* at 27 n.5.

57. *Id.* at 28 (Wells, C.J., dissenting).

58. *Id.*

59. *See generally id.*

60. 884 So. 2d 1139 (Fla. 2d Dist. Ct. App. 2004).

61. *Id.* at 1140.

62. *Id.*

63. *Id.* (quoting FLA. STAT. § 893.13(1)(c)(1) (2009)). “The only reason I can give [the departure] is the drug addiction.” *Id.*

64. *Crews*, 884 So. 2d at 1141–42.

that the defendant presently suffer the penalty imposed by law”⁶⁵ The appellate court found that the statute “appear[ed] to apply broadly to permit a judge to withhold a sentence and impose a term of probation in lieu of imprisonment;” however, such an interpretation had been barred by the Supreme Court of Florida.⁶⁶ Basing its interpretation of the application of section 948.01 on previous rulings, the appellate court found that, since section 893.13(1)(c)(1) was enacted after section 948.01, the trial court was prohibited from sentencing the defendant to probation despite his addiction.⁶⁷ The appellate court also noted that issuing probationary sentences when the scoresheet called for a minimum term of imprisonment was considered a downward departure.⁶⁸ The court finally noted that the trial court was further barred from its downward departure due to section 921.0026(3) of the *Florida Statutes*, which states that a defendant’s addiction can never be considered as a valid reason for departure and reversed the trial court’s ruling.⁶⁹

C. State v. Roper

In *State v. Roper*,⁷⁰ the appellate court reversed the lower court’s ruling, sentencing the Defendant to drug offender probation for five years—though he scored a mandatory 17.925 months in state prison—because the trial court found the Defendant to be a chronic drug user.⁷¹ In its analysis, the appellate court noted that the Defendant wrongfully relied on the Supreme Court of Florida’s decision in *Jones* because that court concerned itself with the previous version of the drug offender statute.⁷² Because the new version of the drug offender statute did not include the Defendant’s offense of delivery and possession of a controlled substance with intent to sell, the trial court erred

65. *Id.* at 1141 (quoting FLA. STAT. § 948.01 (2008)).

66. *Id.* at 1141–42.

In *McKendry*, the [S]upreme [C]ourt [of Florida] . . . noted “accepted rules of statutory construction” that “a specific statute covering a particular subject area always controls over a statute covering the same and other subjects in more general terms” and “when two statutes are in conflict, the later promulgated statute should prevail as the last expression of legislative intent.”

Id. at 1142 (quoting *McKendry v. State*, 641 So. 2d 45, 46 (Fla. 1994)).

67. *Id.* at 1143.

68. *Crews*, 884 So. 2d at 1143 (citing *State v. VanBebber*, 848 So. 2d 1046, 1053 (Fla. 2003) (per curiam); *State v. Scott*, 879 So. 2d 99, 100 (Fla. 2d Dist. Ct. App. 2004); *State v. Brannum*, 876 So. 2d 724, 725 (Fla. 5th Dist. Ct. App. 2004)).

69. *Id.*; see FLA. STAT. § 921.0026(3) (2002) (amended by Act effective July 1, 2009, ch. 2009-64, 2009 Fla. Laws 1, 1 (codified as amended in FLA. STAT. §§ 397.334, 921.0026, 948.06, .08, .16, .20, 985.345)).

70. 915 So. 2d 622 (Fla. 5th Dist. Ct. App. 2005).

71. *Id.* at 623.

72. *Id.* at 624.

when it sentenced the Defendant to drug offender probation.⁷³ Though the court realized that the Defendant was a good candidate for drug offender probation given his addiction to drugs, the appellate court noted that the trial court had no authority to depart from the mandatory minimum without a valid reason.⁷⁴ Unfortunately, though, there was a better alternative for the Defendant, the court's hands were tied by the statute and mandatory sentencing guidelines.⁷⁵

D. *State v. Langdon*

Finally, the appellate court in *State v. Langdon*⁷⁶ reiterated that “[w]here possible, courts must give full effect to all statutory provisions and construe related statutory provisions in harmony with one another.”⁷⁷ In doing so, the court ruled that the lower court’s decision to place the Defendant, who was charged with “possession of cocaine with intent to sell or deliver,” on drug offender probation was an impermissible downward departure.⁷⁸ The court found that a close inspection of the relevant statutes revealed that *Florida Statutes* section 948.034 did not permit a defendant to enter into a community residential drug center if the defendant had previous felony convictions which were not drug related.⁷⁹ Because the Defendant had multiple prior possession of cocaine convictions and a prior conviction for grand theft, the Defendant was not eligible for the “alternative to the sentencing guidelines” offered by the trial court.⁸⁰ The appellate court’s interpretation of the relevant statutes was contrary to how the trial court interpreted the statutes.⁸¹ The trial court did not read section 948.034 with sections 893.13 and 921.187 because section 948.034 did not reference the later sections; however, the appellate court explained that it does not matter if the statutes reference each other specifically.⁸² Rather, it is enough that the sta-

73. *Id.*

74. *Id.* (citing *State v. Tyrrell*, 807 So. 2d 122, 125 (Fla. 5th Dist. Ct. App. 2002)).

75. *Roper*, 915 So. 2d at 624; see Clemens & Stancil, *supra* note 9, at 55.

76. 978 So. 2d 263 (Fla. 4th Dist. Ct. App. 2008).

77. *Id.* at 264 (quoting *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992)).

78. *Id.* at 263.

79. *Id.* at 264; see FLA. STAT. § 948.034 (2009) (explaining the criteria for entering a residential drug treatment center).

80. *Langdon*, 978 So. 2d at 264–65.

81. *Id.* at 265.

82. *Id.*; see FLA. STAT. § 921.187(1)(a) (2009) (explaining that a defendant who commits certain drug crimes may be required to serve a term of probation in light of serving time in prison); FLA. STAT. § 893.13(10)–(11) (2009) (stating, in relevant part, that in order to qualify for residential drug treatment or probation, the defendant must not have been convicted of any

tutes “deal with sentencing combined with drug abuse control.”⁸³ The policy behind the interpretation, the court noted, was that sentencing alternatives in criminal cases were to be “used in a manner that [would] best serve the needs of society, punish criminal offenders, and provide the opportunity for rehabilitation.”⁸⁴

IV. WHAT CHANGED: SENATE BILL 1726’S AMENDMENTS TO *FLORIDA’S STATUTES*

In its analysis report on Senate Bill 1726, the Florida Senate explained that the “bill expands the potential use of postadjudicatory treatment-based drug court programs as a sentencing option for a limited, specified group of nonviolent felony defendants.”⁸⁵ The report also states that the bill will have positive fiscal impacts, specifically that the changes will save approximately \$11.8 million in prison costs due to the reduced amount of offenders convicted.⁸⁶ In addition to focusing on the statutes mentioned above, the bill also makes changes to section 397.334 of the *Florida Statutes*, which deals with Florida’s drug courts.⁸⁷ Accordingly, the bill analysis repeatedly references one legislative group’s research regarding the state of drug courts in Florida.⁸⁸ For this reason, this section will begin with a brief description and background on Florida’s drug court system as it is explicitly connected with downward departures and sentencing alternatives. The rest of this section will focus on the various statutes affected by the bill and the positive changes the bill makes to the previous legislation.

other felonies, other than those drug crimes listed, including possession, purchase, selling/delivering of certain drugs).

83. *Langdon*, 978 So. 2d at 265.

84. *Id.* (quoting FLA. STAT. § 921.187(1)).

85. Fla. S. Comms. on Crim. and Civil Just. Appropriations, PCS for SB 1726 (2009) Staff Analysis 1 (Mar. 27, 2009), available at <http://www.flsenate.gov/data/session/2009/Senate/bills/analysis/pdf/2009s1726-pcs.ja.pdf> [hereinafter SB 1726 Staff Analysis].

86. *Id.*

87. *Id.*; see FLA. STAT. § 397.334 (2008).

88. See SB 1726 Staff Analysis, *supra* note 85, at 2 (citing FLA. LEGISLATURE, OFFICE OF PROGRAM POLICY ANALYSIS & GOV’T ACCOUNTABILITY, REPORT NO. 09–13, 2 (Mar. 2009), available at <http://www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/0913rpt.pdf> [hereinafter OPPAGA]).

A. *The Amendments' Impact on Drug Courts*

1. Florida's Drug Court System

The drug court program started in Miami, Florida by then-Circuit Court Judge Herbert Klein in 1989.⁸⁹ Judge Klein believed that a specialized treatment program like drug courts was the best way to handle the increase of drug cases nation-wide.⁹⁰ As one judge explained, “[b]asically, we have had a revolving door phenomenon where we take an offender, lock him up for whatever appropriate period of time, and have him back out in the community without addressing the underlying source of his criminal behavior.”⁹¹ This “revolving door” refers directly to the high recidivism rates for drug offenders which continues today.⁹² The national recidivism rate ranges from sixty-five to eighty percent, meaning that between sixty-five and eighty percent of drug “offenders continue to commit crimes after being released from custody.”⁹³ Furthermore, the Bureau of Justice Assistance found that “only 28% of prisons had substance abuse programs, and that only 7% of those programs provided a comprehensive level of services that included drug counseling, treatment, and transitional planning.”⁹⁴ Because of this information, Florida’s drug courts strive to provide rehabilitation and “proactive court monitoring of offenders while in treatment” in order to reduce recidivism.⁹⁵ A drug offender placed in either the pretrial or postadjudicatory⁹⁶ drug court can expect to receive increased, personalized, and constant supervision provided in large part by the judge himself.⁹⁷ Drug courts not only reduce reci-

89. REPORT ON FLORIDA’S DRUG COURTS, *supra* note 5, at 3.

90. *Id.*; see also Andrew Armstrong, Comment, *Drug Courts and the De Facto Legalization of Drug Use for Participants in Residential Treatment Facilities*, 94 J. CRIM. L. & CRIMINOLOGY 133, 139–40 (2003).

91. *Armstrong*, *supra*, note 90 at 140 (quoting JAMES L. NOLAN, REMEMBERING JUSTICE: AMERICAN DRUG COURT MOVEMENT 45 (2003)).

92. Note, *Winning the War on Drugs: A “Second Chance” for Nonviolent Drug Offenders*, 113 HARV. L. REV. 1485, 1491 (2000).

93. *Id.* at 1491 n.52.

94. *Id.* at 1492.

95. REPORT ON FLORIDA’S DRUG COURTS, *supra* note 5, at 4.

96. OPPAGA, *supra* note 88, at 2 (noting that the pretrial division of the drug court program is formatted for first-time drug offenders are placed in county probation rather than in state prison. Usually, after the offender has successfully completed the program, his or her charges are dropped. Postadjudicatory programs cater to “non-violent drug addicted offenders who typically have prior convictions.” After the offender completes the program, the consequences of their charges are usually mitigated and adjudication withheld).

97. See REPORT ON FLORIDA’S DRUG COURTS, *supra* note 5, at 4 (“[J]udge[s] monitored offenders through frequent court appearances to encourage good behavior and sanctioned non-compliance in a more informal, stream-lined, and structured process.”).

divism by providing the treatment a prison cannot, they also reduce costs substantially.⁹⁸ The eligibility for drug courts depends on the criteria set by the individual circuit drug court programs; however, most only service “offenders who have non-violent felony drug or drug-related offenses and who have no history of violence, drug trafficking, or drug sales.”⁹⁹

2. Modifications to *Florida Statutes* Section 397.334

Section 397.334 of the *Florida Statutes* describes and allows for the drug court system in Florida.¹⁰⁰ The Florida Legislature enacted section 397.334 in 2001 after the Supreme Court Task Force on Treatment-Based Drug Courts proposed that the legislature take action and “require[] each judicial circuit to establish a treatment-based drug court program.”¹⁰¹ In addition, section 397.334 calls on the drug courts to establish and adhere to ten components of drug courts.¹⁰² The rest of section 397.334 establishes administrative guidelines for drug courts.¹⁰³ The amendments passed in May 2009 add to section 397.334 by giving the judge certain qualifications for allowing an offender to take advantage of the drug court program as a form of downward departure.¹⁰⁴ Furthermore, the amendments provide that offenders in the drug court program who violate their probation solely based on a failed

98. *Id.* at 11–12. The National Association of Drug Court Professionals reported that “incarceration of drug offenders costs [range] between \$20,000 and \$50,000 a year.” *Id.* at 11. However, “participation in drug court costs” [only] \$2500 to \$4000 per person. *Id.*

99. OPPAGA, *supra* note 88, at 2.

100. FLA. STAT. § 397.334 (2009).

101. REPORT ON FLORIDA’S DRUG COURTS, *supra* note 5, at 8.

102. FLA. STAT. § 397.334(4)(a)–(j). These ten components are:

(a) Drug court programs integrate alcohol and other drug treatment services with justice system case processing; (b) Using a nonadversarial approach, prosecution and defense counsel promote public safety while protecting participants’ due process rights; (c) Eligible participants are identified early and promptly placed in the drug court program; (d) Drug court programs provide access to a continuum of alcohol, drug, and other related treatment and rehabilitation services; (e) Abstinence is monitored by frequent testing for alcohol and other drugs; (f) A coordinated strategy governs drug court programs responses to participants’ compliance; (g) Ongoing judicial interaction with each drug court program participant is essential; (h) Monitoring and evaluation measure the achievement of program goals and gauge program effectiveness; (i) Continuing interdisciplinary education promotes effective drug court program planning, implementation, and operations; (j) Forging partnerships among drug court programs, public agencies, and community-based organizations generates local support and enhances drug court program effectiveness.

Id.

103. *See* FLA. STAT. § 397.334.

104. *See* FLA. STAT. § 397.334(3)(a) (stating that entry into the program “as a condition of probation or community control” by the sentencing judge “must be based upon the sentencing court’s assessment of the defendant’s criminal history, substance abuse, . . . amenability to the services of the program, [and] total sentence points”).

substance abuse test will have the violation dismissed.¹⁰⁵ These additions stress the importance of the offender's need for treatment and rehabilitation which the former version of the statute failed to do.¹⁰⁶ The former version of section 397.334 explained that the purpose of drug courts in Florida was to process offenders with substance abuse problems "in such a manner as to appropriately address the severity of the identified substance abuse problem through treatment services tailored to the individual needs of the participant."¹⁰⁷ However, the statute remained silent as to what specifically about the offender's needs the judge should inquire about when considering whether the offender should be moved to the drug court program as a sentencing alternative.¹⁰⁸ The additions, conversely, now require the judge to think about the offender's personal criminal history along with his or her individual substance abuse, which may lead to an increase of offenders who receive treatment.¹⁰⁹ As more offenders enter drug court rather than prison, the recidivism rate will continue to decrease among offenders while public safety and savings will increase.¹¹⁰ Additionally, the changes to section 397.334 make drug courts more forgiving as offenders begin weaning themselves off drugs.¹¹¹ As previously noted, drug court judges now must dismiss violations of the drug court's terms when those violations are due to failing drug tests, recognizing that substance abusers have a difficult time resisting drugs during the beginning stages of treatment.¹¹² Overall, the amendments to section 397.334 not only reinforce the individuality of drug courts and increase the chances that an offender may be granted a downward departure to participate in drug courts, but they also direct drug court judges and sentencing judges towards treatment rather than punishment.¹¹³

105. FLA. STAT. § 397.334(3)(b).

An offender who is sentenced to a postadjudicatory drug court program and who . . . is the subject of a violation of probation or community control . . . based solely upon a failed or suspect substance abuse test administered . . . shall have the violation of probation or community control heard by the judge presiding over the postadjudicatory drug court program. The judge shall dispose of any such violation, after a hearing on or admission of the violation . . .

Id.

106. See FLA. STAT. § 397.334.

107. FLA. STAT. § 397.334(1) (2008).

108. See FLA. STAT. § 397.334.

109. See FLA. STAT. § 397.334(3)(a)(2009); see SB 1726 Staff Analysis, *supra* note 85.

110. See OPPAGA, *supra* note 88, at 4–5.

111. See *id.*

112. See FLA. STAT. § 397.334(3)(b).

113. See FLA. STAT. § 397.334.

B. *The Amendments' Impact on Downward Departures*

While the change to section 921.0026(2) of the *Florida Statutes* is not as extensive as the amendments to section 397.334, what the new act adds will have a significant impact on sentencing in Florida.¹¹⁴ As stated earlier, section 921.0026(2) describes mitigating circumstances which could permit a judge to give an offender a lesser sentence than the offender stands to receive via the sentencing scoresheet.¹¹⁵ Previously, subsection 3 indicated that an offender's substance abuse or addiction could never be used as a mitigating circumstance.¹¹⁶ However, the new additions to section 921.0026 explicitly allow for the sentencing court to take into consideration the defendant's substance abuse as long as the defendant scores fifty-two sentence points or fewer, is amenable to treatment-based drug court, is eligible to participate in the program, and was charged with a nonviolent felony.¹¹⁷ This amendment works in conjunction with the changes to drug courts and drug offender probation as it permits the sentencing judge to give a drug offender a chance to complete one of these programs even though he or she may score mandatory prison time.¹¹⁸ Allowing downward departures based on the defendant's substance abuse or addiction indicates that the legislature realized that in order to control the increased prison admission rates and expenses, it would have to modify its blanket statement forbidding downward departures based on substance abuse in every circumstance.¹¹⁹ Savings to society, however, also make the amendments to section 921.0026 worthwhile since "hurt people hurt people," meaning that by limiting drug treatment availability to offenders, drug addicted offenders will likely commit violent crimes to others.¹²⁰ Other monetary and societal benefits include keeping prisons full of actual violent-offenders rather than those who are drug-addicted.¹²¹ By giving the judge additional discretion, the judge may place a defendant in drug court or drug offender probation rather than sending him or her to jail, where

114. See FLA. STAT. § 921.0026 (2009).

115. FLA. STAT. § 921.0026(2) (2008).

116. FLA. STAT. § 921.0026(3) (2008).

117. FLA. STAT. § 921.0026(2)(m) (2009).

118. See *id.*

119. See SB 1726 Staff Analysis, *supra* note 85, at 1; see also 2007–2008 FLA. DEP'T OF CORR. ANN. REP., *supra* note 3, at 16 (stating its expenditures for one prisoner per year totals \$20,108); GRAY, *supra* note 2, at 36 (stating that prison overcrowding, which drains state budgets, is due in large part to mandatory minimums).

120. See GRAY, *supra* note 2, at 189.

121. See *id.* at 36 ("[W]ardens throughout the country are routinely forced to grant an early release to violent offenders so that nonviolent *drug* offenders can serve their sentences in full.").

the drug addict may end up taking a bed that a rapist or other violent offender could have occupied.¹²²

C. *The Amendments' Impact on Drug Offender Probation*

1. Drug Offender Probation in Florida

Drug offender probation is a type of court ordered probation which "is a more intensive form of supervision."¹²³ An offender may be put in drug offender probation either as a condition of his or her deal with the State Attorney, as a part of the judge's sentence, or through the Florida Parole Commission.¹²⁴ Drug offender probation includes the standard supervisions of regular probation combined with special conditions tailored to the needs of the offender.¹²⁵ For example, a judge may require a drug offender to attend Narcotics Anonymous meetings, keep a curfew, get drug tested regularly, or attend an inpatient or outpatient drug treatment program.¹²⁶ Drug offender probation, like any type of probation, constitutes a sentencing alternative and downward departure since probation provides a way for an offender to avoid spending his or her whole sentence in state prison, and, like drug courts, reinforces "rehabilitation rather than punishment."¹²⁷ Furthermore, judges view drug offender probation as a privilege rather than a right and reserve the broad discretion of determining what the individual offender deserves or requires as conditions of probation.¹²⁸ However, just as a judge has the discretion to place an offender in drug offender probation, a judge is equally given the discretion to determine whether the probation has been violated and hand down a prison sentence.¹²⁹

122. *See id.*

123. 2007–2008 FLA. DEP'T OF CORR. ANN. REP., *supra* note 3, at 71.

124. *See id.*

125. *Id.*

126. *See id.*

127. *Lawson v. State*, 969 So. 2d 222, 229 (Fla. 2007) (quoting *Bernhardt v. State*, 288 So. 2d 490, 495 (Fla. 1974)).

The underlying concept of probation is rehabilitation rather than punishment and presupposes the fact that probationer is not in prison confinement. The purpose of the granting of probation . . . is rehabilitation of one who has committed the crime charged without formally and judicially branding the individual as a convicted criminal and without consequent loss of civil rights and other damning consequences.

Bernhardt, 288 So. 2d at 495 (citations omitted).

128. *Lawson*, 969 So. 2d at 229.

129. *See id.*

2. Modifications to *Florida Statutes* Section 948.20

The pre-amended version of section 948.20 of the *Florida Statutes* explains that, in order to qualify for drug offender probation, the defendant must have been charged with either purchasing or possessing narcotics in addition to being a chronic substance abuser.¹³⁰ The statute further provides that the judge may “stay and withhold the adjudication of guilt [or] . . . stay and withhold the imposition of sentence and place the defendant on drug offender probation” or into a postadjudicatory treatment-based drug court program in lieu of a prison sentence.¹³¹ The amended version of the statute expands the eligibility requirements for drug offender probation by allowing defendants who have committed a burglary, trespassing, or other nonviolent felony to qualify for drug offender probation.¹³² Additionally, the amendment also states that no matter what nonviolent felony the defendant has been charged with, the defendant’s total sentence scoresheet points must not exceed fifty-two.¹³³ The expanded qualifications only affect those who committed crimes on or after July 1, 2009, however, preventing these amendments from reaching back and affecting previous cases and rulings.¹³⁴ Because drug offender probation is linked to drug courts, the changes to section 948.20 will likely have the same positive fiscal and societal impacts as the changes to section 397.334.¹³⁵

D. *Why Change?*

As noted before, the anti-drug sentiment created by Nixon’s “War on Drugs” influenced many legislatures to create harsh drug laws and strict sentencing guidelines for drug offenders, which swiftly increased prison popula-

130. FLA. STAT. § 948.20 (2008) (explaining that the court must hold a hearing to determine that the defendant qualifies as a chronic substance abuser).

131. *Id.*

132. Act effective July 1, 2009, ch. 2009-64, 2009 Fla. Laws 583 (codified as amended in FLA. STAT. §§ 397.334, 921.0026, 948.06, .08, .16, .20, 948.345).

“Forcible felony” means treason; murder; manslaughter; sexual battery; carjacking; home-invasion robbery; robbery; burglary; arson; kidnapping; aggravated assault; aggravated battery; aggravated stalking; aircraft piracy; unlawful throwing, placing, or discharging of a destructive device or bomb; and any other felony which involves the use or threat of physical force or violence against any individual.

FLA. STAT. § 776.08 (2009).

133. Ch. 2009-64, 2009 Fla. Laws at 583.

134. *See id.*

135. *See Lawson v. State*, 969 So. 2d 222, 232 (Fla. 2007); SB 1726 STAFF ANALYSIS, *supra* note 85, at 1.

tions.¹³⁶ The harsh drug laws translate into law enforcement officials who focus their efforts on incarcerating drug addicts rather than violent criminals—which further reinforce a national “demonization” of drug addicted criminals.¹³⁷ While changing, many Americans still believe drug addiction is a choice and drug addicts should be jailed to keep them off the streets.¹³⁸ In decades past, these feelings were steered towards alcoholics during the time of prohibition; however, many realize today that alcoholism is a disease which can—and should—be treated rather than punished.¹³⁹ Unfortunately, these feelings are not as widely applied to drug addicts, although there has been increased education and awareness about drug addiction.¹⁴⁰ For example, Florida’s Office of Drug Control emphasizes that, while “[t]he initial decision to take drugs is often voluntary,” drug users crave drugs so much so that their bodies cannot function without the drugs and drug addicts reach a point where they can no longer exert self-control.¹⁴¹ Further, “[b]ecause of the way drug use alters the structure and function of the brain, drug addiction is regarded as comparable to other diseases like heart disease.”¹⁴² Due to reports like this and others which bring drug addiction into the medical, rather than the criminal arena, legislatures, like Florida, have amended their harsh drug laws to accommodate for drug treatment.¹⁴³ Furthermore, the changes reflect the increased attention on the constitutionality of strict drug laws and make efforts to end the criminalization of drug addicts.¹⁴⁴

136. See generally BAUM, *supra* note 18, at 259 (discussing an instance in 1988 where Florida State University economists discovered that drug arrests in Florida doubled since 1982). Skeptical, the economists compared their statistics with those from Illinois. *Id.* They found the same thing: “Drug arrests in Illinois rose 69 percent” in ten years. *Id.*

Florida and Illinois were typical in their zeal to send drug offenders to prison at the expense of incarcerating other, perhaps more dangerous, criminals. The War on Drugs doubled the nation’s prison population during the Reagan administration. The portion of state prisoners inside for drugs went from one in fifteen to one in three, and 85 percent were in for mere possession.

Id.

137. See GRAY, *supra* note 2, at 123.

138. See *id.*

139. *Id.* at 124.

140. See *id.* at 123 (discussing one professor at the University of California at Irvine who invites drug addicts from a local treatment center to his classroom to help students realize that drug addicts are humans with “needs and desires, goals and failings, just like everyone else”).

141. FLORIDA’S DRUG CONTROL STRATEGY, *supra* note 1, at 68.

142. *Id.*

143. See Act effective July 1, 2009, ch. 2009-64, 2009 Fla. Laws 578-85 (codified as amended in FLA. STAT. §§ 397.334, 921.0026, 948.06, .08, .16, .20, 948.345).

144. GRAY, *supra* note 2, at 124–25 (explaining that many current drug laws violate the precedent set by the United States Supreme Court which held that punishing a person “for the disease of drug addiction violated the Constitution’s prohibition on cruel and unusual punishment”).

V. THE CHANGES APPLIED TO EARLIER CASES

While the changes Senate Bill 1726 made to how drug offenders are sentenced seem positive on paper, the actual effects of the act have not yet been seen. However, this section attempts to predict how practical these changes are by using the fact patterns from previous cases and applying the new versions of the statutes to those defendants to determine if the defendants would have had different outcomes. This section does not discuss *Jones* since the amendments would not have changed the outcome of the defendant's case.

In *Crews*, the Defendant was charged with delivery of cocaine within 1000 feet of a school and possession of cocaine.¹⁴⁵ The trial judge chose to give the Defendant a downward departure based on his drug addiction, which the appellate court found to be against the explicit language of section 921.0026 of the *Florida Statutes*.¹⁴⁶ The appellate court's decision hinged on sections 921.0026 and the 2004 version of 948.01, both of which were changed by Senate Bill 1726.¹⁴⁷ If the Defendant had been tried under the new amendments, the appellate court may have found that the trial court judge's downward departure was not an abuse of discretion, as the new laws explicitly allow judges to consider substance abuse as the sole factor for departure.¹⁴⁸ Furthermore, since Senate Bill 1726 stresses rehabilitation over incarceration, the Defendant would have qualified for drug offender probation under revised section 948.20.¹⁴⁹ The appellate court ruled that section 948.034 barred the Defendant from enrolling in probation because the statute did not list the Defendant's charge as one which qualifies; however, section 948.20 indicates that a defendant qualifies for drug offender probation as long as the court finds the defendant is a chronic substance abuser and has committed any nonviolent felony.¹⁵⁰ In *Crews*, the trial judge would have been given more discretion in his sentencing and, while it could still be ap-

145. *State v. Crews*, 884 So. 2d 1139, 1140 (Fla. 2d Dist. Ct. App. 2004).

146. *Id.* at 1140, 1143.

147. *See id.* at 1142-43; CS for SB 1726, §2, 2009 Leg. Reg. Sess. (Fla. 2009) (first engrossed).

148. *See* ch. 2009-64, 2009 Fla. Laws at 580. Departure from the lowest permissible sentencing for substance abuse convictions is subject to the defendant's Criminal Punishment Code scoresheet totaling less than fifty-two points and a court determination "that the defendant is amenable to the services of a postadjudicatory treatment-based drug court program and is otherwise qualified to participate in the program." *Id.*

149. *See id.*

150. *See Crews*, 884 So. 2d at 1140; ch. 2009-64, 2009 Fla. Laws at 583.

pealed, the appellate court would have likely upheld the trial court's sentencing based on the amendments the new law provides.¹⁵¹

In *Roper*, the Defendant was charged with delivery and possession of cocaine with intent to sell or deliver.¹⁵² The Defendant scored almost eighteen months in state prison, yet the trial court found that he "was a chronic drug user, and placed him on drug offender probation for five years."¹⁵³ The appellate court overruled that sentence finding that the statute did not allow for the Defendant to enter drug offender probation.¹⁵⁴ Under the new version, Mr. Roper would have been one of the many affected and spared prison since the amendment includes all nonviolent felonies as qualified charges for drug offender probation.¹⁵⁵ In this case, the appellate court fully relied on section 948.20; therefore, Mr. Roper's fate certainly would have been different.¹⁵⁶ The final paragraph of the appellate court's decision reinforces that many courts are restricted to the statutes regardless of whether they believe the sentence is appropriate for the defendant or not:

[w]e acknowledge the good intentions of the trial judge to offer drug treatment to Mr. Roper, . . . [n]evertheless, . . . [t]he Criminal Punishment Code requires a sentencing court to impose not less than the lowest permissible sentence calculated on the scoresheet, unless there is evidence that supports a valid reason for a downward departure.¹⁵⁷

It follows that this sentiment and similar rulings influenced the legislature to amend the sentencing statutes.¹⁵⁸

Finally, in *Langdon*, the appellate court found that the trial court granted the Defendant a downward departure for which she did not qualify.¹⁵⁹ The appellate court revoked the defendant's sentence due to section 948.034's stipulation that the Defendant have no prior non-drug felony convictions.¹⁶⁰ Again, the court's ruling would have been different if the amendments were effective in 2008, as the Defendant would have been able

151. See ch. 2009-64, 2009 Fla. Laws at 580, 583.

152. *State v. Roper*, 915 So. 2d 622, 623 (Fla. 5th Dist. Ct. App. 2005).

153. *Id.*

154. *Id.* at 623–24. Again, note that the statute prior to the amendments only provided drug offender probation to a defendant who was charged with possession or purchase of controlled substances. See FLA. STAT. § 948.20 (2008).

155. See ch. 2009-64, 2009 Fla. Laws at 583.

156. See *Roper*, 915 So. 2d at 624.

157. *Id.*

158. See SB 1726 STAFF ANALYSIS, *supra* note 85, at 1–4.

159. *State v. Langdon*, 978 So. 2d 263, 263 (Fla. 4th Dist. Ct. App. 2008).

160. *Id.* at 264.

to receive a downward departure based on her substance addiction or, alternatively, she could have qualified for drug offender probation under *Florida Statutes* section 948.20, despite her previous non-drug related felony charge.¹⁶¹ Because both sections 948.20 and 948.034 speak to the requirements of drug offender probation, the *Langdon* court would now be able to use section 948.20's standards.¹⁶² The court voiced the policy behind their ruling, indicating that if the relevant statutes were read together, they would show that the legislature intended the court to make their determinations of the availability of sentencing alternatives based on the "'manner that will best serve the needs of society, punish criminal offenders, and provide the opportunity for rehabilitation.'"¹⁶³ Had the revised version of section 948.20 been available to the court, application of this policy would have prevented the Defendant from incarceration.¹⁶⁴

These cases merely provide a sampling of defendants whose fates would have changed had the amendments been in effect when they were tried. However, it is safe to assume that many more drug addicted offenders would be out of jail and in treatment centers, or postadjudicatory treatment programs, had the amendments been instituted earlier, specifically because of the explicit nature of the former version of section 921.0026 subsection 3 of the *Florida Statutes*.¹⁶⁵

VI. IS SENATE BILL 1726 MERELY A BAND-AID?

While the changes effectuated by Senate Bill 1726 certainly increase a judge's discretion in sentencing drug offenders, the act does not reach a substantial amount of drug addicted offenders in need of treatment. For example, in order to qualify for a downward departure based on substance abuse, the offender must not be charged with a violent felony.¹⁶⁶ Additionally, the new version of the statute reads that the offender must not score above fifty-two points on his or her scoresheet.¹⁶⁷ This poses a problem for offenders who commit aggravated battery or assault on law enforcement officers, a crime which is not only violent, but also carries a higher score than most

161. *See id.*; ch. 2009-64, 2009 Fla. Laws at 580, 583.

162. *See Langdon*, 978 So. 2d at 264 (citing *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992)).

163. *Id.* at 265 (quoting FLA. STAT. § 921.187(1) (2008)).

164. *See id.*

165. *See* FLA. STAT. § 921.0026(3) (2002) ("[T]he defendant's substance abuse or addiction . . . is not a mitigating factor . . . and does not, *under any circumstances*, justify a downward departure from the permissible sentencing range." (emphasis added)).

166. Ch. 2009-64, 2009 Fla. Laws at 580.

167. *Id.*

drug charges.¹⁶⁸ Such a violent crime may be one of the most common among drug abusing offenders under the influence at the time of their arrest, especially if they are taken by surprise or do not understand why they are being arrested given their altered state of mind.¹⁶⁹ Furthermore, with the sentencing points capped at fifty-two, an offender with an extensive record may not qualify for a downward departure, drug offender probation, drug court or regular probation, or community control.¹⁷⁰ While the legislature intended to create a bill that would alleviate the growing prison admission rates and stress on taxpayer dollars, they failed to realize that their changes would still leave judges scratching their heads when faced with a serious drug abuser, who scores more than fifty-two points or is charged with a violent crime.¹⁷¹ By doing so, the legislature continues to leave judges and their invaluable discretion out of the equation.¹⁷²

Moreover, Senate Bill 1726 proposes that, in order for the court to determine whether the defendant qualifies for drug court or a downward departure, the sentencing court must conduct a substance abuse screening and determine if the defendant is amenable to treatment.¹⁷³ However, the act does not discuss the method of evaluating substance abuse or amenability.¹⁷⁴ Additionally, revised section 948.20 of the *Florida Statutes*, calls for a hearing to determine whether the defendant is a chronic substance abuser; yet again, the statute fails to indicate what the hearing entails.¹⁷⁵ It does indicate,

168. See FLA. STAT. § 776.08 (2009) (stating that aggravated battery or assault is a violent crime); FLA. STAT. § 921.0012 (2008) (listing aggravated battery and assault on a law enforcement officer as level six and seven offenses, respectively, as opposed to common drug crimes which are a level four offense).

169. See FLORIDA'S DRUG CONTROL STRATEGY, *supra* note 1, at 39.

The 2006 National Crime Victimization Survey asked victims of violent crimes [including assault] . . . about their perceptions of the offender's use of . . . drugs. In the 54% of violent crimes in which the victim formed an opinion, 27% perceived the offender to be under the influence of alcohol or other drugs.

Id.

170. See ch. 2009-64, 2009 Fla. Laws at 580-83.

171. See SB 1726 Staff Analysis, *supra* note 85, at 1, 3.

172. See Clemens & Stancil, *supra* note 9, at 54.

[T]he Florida Legislature snatched discretion in criminal sentencing from the hands of judges. . . Many judges are experienced former prosecutors or criminal defense lawyers who have been handling cases for decades. More importantly, all trial judges must individually stand for election . . . every six years, where any individual sentence perceived as too light could weigh heavily in the electorate's mind. But still, the legislature removed sentencing discretionary to nonelected assistant state attorneys, whose zeal may be untempered by experience or electorate accountability.

Id.

173. See ch. 2009-64, 2009 Fla. Laws at 579-80.

174. See *id.*

175. See *id.* at 583.

though, that the “state attorney and victim, if any” may offer recommendations for the drug offender regarding their entry into a drug court program, leading one to believe that the fate of drug offenders may be left in the hands of a state attorney or victim rather than a judge.¹⁷⁶ Again, the act is vague as to what kind of drug addicted offender may qualify for these treatment programs beyond the bare sentencing point score and the requirement that the defendant be a chronic substance abuser.¹⁷⁷ While the purpose of the phrase “amenable to treatment” is important as it may help prevent a decrease in rates of drug court graduation,¹⁷⁸ it just creates more ambiguity as to the level of discretion the judge actually has.¹⁷⁹ Does this mean that the judge determines if the defendant is amenable or should the state attorney come to this conclusion?¹⁸⁰ Due to these unanswered questions, the court’s discretion may become limited by an adamant state attorney or victim who believes that the defendant should not be rewarded by drug offender probation or drug court treatment.¹⁸¹

As noted before, the act forges new paths to allow more drug addicted offenders to enter into treatment-based programs.¹⁸² However, the legislature did not recognize that counties in Florida already have eligibility requirements in place; requirements which usually state that the defendant must have no prior felony convictions or be charged with a non-drug offense.¹⁸³ The act lacks reference to these requirements set up by the counties and does not mandate that the counties change them.¹⁸⁴ Because of this oversight, it is possible for counties to retain their rules for an indeterminate amount of time, until the legislature mandates that the rules change. In this sense, the act, while very appealing on the surface, does not pack the power needed to overhaul the state’s current system of properly sentencing drug addicted defendants.

176. *See id.* at 579.

177. *See id.* at 580, 583.

178. *See* OPPAGA, *supra* note 88, at 4 (“[W]hile drug court graduates have lower recidivism rates, only half of participants complete the program, and many non-completers are arrested and subsequently sentenced to prison.”).

179. *See* ch. 2009-64, 2009 Fla. Laws at 579.

180. *See id.*

181. *See id.*

182. *See id.* at 579–83.

183. *See* REPORT ON FLORIDA’S DRUG COURTS, *supra* note 5, at app. B.

184. *See* ch. 2009-64, 2009 Fla. Laws at 579 (explaining that entrance into a drug court program is pursuant to section 948.01 or 948.20). Section 948.01 states that a defendant is eligible for drug court as long as the defendant is a nonviolent offender, scores fifty-two points or below, and is amenable to treatment. FLA. STAT. § 948.01(7) (2009).

VII. CONCLUSION

The new legislation enacted by the Florida Legislature on May 27, 2009 will greatly change how judges and both defense and state attorneys think about sentencing drug addicted defendants. Thankfully, the time has finally come in Florida for courts to treat drug addicts like they really are—individuals in need of treatment, not incarceration. However, while the change is noteworthy, the legislation is not nearly as revolutionary as the times call for. With society becoming increasingly aware of the physical and mental effects of drugs, legislatures must respond with stronger laws ensuring drug addicts stay out of prisons and stay in treatment centers where they can learn to become productive members of society. Furthermore, other states with ancient laws regarding drug sentencing must follow in Florida and New York's footsteps and create legislation which erases the signs of the failed War on Drugs. The future of mandatory minimums and strict downward departure guidelines look beautifully dim and the next decade promises to show more of the support drug addicted defendants require.