Criminal Law: 2010-2012 Survey of Florida Law

Pearl Goldman

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I. Introduction ....................................................................................... 2
II. Crimes ................................................................................................... 2
   A. Burglary ........................................................................................ 2
      1. Burglary of a Dwelling ........................................................ 2
      2. Ownership and Possession of the Burglarized Premises...... 5
      3. Remaining in the Premises ................................................... 6
   B. Criminal Mischief ......................................................................... 7
   C. Homicide ....................................................................................... 8
      1. Felony Murder ..................................................................... 8
         a. Merger Doctrine .......................................................... 8
         b. Underlying Felony ....................................................... 11
      2. Second-Degree Depraved Mind Murder ......................... 12
      3. Manslaughter .................................................................. 13
         a. Manslaughter by Act .................................................. 13
         i. The 2008 Jury Instruction ......................................... 15
         ii. Instructing the Jury on Both Manslaughter by 
             Act and Manslaughter by Culpable Negligence .... 17
         iii. The Attempted Manslaughter by Act Instruction .... 18
         iv. Ineffective Assistance of Appellate Counsel .......... 21
         v. Conclusion .............................................................. 21
         b. Manslaughter by Culpable Negligence ..................... 22
       D. Kidnapping ............................................................................. 24
   E. Sexual Offenses ............................................................................. 27
   F. Theft ............................................................................................. 28
   G. Trespass ....................................................................................... 32
   H. Miscellaneous............................................................................. 33
III. Defenses ............................................................................................. 37
    A. Abandonment ......................................................................... 37
    B. Prescription Defense ............................................................. 38
    C. Self-Defense ............................................................................. 42
    D. Stand Your Ground Law ........................................................ 44
IV. Constitutional Claims ....................................................................... 48
    A. Cruel and Unusual Punishment ............................................. 48
       1. Execution of Mentally Retarded Defendants .................. 48

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I. INTRODUCTION

This article surveys selected criminal law decisions of the Supreme Court of Florida and the Florida District Courts of Appeal published between August 1, 2010 and July 31, 2012. The survey covers cases of first impression, decisions involving or identifying conflicts between the Florida District Courts of Appeal, questions certified to the Supreme Court of Florida as being of great public importance, and cases that clarify or expand upon existing principles of law. Decisions discussing procedural and evidentiary issues and Florida’s sentencing guidelines are beyond the scope of this article, which focuses on substantive principles of criminal law.

II. CRIMES

A. Burglary

1. Burglary of a Dwelling

Burglary of a dwelling, which is a second-degree felony in Florida, includes burglary of an “attached porch.” In Colbert v. State, the issue was whether the area in front of the victim’s townhouse, from which the defendant had taken a bicycle, was an attached porch and therefore a dwelling. Noting that Florida’s judicial treatment of this term demonstrates only “what

2. 78 So. 3d 111 (Fla. 1st Dist. Ct. App. 2012).
3. Id. at 112; see also Fla. Stat. § 810.011(2).
an ‘attached porch’ is not,” the First District distinguished the instant case from decisions dealing “with areas where common notions of security and privacy associated with a dwelling were present.” In contrast, the area from which the defendant had taken the bicycle, a concrete pad and mulch, “was open to unknown, uninvited people.” It was therefore not an attached porch. For this reason, the court reversed the defendant’s conviction.

The definition of the term “dwelling” also includes the “curtilage,” which must be enclosed. The question of what constitutes an enclosure is frequently the subject of debate, however. In *J.L. v. State*, for example, the Fifth District held that items leaning against the side of a house were not taken from its curtilage, even though the yard was fenced on two sides, because there was no proof of the distance between these fences and the house, any connection between the fences, or the existence of a fence on the side of the house from which the property was removed. The court rejected the State’s argument “that curtilage necessarily includes an item that touches (but is not attached) to the house [because this] would mean that a burglary of a dwelling would occur if an individual took a fruit from a tree in an open yard when the fruit happened to be touching the house.” Concluding that this result would not comport with legislative intent, the court reversed the defendant’s burglary conviction and directed entry of judgment for trespass.

In *Jacobs v. State*, on the other hand, the First District held that “the enclosure need not be continuous and an ungated opening for ingress and egress does not preclude” a finding that the yard is part of the curtilage.

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4. Colbert, 78 So. 3d at 112–13; see also Fla. Stat. § 810.011(2).
5. Colbert, 78 So. 3d at 112–13.
6. *Id.* at 113; see also Fla. Stat. § 810.011(2).
7. Colbert, 78 So. 3d at 113.
11. 57 So. 3d 924 (Fla. 5th Dist. Ct. App. 2011).
12. *Id.* at 925–26; see also Fla. Stat. § 810.011(2).
13. *J.L.*, 57 So. 3d at 926.
14. *Id.* (citing Hamilton, 660 So. 2d at 1044).
15. *Id.*
16. 41 So. 3d 1004 (Fla. 1st Dist. Ct. App. 2010), review denied, 79 So. 3d 744 (Fla. 2012).
17. *Id.* at 1006 (citing Chambers v. State, 700 So. 2d 441, 442 (Fla. 4th Dist. Ct. App. 1997)); see also Fla. Stat. § 810.011(2).
The residential yard in Jacobs was an enclosure, the court explained, because it was “fenced on three sides,” with a “low-walled ‘stoop’ in . . . front” and an “opening for the driveway.”\textsuperscript{18} The court also rejected the defendant’s argument that the house ceased to be a “dwelling” after it was damaged in a fire.\textsuperscript{19} The house, which was being restored, had a roof, floors, walls, and “plumbing and electric utilities [that were turned off] because the home was unoccupied.”\textsuperscript{20} Accordingly, the court held that the fire had not “substantially changed the character of the house to the extent that it was unsuitable for lodging by people.”\textsuperscript{21} As authority, the court cited Munoz v. State,\textsuperscript{22} a Second District opinion that was called into question in two cases during the survey period.\textsuperscript{23}

In Munoz, the Second District held that a house under renovation was not a “dwelling under the burglary statute” because the renovations rendered it temporarily uninhabitable.\textsuperscript{24} The court reasoned that to qualify as a “dwelling,” a structure must be designed for human habitation and must not be so substantially changed that it becomes unsuitable for habitation.\textsuperscript{25} In Michael v. State,\textsuperscript{26} however, the Fifth District criticized Munoz for adding an element to the crime that improperly required the State to “prove that the structure was habitable as a dwelling on the date of the offense.”\textsuperscript{27} Instead, the Michael court adopted the dissenting opinion in Munoz,\textsuperscript{28} which had eschewed the majority’s reasoning on two grounds.\textsuperscript{29} First, the majority’s reasoning in Munoz was inconsistent with the plain language of the statute, which re-

\textsuperscript{18} Jacobs, 41 So. 3d at 1006; see also Dicks v. State, 75 So. 3d 857, 858–60 (Fla. 1st Dist. Ct. App. 2011) (holding that a prosecutor’s misstatement of law during closing argument by defining the term “dwelling” to include a trespass on the unenclosed property surrounding the dwelling did not constitute fundamental error because the defendant was found beneath the victim’s mobile home where he was removing its copper wiring).
\textsuperscript{19} Id. at 1005–06.
\textsuperscript{20} Id. at 1007.
\textsuperscript{21} Id. at 1006.
\textsuperscript{22} Munoz, 937 So. 2d 686 (Fla. 2d Dist. Ct. App. 2006).
\textsuperscript{23} Young v. State (Young I), 73 So. 3d 825, 825 (Fla. 5th Dist. Ct. App. 2011) (per curiam) (certifying conflict with Munoz), review granted, 84 So. 3d 1033 (Fla. 2012); Michael v. State, 51 So. 3d 574, 575 (Fla. 5th Dist. Ct. App. 2010) (certifying conflict with Munoz); Jacobs, 41 So. 3d at 1006–07 (citing Munoz, 937 So. 2d at 689).
\textsuperscript{24} Munoz, 937 So. 2d at 689 (citing Perkins v. State (Perkins II), 682 So. 2d 1083, 1084 (Fla. 1996) (per curiam)).
\textsuperscript{25} Id. at 688–89 (relying on Perkins II, 682 So. 2d at 1084).
\textsuperscript{26} 51 So. 3d 574 (Fla. 5th Dist. Ct. App. 2010).
\textsuperscript{27} Michael, 51 So. 3d at 575.
\textsuperscript{28} Id.; see also Munoz, 937 So. 2d at 689–91 (Canady, J., dissenting).
quired only that a “dwelling” be “designed” for habitation.\textsuperscript{30} Second, it was inconsistent with the decision of the Supreme Court of Florida in \textit{Perkins v. State (Perkins II)},\textsuperscript{31} which made clear that in determining whether a structure qualified as a dwelling, “‘the design of the structure’ . . . is ‘paramount.’”\textsuperscript{32} Therefore, according to the \textit{Munoz} dissent, the home’s temporary transformation had not altered its use for human habitation.\textsuperscript{33} Adopting this reasoning, the \textit{Michael} court affirmed the defendant’s conviction for burglary of a dwelling and certified conflict with \textit{Munoz}.\textsuperscript{34} The Fifth District again certified conflict with \textit{Munoz} in \textit{Young v. State (Young I)}.\textsuperscript{35} The Supreme Court of Florida has accepted jurisdiction in \textit{Young v. State (Young II)}.\textsuperscript{36}

2. Ownership and Possession of the Burglarized Premises

A victim’s ownership of the burglarized premises is a necessary “element of the crime of burglary.”\textsuperscript{37} However, the definition of “ownership” under the burglary statute differs from its counterpart in property law because it requires the victim to have a possessory interest in the burglarized structure superior to that of the defendant.\textsuperscript{38} In \textit{Pierre v. State},\textsuperscript{39} the Third District reversed a conviction for burglary of an occupied dwelling on the ground that the State had not established the victim’s superior possessory interest.\textsuperscript{40} In this case, a sexual battery took place on the victim’s last night as a guest in an apartment leased by the defendant who was moving out of the premises.\textsuperscript{41} The court found no conclusive evidence that the defendant had abandoned his possessory interest in the apartment.\textsuperscript{42} His possessions

\begin{itemize}
\item \textit{Munoz}, 937 So. 2d at 690 (Canady, J., dissenting) (citing State v. Bennett, 565 So. 2d 803, 805 (Fla. 2d Dist. Ct. App. 1990) (per curiam)).
\item 682 So. 2d 1083 (Fla. 1996) (per curiam).
\item \textit{Munoz}, 937 So. 2d at 691 (Canady, J., dissenting) (quoting Perkins v. State (\textit{Perkins I}), 630 So. 2d 1180, 1181 (Fla. 1st Dist. Ct. App. 1994), review granted per curiam, 673 So. 2d 30 (Fla. 1996)).
\item \textit{Id.}
\item Michael v. State, 51 So. 3d 574, 575 (Fla. 5th Dist. Ct. App. 2010) (citing Baker v. State, 636 So. 2d 1342, 1344 (Fla. 1994)).
\item 73 So. 3d 825, 825 (Fla. 5th Dist. Ct. App. 2011) (per curiam), review granted, 84 So. 3d 1033 (Fla. 2012); see also \textit{Munoz}, 937 So. 2d at 689–90.
\item 84 So. 3d 1033, 1033 (Fla. 2012) (unpublished table decision).
\item D.S.S. v. State, 850 So. 2d 459, 461 (Fla. 2003) (citing \textit{In re M.E.}, 370 So. 2d 795, 796 (Fla. 1979)).
\item 77 So. 3d 699 (Fla. 3d Dist. Ct. App. 2011).
\item \textit{Id. at 702.}
\item \textit{Id. at 700.}
\item \textit{Id. at 702.}
remained there, he went back and forth between the two properties, and the victim returned her key on her last night in the unit. 43 Although a lessee’s legal interest in the leased premises does not conclusively establish his possessory interest, in this case, the evidence showed that the defendant’s legal interest in the property was superior or “at least equal to the victim’s temporary possessory interest.” 44 As a result, the appellate court reversed and remanded with instructions to enter a judgment of acquittal on the burglary count. 45

The concept of ownership was also the subject of the appeal in *Morris v. State*, 46 where the Fourth District held that the victim named in the information “did not have the requisite possessory interest in the [burglarized warehouse] to support” Morris’ armed burglary conviction because he was an employee. 47 The court noted that the important distinction is between a “manager, who exercises lawful control over premises,” and an “employee, [who] occupies the space but does not control it.” 48 In *Morris*, however, the named victim was not a manager; instead, he was an employee of a subsidiary of the warehouse owner and did not ordinarily work at the location in question. 49 Because “[h]is interest in the warehouse was limited to servicing the open distribution route,” he “did not have the requisite possessory interest in the property.” 50 Consequently, the court reversed the defendant’s armed burglary conviction. 51

3. Remaining in the Premises

The statutory definition of burglary includes the act of remaining in the premises, “[n]otwithstanding a licensed or invited entry,” with intent to commit a forcible felony. 52 In *Harris v. State*, 53 the Fifth District held that “the legislative intent [of the statute] indicates that a licensed or invited entry is an element of a remaining in burglary,” and that this interpretation is sup-

43. *Id.* at 700, 702.
44. *Pierre*, 77 So. 3d at 702.
45. *Id.*
46. 87 So. 3d 89 (Fla. 4th Dist. Ct. App. 2012).
47. *Id.* at 91.
48. *Id.* at 90–91 (citing *Adirim v. State*, 350 So. 2d 1082, 1084 (Fla. 3d Dist. Ct. App. 1977) (per curiam)).
49. *Id.* at 89–90.
50. *Id.* at 91.
51. *Morris*, 87 So. 3d at 91.
52. *FLA. STAT.* § 810.02(1)(a)–(b) (2012).
53. 48 So. 3d 922 (Fla. 5th Dist. Ct. App. 2010).
ported by decisional law and the applicable standard jury instruction.\(^{54}\) Accordingly, a defendant who knocked on the door of a residence, then pushed his way in and stole money from the occupants, could not be convicted of a remaining in burglary under the statute because his initial entry was neither licensed nor invited.\(^{55}\)

B. **Criminal Mischief**

In *Marrero v. State* (*Marrero II*),\(^{56}\) the Supreme Court of Florida held that the State must prove a specific monetary amount of damage to convict a defendant of felony criminal mischief and cannot rely on a “life experience” exception.\(^{57}\) This decision resolved a conflict among Florida’s District Courts of Appeal “as to whether the amount of damage is” a necessary element of the offense and called into question the use of a life experience exception in any criminal statute, including theft.\(^{58}\) In this case, the defendant drove his truck through a casino entrance, requiring replacement of four tall impact-resistant glass doors.\(^{59}\) He was charged with felony criminal mischief under section 806.13(1)(b)(3) of the *Florida Statutes*, which applies only when the mischief causes one thousand dollars or more in damages.\(^{60}\) At trial, the State presented no “evidence of the repair or replacement costs of the damaged [doors].”\(^{61}\) The trial court therefore instructed the jury, according to the standard theft instruction, to “attempt to determine a minimum value” of the damaged property.\(^{62}\) Marrero was convicted of felony criminal mischief based upon the jury’s finding “that ‘the property was [valued at] one thousand dollars or more.’”\(^{63}\) The Third District affirmed, holding that “‘a trial court may conclude “that certain repairs are so self-evident that the fact-finder could conclude based on life experience that the statutory damage threshold has been met.’”\(^{64}\)

\(^{54}\) *Id.* at 924–25 (citing FLA. STD. JURY INSTR. (CRIM.) 13.1 (2008)).

\(^{55}\) *Id.* at 923, 925 (reversing and remanding the judgment and sentence for burglary).

\(^{56}\) 71 So. 3d 881 (Fla. 2011) (per curiam).

\(^{57}\) *Id.* at 891 (citing Jackson v. State, 413 So. 2d 112, 114 (Fla. 2d Dist. Ct. App. 1982)).

\(^{58}\) *Id.* at 886–87, 891.

\(^{59}\) *Id.* at 883–84.

\(^{60}\) *See id.* at 884, 886 (citing FLA. STAT. § 806.13(1)(b)(3) (2012)).

\(^{61}\) *Marrero II*, 71 So. 3d at 884.

\(^{62}\) *Id.*

\(^{63}\) *Id.* at 884–85.

\(^{64}\) *Marrero v. State* (*Marrero I*), 22 So. 3d 822, 823 (Fla. 3d Dist. Ct. App. 2009) (quoting T.B.S. v. State, 935 So. 2d 98, 99 (Fla. 2d Dist. Ct. App. 2006), *review granted*, 29 So. 3d 291 (Fla. 2010), *and quashed*, 71 So. 3d 881 (Fla. 2011)).
The Supreme Court of Florida reversed and remanded for entry of a judgment for misdemeanor criminal mischief.\textsuperscript{65} Application of the “life experience” exception was invalid on due process grounds, the court explained, because “the amount of damage is an essential element of the crime of felony criminal mischief.”\textsuperscript{66} In so ruling, the court disapproved \textit{Jackson v. State},\textsuperscript{67} a Second District case interpreting the theft statute to permit a petty theft conviction when, in the absence of proof of value, no reasonable person could doubt that the value of the stolen property exceeded one hundred dollars.\textsuperscript{68} The court held that \textit{Jackson} had misinterpreted the theft statute, which permits a jury to determine a minimum value only if it is impossible to ascertain the value of the stolen items.\textsuperscript{69} However, the jury may not do so if the state fails to prove the value of property that is capable of valuation.\textsuperscript{70} Finally, the court observed, “application of a ‘life experience’ exception to any criminal statute, including the criminal theft statute, is inconsistent with the uniform system of justice that both the Florida and Federal Constitutions require and should not be left to the whim of individual jury members.”\textsuperscript{71}

C. Homicide

1. Felony Murder

   a. Merger Doctrine

   In \textit{State v. Sturdivant},\textsuperscript{72} the Supreme Court of Florida receded from its decision in \textit{Brooks v. State}\textsuperscript{73} and held “that the merger doctrine does not preclude . . . conviction” for felony murder when death is caused by “a single

\begin{enumerate}
\item 65. Marrero II, 71 So. 3d at 891.
\item 66. Id. at 887, 889.
\item 67. 413 So. 2d 112 (Fla. 2d Dist. Ct. App. 1982).
\item 68. Marrero II, 71 So. 3d at 888–89 (citing Jackson, 413 So. 2d at 112); see FLA. STAT. § 812.012(10)(b) (2012).
\item 69. Marrero II, 71 So. 3d at 888–89 (citing Jackson, 413 So. 2d at 112); see FLA. STAT. § 812.012(10)(b).
\item 70. Marrero II, 71 So. 3d at 889 (citing Jackson, 413 So. 2d at 112).
\item 71. Id.; see also Colletti v. State, 74 So. 3d 497, 498, 500 (Fla. 2d Dist. Ct. App. 2011) (citing Marrero II, 71 So. 3d at 891) (reversing the defendant’s felony murder conviction, which was based on the underlying felony of grand theft, because the State failed to present any evidence showing the value of the items taken from the victim’s home).
\item 72. 94 So. 3d 434 (Fla. 2012).
\item 73. 918 So. 2d 181 (Fla. 2005) (per curiam), abrogated in part by State v. Sturdivant, 94 So. 3d 434 (Fla. 2012).
\end{enumerate}
act of aggravated child abuse.\textsuperscript{74} Sturdivant was convicted of both first-degree felony murder and aggravated child abuse because he struck his two-year old victim on the head so forcefully that the child fell and hit his head on a concrete wall.\textsuperscript{75} The First District reversed and certified the following question: “Whether Brooks precludes a conviction for felony murder based on the predicate offense of aggravated child abuse when the abuse consists of a single act, despite the language of section 782.04(1)(a)2., the felony-murder statute.”\textsuperscript{76}

The court began by examining the merger doctrine as a doctrine of statutory construction distinct from the constitutional principle of double jeopardy.\textsuperscript{77} Consequently, the analysis centered on the plain language of the statute, which expressly permits a felony murder conviction to be predicated upon “‘any . . . [a]ggravated child abuse.’”\textsuperscript{78} Thus, the court concluded that the legislature’s unambiguous intent is to preclude merger of an enumerated felony into a homicide conviction and to increase punishment when a child’s death “is caused by even a single act of aggravated child abuse.”\textsuperscript{79}

The court then reviewed its decision in Brooks, which held that where a child was killed by a single act of stabbing, the abusive act merged with the homicide because both crimes involved the same conduct.\textsuperscript{80} The court concluded that Brooks was incorrectly decided on two levels.\textsuperscript{81} First, the decision “was contrary to the plain language of the statute and legislative intent” because it “created a distinction not contemplated by the Legislature—whether the underlying felony of aggravated child abuse consists of a single act or multiple acts.”\textsuperscript{82} Second, the decision “improperly extended and relied upon”\textsuperscript{83} Mills v. State,\textsuperscript{84} where the court held that an aggravated battery conviction merged with a homicide conviction because both were based on a

\textsuperscript{74} Compare Sturdivant, 94 So. 3d at 442, with Brooks, 918 So. 2d at 198 (holding that the underlying felony of aggravated child abuse could not serve as the predicate felony crime in a first-degree felony murder charge if only a single act led to the child’s death because in that situation the felony would merge into the homicide).

\textsuperscript{75} Sturdivant, 94 So. 3d at 436.

\textsuperscript{76} Id. at 437 (citing FLA. STAT. § 782.04(1)(a)2. (2012)).

\textsuperscript{77} Id. at 437 n.3.

\textsuperscript{78} Id. at 440 (alteration in original) (quoting FLA. STAT. § 782.04(1)(a)2.h.).

\textsuperscript{79} Id.; see also § 782.04(1)(a)2.h.

\textsuperscript{80} Sturdivant, 94 So. 3d at 440–42 (citing Brooks v. State, 918 So. 2d 181, 198 (Fla. 2005) (per curiam), abrogated in part by State v. Sturdivant, 94 So. 3d 434 (Fla. 2012)).

\textsuperscript{81} Id. at 441 (citing Dorsey v. State, 868 So. 2d 1192, 1199 (Fla. 2003); Mills v. State, 476 So. 2d 172, 177 (Fla. 1985) (per curiam)); see also Brooks, 918 So. 2d at 198.

\textsuperscript{82} Sturdivant, 94 So. 3d at 441; see also Brooks, 918 So. 2d at 217 (Lewis, J., dissenting).

\textsuperscript{83} Sturdivant, 94 So. 3d at 441.

\textsuperscript{84} 476 So. 2d 172 (Fla. 1985) (per curiam).
single gunshot blast.\textsuperscript{85} \textit{Mills} was inapposite, the court explained, because the underlying crime in that case was an unenumerated felony.\textsuperscript{86} The felony murder statute has been amended since \textit{Mills}\textsuperscript{87} to include aggravated child abuse as an enumerated predicate felony.\textsuperscript{88} Accordingly, the court quashed the decision of the First District, receded from \textit{Brooks}, and held that “the merger doctrine does not preclude a felony-murder conviction predicated upon a single act of aggravated child abuse that caused the child’s death since aggravated child abuse is an enumerated underlying offense in the felony murder statute.”\textsuperscript{89}

In \textit{Williams v. State},\textsuperscript{90} the First District reversed a conviction for attempted felony murder based on the felony merger doctrine and endeavored to explain the difference between a “standard double jeopardy analysis and the principle of merger.”\textsuperscript{91} The defendant in this case was convicted, \textit{inter alia}, of attempted premeditated first-degree murder and attempted felony murder after he fired multiple shots at his fleeing victim.\textsuperscript{92} In support of his argument that his convictions violated the principle against double jeopardy, he cited case law addressing the merger principle.\textsuperscript{93} The court rejected the double jeopardy claim because the design to kill element that is required for attempted premeditated first-degree murder is not required for attempted felony murder, and no exception in the double jeopardy statute applied.\textsuperscript{94} However, the merger principle “is an exception to the standard double jeopardy analysis,” the court wrote.\textsuperscript{95} Because the defendant’s “pursuit of the victim constituted one criminal act or one attempted murder,” the dual convictions were impermissible.\textsuperscript{96} In other words, unless each attempted murder conviction is based on “a separate criminal episode or distinct acts,” multiple punishments for the same attempted killing of the same victim violate the

\textsuperscript{85} \textit{Id.} at 177; \textit{see also} \textit{Sturdivant}, 94 So. 3d at 442 (citing \textit{Mills}, 476 So. 2d at 177).
\textsuperscript{86} \textit{Sturdivant}, 94 So. 3d at 442 (citing \textit{Mills}, 476 So. 2d at 177).
\textsuperscript{87} \textit{Mills}, 476 So. 2d at 177. Although \textit{Mills} was decided in 1985, the court relied on the 1979 statute. \textit{Id.}; \textit{see also} Fl. Stat. § 782.04(1)(a) (1979), amended by Fl. Stat. § 782.04(1)(a2).h. (Supp. 1984).
\textsuperscript{88} Fl. Stat. § 782.04(1)(a2.h. (2012).
\textsuperscript{89} \textit{Sturdivant}, 94 So. 3d at 442.
\textsuperscript{90} 90 So. 3d 931 (Fla. 1st Dist. Ct. App. 2012).
\textsuperscript{91} \textit{Id.} at 932–33.
\textsuperscript{92} \textit{Id.}
\textsuperscript{93} \textit{Id.} at 934 (citing Smith v. State, 973 So. 2d 1209, 1210–11 (Fla. 2d Dist. Ct. App. 2008); Jackson v. State, 868 So. 2d 1290, 1291 (Fla. 4th Dist. Ct. App. 2004)).
\textsuperscript{94} \textit{Id.; see also} Blockburger v. United States, 284 U.S. 299, 304 (1932) (citing Gavieres v. United States, 220 U.S. 338, 342 (1911)).
\textsuperscript{95} \textit{Williams}, 90 So. 3d at 934.
\textsuperscript{96} \textit{Id.} at 935.
merger principle. Accordingly, the court affirmed Williams’ conviction for attempted premeditated first-degree murder and reversed his conviction for attempted felony murder.

b. Underlying Felony

In Hernandez v. State (Hernandez II), the Supreme Court of Florida reversed a defendant’s first-degree felony murder convictions on the ground that the evidence failed to establish the predicate crime of trafficking or attempted trafficking in cocaine. In this case, the State charged Hernandez with two counts of first-degree felony murder, alleging that the victims were killed while he was engaged in the underlying felony of trafficking or attempting to traffic in cocaine. The Third District affirmed, holding that the evidence was sufficient evidence for a jury to infer that the parties contemplated a sale of twenty-eight grams or more of cocaine. The Supreme Court of Florida granted discretionary review based on conflict with Williams v. State, where the First District overturned a conviction for conspiracy to traffic in twenty-eight or more grams of cocaine because “no specific amounts were discussed on the two occasions when appellant was present, nor did appellant agree to furnish a specific amount of cocaine.” This, then, was the context for the decision of the Supreme Court of Florida in Hernandez.

The court decided that, as in Williams, the evidence was insufficient to establish the predicate crime. Testimony that Hernandez intended to sell 10,000 grams of counterfeit cocaine was unhelpful in establishing his intent.

97. Id.
98. Id.
99. 56 So. 3d 752 (Fla. 2010).
100. Id. at 758; see Fla. Stat. § 782.04(1)(a)2.a. (2012) (stating that an unlawful killing committed “in the perpetration of, or in the attempt to perpetrate, [a] [t]rafficking offense prohibited by s[ection] 893.135(1)” is first-degree murder); see also Fla. Stat. § 893.135(1)(b)1.; Williams v. State, 592 So. 2d 737, 739 (Fla. 1st Dist. Ct. App. 1992).
101. Hernandez II, 56 So. 3d at 754; see also Fla. Stat. §§ 782.04(1)(a)2.a., 893.135(1)(b)1.
102. Hernandez v. State (Hernandez I), 994 So. 2d 488, 490 (Fla. 3d Dist. Ct. App. 2008), review granted, 15 So. 3d 590 (Fla. 2009), and rev’d, 56 So. 3d 580 (Fla. 2010); see also Fla. Stat. § 893.135(1)(b)1.a.
104. Hernandez II, 56 So. 3d at 754, 758 (quoting Williams, 592 So. 2d at 739); see also Hernandez I, 994 So. 2d at 490.
105. Hernandez II, 56 So. 3d at 754, 757–58.
106. Id. at 762.
to traffic in actual cocaine, the court explained.\textsuperscript{107} The inference that Hernandez believed that the transaction was going to be for $30,000 was also insufficient.\textsuperscript{108} There was no evidence of the value of the cocaine, the court stated, adding that the price of this drug is not “sufficiently known to the public at large that a jury can be left to infer on its own that a dollar value alone proves that a trafficking quantity of cocaine was involved.”\textsuperscript{109} Finally, Hernandez’s statement that the seller arrived at the transaction with a large box was likewise insufficient because no evidence showed that drugs were in the box or that Hernandez even believed the box contained $30,000 worth of cocaine.\textsuperscript{110} However, the court found that the evidence was sufficient to convict Hernandez of an “attempt[] to engage in a transaction involving an unspecified quantity of cocaine,” which is a predicate felony for third-degree felony murder.\textsuperscript{111} Accordingly, the court vacated his first-degree felony murder convictions and directed entry of judgment for third-degree felony murder.\textsuperscript{112}

2. Second-Degree Depraved Mind Murder

In \textit{Black v. State},\textsuperscript{113} the issue before the Second District was whether extreme recklessness alone is legally sufficient to establish the actual malice element of second-degree murder.\textsuperscript{114} In this case, Black told a friend that he wanted to commit suicide and “intended to make big headlines and go out with a bang.”\textsuperscript{115} He then drove into a parking lot and accelerated directly into a group of people.\textsuperscript{116} After driving away from his first victim, Black crossed into oncoming traffic and drove toward a pregnant pedestrian, killing her and her unborn child.\textsuperscript{117} A jury convicted the defendant, \textit{inter alia}, of two counts of second-degree murder and one count of attempted second-degree murder.\textsuperscript{118} On appeal, he argued that extreme recklessness alone is legally insufficient to establish the actual malice element of second-degree

\begin{footnotesize}
\begin{enumerate}
\item[107.] Id. at 760–61 (citing Hernandez I, 994 So. 2d at 490).
\item[108.] Id. at 761–62.
\item[109.] Id. at 762.
\item[110.] Hernandez II, 56 So. 3d at 761.
\item[111.] Id. at 763–64 (citing Ross v. State, 528 So. 2d 1237, 1241 (Fla. 3d Dist. Ct. App. 1988)); see also Fla. STAT. § 782.04(4) (2012).
\item[112.] Hernandez II, 56 So. 3d at 754, 764.
\item[114.] Id. at D594.
\item[115.] Id.
\item[116.] Id.
\item[117.] Id.
\item[118.] \textit{Black}, 37 Fla. L. Weekly at D593.
\end{enumerate}
\end{footnotesize}
murder.\textsuperscript{119} The court disagreed and distinguished the decisional law on which Black relied.\textsuperscript{120} In those cases, the court wrote, the reckless driving was motivated by a desire to elude arrest, and each driver either “failed to see the victims until it was too late . . . or lost control over his vehicle.”\textsuperscript{121} No evidence established that those defendants acted with malice toward their victims.\textsuperscript{122} In contrast, because Black drove directly into his victims, the jury could reasonably infer that he was trying to carry out his threat.\textsuperscript{123} The court affirmed Black’s convictions, writing that a plan such as that one demonstrated the requisite malice for second-degree murder.\textsuperscript{124}

3. Manslaughter

a. Manslaughter by Act

During the survey period, the Florida courts continued to struggle with the jury instructions for manslaughter and attempted manslaughter.\textsuperscript{125} In 2010, in\textit{State v. Montgomery (Montgomery II)},\textsuperscript{126} the Supreme Court of Florida held that where the defendant was charged with second-degree murder, it was fundamentally erroneous\textsuperscript{127} to give the 2006 standard jury instruction for manslaughter by act because that instruction incorrectly required the jury to find that the defendant intended to cause the death of the victim.\textsuperscript{128} The 2006 jury instruction that proved problematic in\textit{Montgomery II} required

\textsuperscript{119}Id. at D594 (citing Hicks v. State, 41 So. 3d 327, 331 (Fla. 2d Dist. Ct. App. 2010); Michelson v. State, 805 So. 2d 983, 985 (Fla. 4th Dist. Ct. App. 2001) (per curiam); Ellison v. State, 547 So. 2d 1003, 1006 (Fla. 1st Dist. Ct. App. 1989), quashed in part, 561 So. 2d 576 (Fla. 1990)).

\textsuperscript{120}Id. (citing Hicks, 41 So. 3d at 331; Michelson, 805 So. 2d at 985; Ellison, 547 So. 2d at 1006).

\textsuperscript{121}Id. at D595 (citing Hicks, 41 So. 3d at 331; Michelson, 805 So. 2d at 984; Ellison, 547 So. 2d at 1006).

\textsuperscript{122}Id. at D594 (citing Hicks, 41 So. 3d at 331; Michelson, 805 So. 2d at 985; Ellison, 547 So. 2d at 1006).

\textsuperscript{123}Black, 37 Fla. L. Weekly at D594.

\textsuperscript{124}Id. at D594–95.

\textsuperscript{125}See State v. Montgomery (Montgomery II), 39 So. 3d 252, 256–57 (Fla. 2010) (citing FLA. STD. JURY INSTR. (CRIM.) 7.7 (2006)); In re Standard Jury Instructions in Criminal Cases–Report No. 2007-10, 997 So. 2d 403, 404 (Fla. 2008) (per curiam) (citing Taylor v. State, 444 So. 2d 931, 934 (Fla. 1983); FLA. STD. JURY INSTR. (CRIM.) 6.6 (1994)).

\textsuperscript{126}39 So. 3d 252 (Fla. 2010).

\textsuperscript{127}Id. at 259. A harmless error analysis applies when the manslaughter charge is two or more degrees removed from the charge for which the defendant is convicted. \textit{Id.} (citing Pena v. State, 901 So. 2d 781, 787 (Fla. 2005)); Daugherty v. State, 37 Fla. L. Weekly D1231, D1231 (4th Dist. Ct. App. May 23, 2012) (citing Pena, 901 So. 2d at 787).

\textsuperscript{128}Montgomery II, 39 So. 3d at 258.
“the State [to] prove that the defendant intentionally caused the death of the victim.”129 This language was at odds with the statutory definition of manslaughter, which required only an intent to commit an act that was neither justifiable nor excusable.130 The court explained that the flawed manslaughter instruction could have led to a second-degree murder conviction if the jury believed that the defendant did not intentionally cause the victim’s death.131

The Montgomery II court specifically limited its decision to the 2006 instruction,132 distinguishing it from the 2008 instruction approved after Montgomery’s trial.133 The 2008 amendment changed the instruction to require proof that the defendant had “an intent to commit an act which caused death.”134 The appendix to the amendment also provided that the State is not required to prove premeditation when the intent-to-kill element is “alleged and proved, and manslaughter [was] being defined as a lesser included offense of first-degree premeditated murder.”135 The court believed that this language was sufficient to clarify that manslaughter by act requires “the intent to commit an act that caused the death of the victim.”136 Nevertheless, the 2008 instruction was bound to create confusion because it still required the State to prove that the defendant intentionally caused the victim’s death.137 Perhaps for this reason, the court issued an interim amended instruction—the 2010 instruction—on its own motion together with the release of its opinion in Montgomery II.138 This new instruction replaced the intent-to-kill language with the requirement that the defendant “inten[ded] to com-

129. Id. at 257 (emphasis added); Fla. Std. Jury Instr. (Crim.) 7.7 (2006).
131. See Montgomery II, 39 So. 3d at 259.
132. Id. at 256 (citing Fla. Std. Jury Instr. (Crim.) 7.7).
133. Id. at 257 (quoting In re Standard Jury Instructions in Criminal Cases–Report No. 2007-10, 997 So. 2d 403, 403 (Fla. 2008) (per curiam)). Montgomery II “does not apply retroactively to convictions [that] were final before” the Supreme Court of Florida issued its opinion in that case. Ross v. State, 82 So. 3d 975, 976 (Fla. 4th Dist. Ct. App. 2011) (per curiam) (citing Harricharan v. State, 59 So. 3d 1162, 1163 (Fla. 5th Dist. Ct. App. 2011) (per curiam), review denied, 92 So. 3d 213 (Fla. 2012)); Rozzelle v. State, 29 So. 3d 1141, 1142 (Fla. 1st Dist. Ct. App. 2009), review denied, 92 So. 3d 214 (Fla. 2012)).
134. In re Standard Jury Instructions in Criminal Cases, 997 So. 2d at 403 (citing Hall v. State, 951 So. 2d 91, 96 (Fla. 2d Dist. Ct. App. 2007) (en banc)).
135. Id. at 404 (citing Fla. Std. Jury Instr. (Crim.) 7.7).
136. Montgomery II, 39 So. 3d at 257.
138. Montgomery II, 39 So. 3d at 257 n.3 (citing In re Amendments to Standard Jury Instructions in Criminal Cases—Instruction 7.7 (In re Amendments to Instruction 7.7 I), 41 So. 3d 853, 853 (Fla. 2010) (per curiam), amended by 75 So. 3d 210 (Fla. 2011)).
mit an act that was not justified or excusable and which caused death."\textsuperscript{139} After receiving comments about the 2010 instruction, the court issued the most recent instruction—the 2011 instruction.\textsuperscript{140} This 2011 instruction provides that the State is not required "to prove that the defendant had an intent to cause death, only an intent to commit an act that was not merely negligent, justified, or excusable and which caused death."\textsuperscript{141}

Together with these amendments, the \textit{Montgomery II} decision has unleashed a veritable tsunami of conflicting decisions on the applicability of that ruling in myriad situations.\textsuperscript{142} The following discussion attempts to categorize and synthesize those opinions.

i. The 2008 Jury Instruction

A conflict exists among the district courts of appeal as to whether the 2008 instruction suffered from the same infirmities as the instruction that was the subject of the \textit{Montgomery II} ruling.\textsuperscript{143} The first court to analyze the 2008 instruction was the First District in \textit{Riesel v. State},\textsuperscript{144} which held that the amended instruction had not obviated the problems of its predecessor "because it, too, erroneously stated that intent-to-kill was an element of manslaughter."\textsuperscript{145} The Second and Third Districts disagreed, however.\textsuperscript{146}

\begin{itemize}
\item \textsuperscript{139} \textit{In re Amendments to Instruction 7.7 I}, 41 So. 3d at 855.
\item \textsuperscript{140} \textit{In re Amendments to Standard Jury Instructions in Criminal Cases—Instruction 7.7 (In re Amendments to Instruction 7.7 II)}, 75 So. 3d 210, 210 (Fla. 2011) (per curiam).
\item \textsuperscript{141} \textit{Id.} at 212 app. (emphasis omitted).
\item \textsuperscript{142} \textit{See infra} Part II.C.3.a.i.
\item \textsuperscript{144} 48 So. 3d 885 (Fla. 1st Dist. Ct. App. 2010) (per curiam), \textit{review denied}, 66 So. 3d 304 (Fla. 2011).
\item \textsuperscript{146} \textit{Compare Daniels I}, 72 So. 3d at 230, \textit{with Figueroa}, 77 So. 3d at 714, 716.
\end{itemize}
In Figueroa v. State, the Third District held that the amendment of the 2008 instruction in 2010 did “not render the giving of the 2008 instruction fundamental error.” After all, the court wrote, the Montgomery II decision “clearly and unequivocally” concluded that the clarifying language in the 2008 instruction had rectified the problems with the 2006 instruction. The Third District therefore certified conflict with the First District’s opinion in Riesel.

Similarly, in Daniels v. State (Daniels I), the Second District determined that the 2008 instruction did not require proof of intent-to-kill. First, the court wrote, the Montgomery II decision specifically concluded that the clarifying language in the 2008 instruction had cured any apparent defect. Second, the fact that the 2010 instruction retained this clarifying language while eliminating other mention of “intentional acts or premeditated intent” demonstrated that the two instructions were not so “materially different . . . [as to warrant] a finding that the 2008 . . . instruction was fundamentally erroneous.” Thus, in Daniels I, the trial court correctly instructed the jury that, when trying to determine if the defendant’s actions “intentionally caused the death of the victim,” the jury must determine if the defendant “‘inten[ded] to commit an act [that] caused death.’” According to the appellate court, this language correctly defined the intent element of manslaughter. The Second District nevertheless certified conflict with the decision of the First District in Riesel. The Supreme Court of Florida has accepted jurisdiction in Daniels v. State (Daniels II).
ii. Instructing the Jury on Both Manslaughter by Act and Manslaughter by Culpable Negligence

In spite of these differences, all of the Florida District Courts of Appeal agree that a trial court does not commit fundamental error by giving the erroneous manslaughter by act instruction in a second-degree murder prosecution if the jury is also instructed on manslaughter by culpable negligence. The reason cited is that this additional instruction affords the jury the opportunity to return a verdict for the lesser included offense of manslaughter by culpable negligence, which does not require intent-to-kill. These cases were therefore distinguishable from the Montgomery cases, where the absence of an instruction on manslaughter by culpable negligence required the jury to return a verdict of second-degree murder upon finding no intent-to-kill.

If the evidence does not support a culpable negligence theory of manslaughter, however, a jury instruction on that crime may not cure an erroneous manslaughter by act instruction. This was the problem confronting the Second District in Haygood v. State (Haygood I), where the court felt bound by governing precedent to affirm a second-degree murder conviction after the jury was instructed on both forms of manslaughter. In this case, however, the jury was faced with a conundrum. The manslaughter by act instruction was flawed, and the evidence arguably did not support "a theory of manslaughter by culpable negligence." This meant that if the jury be-


160. Jackson v. State, 49 So. 3d 271, 272 (Fla. 1st Dist. Ct. App. 2010) (per curiam) ("[E]ven though the erroneous instruction on manslaughter by act was given, the jury in this case was given the option of finding manslaughter by culpable negligence.").

161. Compare, e.g., Barros-Dias, 41 So. 3d at 372, with Montgomery II, 39 So. 3d 252, 258–60 (Fla. 2010), and Montgomery v. State (Montgomery I), 70 So. 3d 603, 608 (Fla. 1st Dist. Ct. App. 2009), aff’d, 39 So. 3d 252 (Fla. 2010).

162. Curry v. State, 64 So. 3d 152, 156 (Fla. 2d Dist. Ct. App. 2011) (per curiam) (finding that the defendant “did not waive the fundamental error in the manslaughter by act instruction by requesting that the [jury] . . . not [be] instruct[ed] on manslaughter by culpable negligence [where] [t]he evidence arguably did not support a culpable negligence theory of manslaughter”); Pollock v. State, 64 So. 3d 695, 698 (Fla. 2d Dist. Ct. App. 2011) (holding that the erroneous manslaughter by act instruction was not saved by a manslaughter by culpable negligence instruction where the evidence did not support that theory).

163. 54 So. 3d 1035 (Fla. 2d Dist. Ct. App.) (per curiam), review granted, 61 So. 3d 410 (Fla. 2011).

164. Id. at 1036–37.

165. Id. at 1037.
lieved the defendant intended his act but not the resulting death, “then neither form of manslaughter provided a viable lesser offense” on which to convict him. Although the evidence supported the second-degree murder verdict, the court found it “impossible to speculate what the jury would have found...” For this reason, the Second District certified the following question to the Supreme Court of Florida:

If a jury returns a verdict finding a defendant guilty of second-degree murder in a case where the evidence does not support a theory of culpable negligence, does a trial court commit fundamental error by giving a flawed manslaughter by act instruction when it also gives an instruction on manslaughter by culpable negligence?

The Supreme Court of Florida has accepted discretionary review of Haygood I.

iii. The Attempted Manslaughter by Act Instruction

Although the manslaughter by act instruction has been amended three times since the trial court decision in Montgomery II, the corresponding instruction for attempted manslaughter has remained unchanged. This instruction requires the State to prove that the defendant committed an act that was intended to cause the victim’s death, and would have caused death, if the defendant had not failed or been prevented from doing so. A conflict exists among the district courts as to whether this instruction remains viable.

166. Id.
167. Id. But cf. Carey v. State, 84 So. 3d 404, 405–06 (Fla. 4th Dist. Ct. App. 2012) (per curiam) (finding it irrelevant that the evidence did not support a theory of manslaughter by culpable negligence because the term “intentional act” did not mislead jurors into thinking that an intent-to-kill was required).
169. See Haygood v. State (Haygood II), 61 So. 3d 410, 410 (Fla. 2011).
170. See In re Amendments to Instruction 7.7 I, 41 So. 3d 853, 853, 857 (Fla. 2010) (per curiam), amended by 75 So. 3d 210 (Fla. 2011); Montgomery II, 39 So. 3d 252, 254 (Fla. 2010); Fla. Std. Jury Instr. (Crim.) 7.7 (2011).
172. Id. When “attempted manslaughter is . . . defined as a lesser included offense of attempted first-degree premeditated murder,” the jury is also instructed that the State need not “prove that the defendant had a premeditated intent to cause death.” Id.
in light of Montgomery II.\textsuperscript{173} The debate centers on the question whether the instruction improperly adds an intent-to-kill element that is not an element of the statutory crime of attempted manslaughter by act.\textsuperscript{174}

During the last survey period, the First District decided Lamb v. State\textsuperscript{175} and Rushing v. State\textsuperscript{176} which held that the attempted manslaughter by act instruction improperly requires the jury to find that the defendant intentionally attempted to kill the victim.\textsuperscript{177} The Fourth District rejected this argument in Williams v. State (Williams I).\textsuperscript{178} There, the court refused to extend Montgomery II to the attempted manslaughter by act instruction because that crime “requires an intent to commit an unlawful act that would have resulted in the victim’s death rather than an intent-to-kill.”\textsuperscript{179} The court also concluded that the instruction, as worded, did not confuse the jury because the defendant’s second-degree murder conviction reflected the jury’s finding that he intended to commit an “imminently dangerous [act evincing] a depraved mind.”\textsuperscript{180} The Fourth District certified conflict with Lamb and also “certified the following questions of great public importance: (1) Does the standard jury instruction on attempted manslaughter constitute fundamental error? (2) Is attempted manslaughter a viable offense in light of [Montgomery II]?”\textsuperscript{181}

More recently, in Houston v. State,\textsuperscript{182} the Second District held that the attempted manslaughter instruction suffers from the same infirmity as the 2008 manslaughter instruction in Montgomery II and constitutes fundamental


\textsuperscript{174} See FLA. STAT. §§ 777.04(1), 782.07(1) (2012); Fenster, 61 So. 3d at 466–67 (citing Williams I, 40 So. 3d at 74–75); Lamb, 18 So. 3d at 735.

\textsuperscript{175} 18 So. 3d 734 (Fla. 1st Dist. Ct. App. 2009) (per curiam).


\textsuperscript{177} Id. at D1376; Lamb, 18 So. 3d at 735; see also Montgomery I, 70 So. 3d 603, 608 (Fla. 1st Dist. Ct. App. 2009), aff’d, 39 So. 3d 252 (Fla. 2010).

\textsuperscript{178} 40 So. 3d 72, 75–76 (Fla. 4th Dist. Ct. App. 2010), review granted, 64 So. 3d 1262 (Fla. 2011); see also Fenster, 61 So. 3d at 466–67 (agreeing with Williams I, 40 So. 3d at 75, that no fundamental error occurs when the jury convicts a defendant of attempted second-degree murder after receiving the standard jury instruction for the lesser offense of attempted manslaughter).

\textsuperscript{179} Williams I, 40 So. 3d at 74–75 (citing Taylor v. State, 444 So. 2d 931, 934 (Fla. 1983)).

\textsuperscript{180} Id. at 75.

\textsuperscript{181} Id. at 75–76. The same questions were certified in Fenster. Fenster, 61 So. 3d at 467.

\textsuperscript{182} 87 So. 3d 1 (Fla. 2d Dist. Ct. App.), appeal dismissed, 73 So. 3d 760 (Fla. 2011).
Nothing in either the manslaughter statute or the attempt statute suggests that the crime of attempted manslaughter requires an intent-to-kill,” the court wrote. Reversing for a new trial on the charge of attempted second-degree murder, the court also certified conflict with Williams I. The First, Third, and Fifth Districts have followed Houston and certified conflict with Williams I.

The Supreme Court of Florida has granted review of Williams I to resolve this conflict, and Instruction 6.6 for attempted voluntary manslaughter is currently under review by the Committee on Standard Jury Instructions in Criminal Cases. The proposed instruction seeks to remove the phrase “intended to cause the death of [the] victim” and to add the word “intention-
ally” before “committed an act.”194 In other words, the proposed revision would require the State to prove that the “[d]efendant intentionally committed an act . . . [that] would have resulted in the [victim’s] death” if the defendant had not failed or been prevented from doing so.195

iv. Ineffective Assistance of Appellate Counsel

All district courts have found ineffective assistance of counsel where appellate counsel failed to raise the Supreme Court of Florida’s decision in Montgomery II while direct appeal was pending.196 The First and Fifth Districts have held that appellate counsel was ineffective for failing to argue that the manslaughter instruction was fundamentally erroneous after conflict was certified in Montgomery v. State (Montgomery I)197 and the Supreme Court of Florida accepted the issue for review.198 The Second and Fifth Districts have found ineffective assistance of appellate counsel for failing to argue that the attempted manslaughter by act instruction was fundamentally erroneous.199

v. Conclusion

The decisional chaos described above appears to stem from the failure of these opinions, including Montgomery II, to recognize that Florida’s manslaughter by act statute is a codification of two forms of common law manslaughter requiring different mental states.200 Thus, manslaughter by act is involuntary when the defendant intends to commit an unlawful act that re-

195. Id.
197. 70 So. 3d 603 (Fla. 1st Dist. Ct. App. 2009), aff’d, 39 So. 3d 252 (Fla. 2010).
199. See McClendon v. State, 93 So. 3d 1131, 1131–32 (Fla. 2d Dist. Ct. App. 2012); Mendenhall v. State, 82 So. 3d 1153, 1154 (Fla. 5th Dist. Ct. App. 2012) (per curiam) (citing Montgomery II, 39 So. 3d 252, 256–58 (Fla. 2010)).
200. Compare Montgomery II, 39 So. 3d at 256, with Fortner v. State, 161 So. 94, 96 (Fla. 1935) (Brown, J., concurring).
sults in death, although with no intent-to-kill. In such cases, Montgomery II correctly holds that fundamental error occurs when the trial court instructs a jury that intent-to-kill is an element of manslaughter by act. Manslaught-er by act is voluntary, on the other hand, when the defendant intends to kill “another in a sudden heat of passion due to adequate provocation, and not with malice.” In Taylor v. State, the Supreme Court of Florida explained that nothing in the statutory definition of manslaughter excludes all intentional killings and provided heat of passion killings as an example of an intentional killing that constitutes manslaughter. The Taylor court extended this reasoning to conclude that the crime of attempted manslaughter would include “situations where, if death had resulted, the defendant could have been found guilty of voluntary manslaughter.”

Arguably, by removing the intent-to-kill element from the jury instruction, the Supreme Court of Florida has eliminated the crime of voluntary manslaughter and possibly attempted voluntary manslaughter as well. Separate jury instructions for voluntary manslaughter and involuntary manslaughter could eliminate the seemingly endless interpretive problems described in this section.

b. Manslaughter by Culpable Negligence

Santarelli v. State was the first manslaughter case to be decided under Florida’s Open House Party statute, which prohibits a person in charge of a

203. Fortner, 161 So. at 96 (Brown, J., concurring).
204. 444 So. 2d 931 (Fla. 1983).
205. 444 So. 2d 931 (Fla. 1983).
206. See id. at 933 (quoting Williams v. State, 26 So. 184, 186 (Fla. 1899)).
208. See id. at 934; Fortner, 161 So. at 96 (Brown, J., concurring).
209. See, e.g., 11TH CIR. PATTERN JURY INSTR. (CRIM.) 46.1 (2010) (voluntary manslaughter “is the unlawful and intentional killing of a human being without malice upon a sudden quarrel or heat of passion”); 11TH CIR. PATTERN JURY INSTR. (CRIM.) 46.2 (involuntary manslaughter “is the unlawful but unintentional killing of a human being [that occurs] while committing an unlawful act that isn’t a felony [or] as a result of an act done in wanton and reckless disregard for human life”).
210. 62 So. 3d 1211 (Fla. 5th Dist. Ct. App.), review denied, 77 So. 3d 1255 (Fla. 2011).
house from allowing minors to consume intoxicants on the premises. In this case, two teenagers were killed in a drunk driving incident after leaving a house party, hosted by Santarelli, at which minors were permitted to consume alcohol and other illegal substances.212 After the trial court denied her motion to dismiss the manslaughter counts, Santarelli was acquitted of manslaughter and convicted of two misdemeanor “count[s] of allowing an open house party . . . and . . . of contributing to the delinquency of a minor.”213 On appeal, she argued that “the judgments and sentences . . . on the misdemeanor counts [were] void” because the circuit court would have lost jurisdiction over these counts if the two felony manslaughter counts had been properly dismissed.214

The Fifth District disagreed and affirmed her convictions.215 In her first argument, Santarelli asserted that the driver’s decision to operate a motor vehicle while intoxicated and the passenger’s decision to ride with him constituted superseding events that broke the causation link necessary for the manslaughter charges.216 The court rejected this argument, concluding that the defendant’s permissive acts had triggered a chain of foreseeable events that led to the deaths.217 In her second argument, Santarelli maintained that a violation of the Open House Party statute “[could not] legally constitute culpable negligence” because it “is not sufficiently willful or wanton to support an award of punitive damages” and so could not support felony subject matter jurisdiction.218 The court rejected this argument because the defendant relied on a case that predated the Open House Party statute and because her other “intentional and culpably negligent acts” were sufficient to support the manslaughter charges.219 Thus, the Fifth District held that the trial court properly denied the defendant’s motion to dismiss two counts of manslaughter.220

210. See id. at 1213, 1215; see also FLA. STAT. § 856.015 (2012).
211. FLA. STAT. § 856.015(2).
212. Santarelli, 62 So. 3d at 1212.
213. Id. at 1212–13.
214. Id. at 1212.
215. Id. at 1212, 1215.
216. Id. at 1213.
218. See id. at 1212–13, 1215 (citing Jacmar Pac. Pizza Corp. v. Huston, 502 So. 2d 91, 92 (Fla. 5th Dist. Ct. App. 1987), superseded by statute, FLA. STAT. § 856.015 (2012)).
219. Id. at 1215 (citing Huston, 502 So. 2d at 92).
220. Id.
D. Kidnapping

During the survey period, the Supreme Court of Florida wrote two opinions interpreting the state kidnapping statute.\(^{221}\) In *Davila v. State (Davila II)*,\(^{222}\) the court held that a custodial parent may be convicted of kidnapping his or her own minor child.\(^{223}\) The defendant in this case was convicted of three counts of kidnapping his eleven-year-old son based on the child’s lengthy confinement in various rooms in the family home on multiple occasions.\(^{224}\) The Third District affirmed the convictions.\(^{225}\) The court recognized a general rule barring conviction for parental kidnapping when no court order deprives the defendant of custody.\(^{226}\) However, a judicial exception exists when the defendant “‘does not simply exercise his rights to the child, but takes her for an ulterior and unlawful purpose which is specifically forbidden by the kidnapping statute itself.’”\(^{227}\) The court certified conflict with *Muniz v. State*,\(^{228}\) in which the Second District held that it is legally impossible for a custodial parent to kidnap his or her own child.\(^{229}\)

Affirming Davila’s conviction, the Supreme Court of Florida resolved the conflict by disapproving of *Muniz*.\(^{230}\) The court declared that no language in Florida’s kidnapping statute precludes criminal liability when a custodial parent consents to the child’s confinement.\(^{231}\) Under section 787.01(1)(a) of the *Florida Statutes*, kidnapping occurs when the defendant “confines, abducts, or imprisons another person, against [that person’s] will,” with the intent (in relevant part) to harm or terrorize that person.\(^{232}\) Under section 787.01(1)(b), if the victim is under the age of thirteen, the absence of parental consent to the confinement establishes that the act is against the child’s will.\(^{233}\) The court rejected the argument that this language means a

\(^{221}\) Davila v. State (Davila II), 75 So. 3d 192, 195 (Fla. 2011); Delgado v. State (Delgado II), 71 So. 3d 54, 56 (Fla. 2011).

\(^{222}\) Id. at 193, 197.

\(^{223}\) Id. at 192–94.

\(^{224}\) Davila v. State (Davila I), 26 So. 3d 5, 6 (Fla. 3d Dist. Ct. App. 2009), review granted, 75 So. 3d 192 (Fla. 2010), and aff’d, 75 So. 3d 192 (Fla. 2011).

\(^{225}\) Id. at 7 (citing Johnson v. State, 637 So. 2d 3, 4 (Fla. 3d Dist. Ct. App. 1994) (per curiam)).

\(^{226}\) Id. (quoting Lafleur v. State, 661 So. 2d 346, 349 (Fla. 3d Dist. Ct. App. 1995)).

\(^{227}\) 764 So. 2d 729 (Fla. 2d Dist. Ct. App. 2000).

\(^{228}\) Davila I, 26 So. 3d at 7 (citing Muniz, 764 So. 2d at 731).

\(^{229}\) See Davila II, 75 So. 3d 192, 197 (Fla. 2011) (citing Muniz, 764 So. 2d at 729).

\(^{230}\) Id.

\(^{231}\) Id. at 196; see also Fla. STAT. § 787.01(1)(a) (2012).

\(^{232}\) Davila II, 75 So. 3d at 197; see also Fla. STAT. § 787.01(1)(b).
parent who confines a child necessarily consents to that confinement.234 Instead, the section simply provides “a method of proof which allows the State to establish that the overt act on the part of the defendant was against a person’s will when that person is a child under the age of thirteen.”235 The court concluded that “if the Legislature intended to exempt a [custodial] parent from [such] criminal liability . . . it would have expressly stated so.”236

In a dissenting opinion, Chief Justice Charles T. Canady argued that, when the victim is under the age of thirteen, the absence of parental consent is a necessary condition for establishing that “confinement is ‘against the [child’s] will.’” In other words, the statute could be read to “exempt custodial parents from criminal liability for kidnapping their own children who are under thirteen.”237 Justice Barbara J. Pariente added a concurring opinion in which she wrote that the dissent’s reasoning would lead to the absurd result that, “the parent . . . could be convicted of kidnapping a child who is thirteen years of age or older, but not a child under the age of thirteen.”238 She also cautioned that section 787.01(1)(b) “was not intended to operate to preclude criminal liability for parents or legal guardians who meet the elements of the statute.”239

The second case was Delgado v. State (Delgado II),240 in which the court held that a defendant cannot be convicted of kidnapping with the intent to commit or facilitate another felony unless he or she is “aware of the victim’s presence” at the time the victim is constrained.241 Here, Delgado and an accomplice stole a pickup truck with a sleeping toddler in the backseat, only to abandon the vehicle three miles away with the child frightened but unhurt.242 Based on these acts, he was convicted of, inter alia, “kidnapping with the intent to commit or facilitate a felony.”243 The Third District upheld the conviction on the ground that the three-part test set out in Faison v.

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234. Davila II, 75 So. 3d at 197.
235. Id. at 196; see also FLA. STAT. § 787.01(1)(b).
236. Davila II, 75 So. 3d at 196.
237. Id. at 199 (Canady, C.J., dissenting); see also FLA. STAT. § 787.01(1)(b).
238. Davila II, 75 So. 3d at 199.
239. Id. at 197 (Pariente, J., concurring) (citing Davila II, 75 So. 3d at 199 (Canady, C.J., dissenting)).
240. Id.
241. 71 So. 3d 54 (Fla. 2011).
242. Id. at 61.
243. Id. at 57 & n.2.
244. Id. at 58.
NOVA LAW REVIEW

State245 was satisfied when the defendant became aware of the child’s presence in the truck and continued to confine her.246

Under the Faison test, in order for a defendant’s actions during the commission of another felony to constitute kidnapping, the movement or confinement:

“(a) Must not be slight, inconsequential, and merely incidental to the other crime;

(b) Must not be of the kind inherent in the nature of the other crime; and

(c) Must have some significance, independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection.”247

According to the Third District in Delgado v. State (Delgado I),248 the “continued confinement of the child” constituted kidnapping under Faison because it was not incidental to the theft, but rather “was essential to Delgado’s attempt to avoid apprehension for [grand] theft.”249

The Supreme Court of Florida disagreed, however, writing that the Faison test was not intended to replace the elements of the kidnapping statute.250 Because the purpose of the test is to prevent kidnapping convictions for crimes such as sexual battery and robbery that inherently involve unlawful confinement, the court ruled that all elements of a kidnapping charge must be proved before applying Faison.251 In this case, the State was required to prove that Delgado performed an overt act with the “specific intent to commit or facilitate the commission of an underlying felony.”252 Without advance knowledge of the victim’s confinement, he could not have constrained the victim with that specific intent, and so Faison was inapplicable.253 Because the State’s evidence was insufficient to sustain the kidnapping convic-

245. 426 So. 2d 963 (Fla. 1983).
246. See Delgado v. State (Delgado I), 19 So. 3d 1055, 1057–58 (Fla. 3d Dist. Ct. App. 2009) (citing Faison, 426 So. 2d at 965), review granted, 32 So. 3d 622 (Fla. 2010), and quashed, 71 So. 3d 54 (Fla. 2011).
247. Faison, 426 So. 2d at 965 (quoting State v. Buggs, 547 P.2d 720, 731 (Kan. 1976)).
248. 19 So. 3d 1055 (Fla. 3d Dist. Ct. App. 2009), review granted, 32 So. 3d 622 (Fla. 2010), and quashed, 71 So. 3d 54 (Fla. 2011).
249. Id. at 1057–58.
250. Delgado II, 71 So. 3d 54, 56, 60 (Fla. 2011).
251. Id. at 60.
252. Id. at 61.
253. Id. at 63–64, 68; see also Fla. STAT. § 787.01(1)(a)2. (2012).
tion, the court remanded the case with instructions to vacate Delgado’s kid-
napping conviction.254

E. Sexual Offenses

During the survey period, the Second District decided two child pornog-
raphy cases in which the faces of children were superimposed upon the
nude bodies of adults to form composite images.255 In Stelmack v. State,256
the defendant was convicted under section 827.071(5) of the Florida Statutes
for possessing composite images in which the faces and heads of two young
girls were cut and pasted onto images of a woman exhibiting her genitals.257
On appeal, Stelmack maintained that the images did not violate the child
pornography statute as a matter of law because the nude bodies depicted in
the composites were those of an adult.258 The Second District agreed, con-
cluding that the images depicted no more than “a simulated lewd exhibition
of the genitals by a child,” which the statute does not proscribe.259 In other
words, the child pornography provision requires “actual lewd exhibition
of the genitals by a child.”260 This conclusion is supported by the legislative
history of the statute, which “was aimed at preventing the exploitation of
children in sexual performances.”261 Because “no part of any of the images
displays a child who is actually lewdly exhibiting her genitals,” the appellate
court reversed the conviction and remanded the case for the trial court to
discharge the defendant.262

The same court extended this decision in Parker v. State,263 where the
composite images showed “a child’s head superimposed on an adult female
body” involved in various forms of sexual activity.264 Regardless of whether
the images depicted actual or simulated conduct, the court held they were not
child pornography because no child had engaged in the conduct shown in the
images.265 The dissent distinguished the simulated lewd exhibition of child-

254. Delgado II, 71 So. 3d at 67–68.
255. Parker v. State, 81 So. 3d 451, 452 (Fla. 2d Dist. Ct. App. 2011); Stelmack v. State,
58 So. 3d 874, 874 (Fla. 2d Dist. Ct. App. 2010).
256. 58 So. 3d 874 (Fla. 2d Dist. Ct. App. 2010).
257. Id. at 874.
258. Id. at 875.
259. Id. at 876; see also Fla. Stat. § 827.071(1)(g) (2007) (amended 2011).
260. Stelmack, 58 So. 3d at 876 (first emphasis added).
261. Id.
262. Id. at 877.
263. 81 So. 3d 451 (Fla. 2d Dist. Ct. App. 2011).
264. Id. at 453.
265. Id.
ren’s genitalia in *Stelmack* from the simulated sexual activity by a child in the instant case.\(^{266}\) The former was not a criminal act, according to the dissent, while the latter constituted prohibited sexual activity.\(^{267}\) The majority refuted this distinction on the ground that, no matter how the images were characterized, the conduct was “that of an adult.”\(^{268}\) Consequently, Parker’s convictions were reversed.\(^{269}\)

In *L.A.P. v. State*,\(^ {270}\) the Second District held that a defendant who failed to advise her partner of her human immunodeficiency virus (HIV) positive status before participating in oral sex and digital vaginal penetration did not violate section 384.24(2) of the *Florida Statutes*.\(^ {271}\) That section makes it unlawful for an individual knowingly infected with HIV to engage in sexual intercourse without both informing a partner that he or she risks contracting HIV and obtaining the partner’s consent.\(^ {272}\) Because section 384.24(2) does not define “sexual intercourse,”\(^ {273}\) the court considered other statutory and decisional law\(^ {274}\) and defined this term as “‘the penetration of the female sex organ by the male sex organ.’”\(^ {275}\) Accordingly, the court agreed with the defendant “that sexual intercourse is an unambiguous phrase which must be given its plain meaning in the absence of a definition in chapter 384” and which does not include oral and digital penetration.\(^ {276}\) The Second District reversed and remanded with directions that the trial court discharge the defendant.\(^ {277}\)

F. *Theft*

In *Sanders v. State*,\(^ {278}\) the Fourth District considered the limits of Florida’s jurisdiction over a defendant whose offense occurred “on a commercial
flight from Arizona before it entered Florida airspace. The State alleged that, before the flight landed in Fort Lauderdale, Sanders stole $500 from another passenger’s handbag but was forced to return the money when a flight attendant interceded. The plane was not in Florida’s airspace when the theft or recovery of the stolen funds occurred. Sanders was charged with grand theft.

Sanders moved to dismiss on the ground that, pursuant to section 910.005 of the Florida Statutes, Florida lacked jurisdiction to prosecute because all acts relating to the charge transpired outside the state. The State argued that her conduct amounted to an attempt to commit grand theft within the state because, in order to complete the crime, she would have had to deplane with the victim’s money after landing in Florida. After the trial court denied her motion to dismiss, Sanders pled no contest and reserved her right to appeal. The Fourth District reversed. The court first noted that the crime of theft includes “both the completed offense and the attempt[ed] . . . offense.” By the time the flight had entered Florida airspace, the court wrote, all elements of theft were complete because Sanders had “obtained the victim’s property with the intent to permanently deprive her of it.” “This means that the theft was not ‘committed . . . within’ Florida” under section 910.005(1)(a). It also meant that her actions on the plane did not amount to an attempt to commit theft within Florida under section 910.005(1)(b). The case was remanded with instructions for the trial court to grant the motion to dismiss.

280. Id. at 914–15.
281. Id. at 915.
282. Id.
283. Id.
284. Sanders, 77 So. 3d at 915; see also Fla. Stat., § 910.005 (2012).
285. Sanders, 77 So. 3d at 915.
286. Id.
287. Id. at 917.
288. Id. at 915 (citing Fla. Stat. § 812.014(1)(a) (2012)). Section 812.04(1)(a) of the Florida Statutes includes the “endeavor[] to obtain or to use the property of another with intent to, either temporarily or permanently deprive the other person of a right to the property or a benefit from the property.” Id. at 915 (emphasis added) (quoting Fla. Stat. § 812.014(1)(a)).
289. Sanders, 77 So. 3d at 916.
290. Id. (quoting Fla. Stat. § 910.005(1)(a)).
291. Id. (quoting Fla. Stat. § 910.005(1)(b)).
292. Id. at 917.
During the survey period, the courts continued to have difficulty applying section 812.025 of the Florida Statutes. That section permits “the State to charge [both] theft and dealing in stolen property in connection with one scheme or course of conduct,” but allows the trier of fact to return a guilty verdict on only one offense. The problem in the district courts centers on the proper remedy to apply when dual convictions result from a trial court’s unchallenged failure to instruct the jury that it may not convict on both offenses.

In Kiss v. State, for example, the Fourth District concluded that the failure to instruct the jury on its obligation under section 812.025 required a new trial because merely striking the grand theft charge could not cure the error. The court reasoned that a properly instructed jury could have found the defendant guilty of only theft, the lesser offense. In Blackmon v. State, on the other hand, the First District held that the proper remedy is to vacate the conviction for the lesser offense. “[T]his remedy better respects the jury’s determination that the state met its burden to prove the greater offense and also avoids the need to speculate what verdict the jury might have returned had it been required to choose between the greater and lesser offenses,” the court wrote. Additionally, it comports with the decision of the Supreme Court of Florida in Hall v. State, where the case was remanded with directions to reverse one count and to resentence the defendant on the remaining count. The Blackmon court “certif[ied] conflict with Kiss regarding the proper remedy when, contrary to section 812.025, the defendant is convicted of both theft and dealing in stolen property.”

The Second District arrived at the same conclusion in Williams v. State, where the trial court failed to instruct the jury on section 812.025 and then dismissed the third-degree grand theft charge when the jury con-

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293. See, e.g., Hall v. State, 826 So. 2d 268, 271 (Fla. 2002) (per curiam); Kiss v. State, 42 So. 3d 810, 811 (Fla. 4th Dist. Ct. App. 2010).
294. Hall, 826 So. 2d at 271 (recognizing that under this statute, the trier of fact must first determine the “defendant’s intended use of the stolen property” and then may convict the defendant “of one or the other offense, but not both”).
295. 42 So. 3d 810 (Fla. 4th Dist. Ct. App. 2010).
296. Id. at 811; see also Fla. Stat. § 812.025.
297. See Kiss, 42 So. 3d at 812–13.
298. 58 So. 3d 343 (Fla. 1st Dist. Ct. App.), review granted, 67 So. 3d 198 (Fla. 2011).
299. Id. at 348.
300. Id.
301. 826 So. 2d 268 (Fla. 2002) (per curiam).
302. Id. at 272.
303. Blackmon, 58 So. 3d at 348; see also Fla. Stat. § 812.025 (2012).
304. 66 So. 3d 360 (Fla. 2d Dist. Ct. App.), review granted, 70 So. 3d 588 (Fla. 2011).
The defendant on both counts. The appellate court determined that no new trial was warranted and that pursuant to the policy of double jeopardy, the defendant could be sentenced based on the greater offense. However, the court also criticized section 812.025 for its legislative policy and its lack of guidance for juries. Finally, the court expressed doubt as to whether any jury instruction was required at all, as further instruction might unnecessarily complicate an already confusing process. The court concluded as follows:

[T]he procedural requirements in section 812.025 are unenforceable to the extent that the statute (1) attempts to establish a procedure by which a jury does not return a factual finding announcing a verdict of guilty on each of the two separately charged offenses despite its determination that the State has proven the offenses beyond a reasonable doubt and (2) requires the jury to make this selection without any legal criteria or factual basis.

Affirming the trial court’s decision, the Second District certified the following questions of great public importance:

1. Must the trial court instruct the jury to perform the selection process described in section 812.025 of the Florida Statutes?
2. If so, must the appellate court order a new trial on both offenses if the trial court fails to give the instruction?
3. If the appellate court is not required to mandate a new trial, must it require the trial court to select the greater offense or the lesser offense when the two offenses are offenses of different degrees or of different severity ranking?

305. Id. at 361; see also Fla. Stat. § 812.025; Wilkins v. State, 78 So. 3d 18, 19 (Fla. 2d Dist. Ct. App. 2011) (certifying conflict with Kiss v. State, 42 So. 3d 810, 812 (Fla. 4th Dist. Ct. App. 2010)).
306. Williams, 66 So. 3d at 365.
307. See id.
308. Id. at 363; see also Fla. Stat. § 812.025.
309. See Williams, 66 So. 3d at 364.
310. Id. at 361.
311. Id. at 365 (emphasis added). The Second District again certified these three questions in Poole v. State, 67 So. 3d 431, 432 (Fla. 2d Dist. Ct. App. 2011) (per curiam).
In Kablitz v. State, the Fourth District reaffirmed the approach it took in Kiss and certified conflict with Blackmon and Williams.

G. Trespass

Trespass on school grounds is a first-degree misdemeanor when the defendant enters or remains there after being directed to leave the premises by the principal of the school or the principal’s designee. A designee is “one who has received express or implied authorization from the school’s principal to exercise control over the property of the school.”

In D.J. v. State (D.J. I), the defendant “was found to have trespassed on school property” after being warned by a school security guard not to enter school property. On appeal, D.J. argued that the case should have been dismissed because the State produced no evidence that the security guard was a designee of the principal, as required by section 810.097(2). The Third District rejected this argument, holding that the state is not required to prove the identity of the person issuing the order unless the defendant challenges that person’s authority. Because D.J. did not contest the security guard’s authority at trial, the Third District affirmed the conviction. D.J. filed a petition for review in the Supreme Court of Florida on the ground that the Third District’s decision expressly and directly conflicted with the supreme court’s decision in State v. Dye. In contrast, in B.C. v. State, the First District held that, “the State must prove the involvement of the principal or his/her designee to establish a violation of section

313. Id. at D2358 (citing Williams, 66 So. 3d at 365; Blackmon v. State, 58 So. 3d 343, 347 (Fla. 1st Dist. Ct. App.), review granted, 67 So. 3d 198 (Fla. 2011); Kiss v. State, 42 So. 3d 810, 811, 813 (Fla. 4th Dist. Ct. App. 2010)).
316. 43 So. 3d 176 (Fla. 3rd Dist. Ct. App.), review granted, 47 So. 3d 1287 (Fla. 2010), and quashed, 67 So. 3d 1029 (Fla. 2011).
317. Id. at 177 (citing Fla. Stat. § 810.097).
318. Id.; Fla. Stat. § 810.097(2).
319. D.J. I, 43 So. 3d at 177 (quoting Downer v. State, 375 So. 2d 840, 845–46 (Fla. 1979)).
320. See id.
321. D.J. II, 67 So. 3d 1029, 1031 (Fla. 2011) (citing State v. Dye, 346 So. 2d 538, 542 (Fla. 1977)).
322. 70 So. 3d 666 (Fla. 1st Dist. Ct. App. 2011).

810.097(2)." Because this decision conflicted with D.J. I, the First District certified conflict.324

This conflict was resolved by the Supreme Court of Florida in D.J. v. State (D.J. II).325 Without mentioning B.C., the court quashed D.J.’s conviction and held that the State must prove both the identity of the individual who warned defendant to leave school grounds and that individual’s authority to control access to the property as necessary elements of the crime.326 This conclusion was supported by the plain language of both the statute and the applicable standard jury instruction, the court wrote.327 It was also supported by the court’s own decision in Dye,328 which held that a trespass conviction requires proof of the identity and authority of the person issuing the warning.329 Under that standard, the State had failed to present evidence that the school’s security guard was the principal’s designee, or was otherwise authorized to limit access to school property, and had not cited any “rule or statute indicating that a school security guard, by virtue of his or her title, would possess such authority as a matter of law.”330

H. Miscellaneous

In Anderson v. State,331 the Supreme Court of Florida held that the offense of driving with a suspended license in violation of section 322.34 of the Florida Statutes did not require actual knowledge of the suspension by the defendant.332 The knowledge element of the offense is satisfied, the court wrote, by evidence that written notice was mailed to a defendant’s last known address, and proof that this was the defendant’s address at the time of mailing.333 In so ruling, the court disapproved of the decisions of the First and Fourth District courts in Haygood v. State334 and Brown v. State,335 which

323. Id. at 669.
324. Id. at 671.
325. 67 So. 3d. 1029, 1035 (Fla. 2011).
326. Id. (citing Dye, 346 So. 2d at 542).
327. Id. at 1033–34 (citing Fla. Stat. § 810.097(2) (2012); Fla. Std. Jury Instr. (Crim.) 13.5(b) (2007)).
328. Id. at 1035 (citing Dye, 346 So. 2d at 541–42).
330. D.J. II, 67 So. 3d at 1035 (citing Dye, 346 So. 2d at 542).
331. 87 So. 3d 774 (Fla. 2012).
332. See id. at 781; see also Fla. Stat. § 322.34(2) (2012).
333. Anderson, 87 So. 3d at 781.
required the State to prove actual receipt of a license suspension notice to establish knowledge of that suspension.336

The Third District reviewed the dismissal of a cannabis trafficking charge in State v. Estrada,337 holding that Florida’s statutory definition of cannabis includes the moisture of a fresh marijuana plant.338 The seized cannabis at issue weighed twenty-six pounds at the time of arrest but, after secreting moisture in storage, it weighed less than the statutory threshold for trafficking.339 The trial court dismissed the trafficking charge, reasoning that the weight of cannabis does not include moisture because wet marijuana cannot be sold on the market.340 The appellate court disagreed and held that the statutory definition of cannabis in section 893.02(3) excludes excess water weight that is “not inherent in the [marijuana] plant’s vegetable matter.”341 The court further defined the term “excess water” as “‘water that has been added extrinsically to . . . or . . . accidentally acquired’” by the marijuana.342 In Estrada, the type of water that drained from the marijuana while it was in evidence storage was “inherent” in its vegetable matter because the live plants had been seized from the defendant’s lab and vehicle, and “had not fallen into a canal or other body of water.”343 The court acknowledged a contrary interpretation in Hatch v. State, Department of Revenue,344 where the First District held that the weight of seized marijuana excludes the moisture of a fresh marijuana plant.345 However, the court distinguished Hatch because it was “limited to tax assessment cases” that require


336. Anderson, 87 So. 3d at 779–81 (citing Haygood, 17 So. 3d at 896; Brown, 764 So. 2d at 743–44).

337. 76 So. 3d 371 (Fla. 3d Dist. Ct. App. 2011).

338. Id. at 372–73 (quoting FLA. STAT. § 893.02(3) (2012)).

339. Id. at 374; see also FLA. STAT. § 893.135(1)(a).

340. Estrada, 76 So. 3d at 372.

341. Id. at 373 (quoting State v. Velasquez, 879 So. 2d 1259, 1260 n.1 (Fla. 3d Dist. Ct. App. 2004) (per curiam). Cannabis is defined as “all parts of any plant of the genus Cannabis, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds or resin.” FLA. STAT. § 893.02(3).

342. Estrada, 76 So. 3d at 373 (quoting Cronin v. State, 470 So. 2d 802, 803 (Fla. 4th Dist. Ct. App. 1985)).

343. See id. at 374 (citing Cronin, 470 So. 2d at 804).


345. Estrada, 76 So. 3d at 373 n.5 (quoting Hatch, 585 So. 2d at 1079).
courts to estimate the retail price of cannabis. Accordingly, the Third District reversed the order dismissing the charges.

In *Pinkney v. State*, the Second District clarified the mental state required for assault under section 784.011(1) of the *Florida Statutes*. This defendant was charged with aggravated assault because he backed his vehicle in the direction of a police officer. On appeal, Pinkney argued that the State had not proven his “specific intent to do violence to [his] victim,” as required by the Second District in *State v. Shorette*. Conceding that this was an accurate statement of *Shorette*, the court nevertheless receded from that case on the ground that it incorrectly stated the law. In so ruling, the court held that the State must prove that the defendant’s act “was substantially certain to put the victim in fear of imminent violence, not that the defendant had the intent to do violence to the victim.” A statute’s use of the word “intentionally,” without more, signifies that the statute “‘prohibits either a specific voluntary act or something that is substantially certain to result from the act,’” rather than an act committed accidentally or negligently. Thus, the “‘subjective intent to cause the particular result is irrelevant,’” the court explained. In light of his vehicle’s proximity to the officer, Pinkney’s act constituted a threat of violence because it was substantially certain to put the officer in fear of imminent violence.

The issue confronting the First District in *Wess v. State* was whether a defendant commits robbery by sudden snatching by taking property that is “close to the victim or within the victim’s reach or control.” The victim in this case was sitting on a bench with her purse next to her, touching her hip. She felt it move and then spotted the defendant running away with

346. *Id.*
347. *Id.* at 374.
348. 74 So. 3d 572 (Fla. 2d Dist. Ct. App. 2011) (en banc), *reviewed denied*, 95 So. 3d 213 (Fla. 2012).
349. *Id.* at 576 (citing FLA. STAT. § 784.011(1) (2012)).
350. *Id.* at 573–74.
351. *Id.* at 575.
353. *Pinkney*, 74 So. 3d at 575.
354. *Id.* at 576.
355. *Id.* (quoting Linehan v. State, 442 So. 2d 244, 247 (Fla. 2d Dist. Ct. App. 1983) (en banc)).
356. *Id.* (quoting Linehan, 442 So. 2d at 247).
357. *Id.* at 577.
358. 67 So. 3d 1133 (Fla. 1st Dist. Ct. App. 2011).
359. *Id.* at 1135–36.
360. *Id.* at 1134.
it.\textsuperscript{361} Wess was convicted of robbery by sudden snatching under section 812.131 of the Florida Statutes, which applies when money or other property is taken "from the victim’s person."\textsuperscript{362} The appellate court interpreted this phrase to require the property to be "on" the person of the victim.\textsuperscript{363} The essential difference between this crime and robbery, which applies when property is taken from a "victim’s immediate vicinity and/or control,"\textsuperscript{364} is that robbery by sudden snatching requires property to be "‘abruptly and unexpectedly plucked from the embrace of the person.’"\textsuperscript{365} It is not enough that the property is next to her, even if it is touching her or within her reach or control.\textsuperscript{366} Therefore, the court reversed the defendant’s conviction for robbery by sudden snatching and directed the trial court to enter a judgment for misdemeanor theft.\textsuperscript{367}

In \textit{State v. Morival},\textsuperscript{368} a case of first impression, the Second District held that a defendant’s act of repeatedly depriving his dogs of nourishment over an extended period was properly charged as felony animal cruelty.\textsuperscript{369} In this case, the discovery of the defendant’s dogs in a severely undernourished and emaciated condition led to charges against him for felony animal cruelty under section 828.12(2) of the Florida Statutes.\textsuperscript{370} The trial court granted Morival’s motion to dismiss on the ground “that failure to feed a dog can constitute no more than a misdemeanor.”\textsuperscript{371} On appeal, however, the Second District concluded that the felony and misdemeanor provisions of section 828.12 properly distinguished between a temporary and short-term deprivation of necessary sustenance and extended deprivation causing malnutrition.\textsuperscript{372} Because the dogs were extremely emaciated, the court found that Morival’s failure to provide food could be considered “excessive or repeated infliction of unnecessary pain or suffering” under the felony animal cruelty

\begin{enumerate}
\item \textit{Id.}
\item \textit{Id.} at 1134–35 (quoting Fl.A. STAT. § 812.131(1) (2012)).
\item \textit{Wess}, 67 So. 3d at 1137.
\item \textit{Id.} at 1135.
\item \textit{Id.} (quoting Brown v. State, 848 So. 2d 361, 364 (Fla. 4th Dist. Ct. App. 2003)).
\item \textit{See id.} at 1136–37.
\item \textit{Id.} at 1137.
\item 75 So. 3d 810 (Fla. 2d Dist. Ct. App. 2011).
\item \textit{Id.} at 810, 812.
\item \textit{Id.} at 810–11 (citing Fl.A. STAT. § 828.12(2) (2012)). Under section 828.12(2), any intentional act resulting in “the cruel death, or excessive or repeated infliction of unnecessary pain or suffering” of an animal is a felony. Fl.A. STAT. § 828.12(2).
\item \textit{Morival}, 75 So. 3d at 811.
\item \textit{Id.} at 812; \textit{see also} Fl.A. STAT. § 828.12(1)–(2).
\end{enumerate}
The court therefore reversed and remanded on the ground that the issue could not “be resolved by a motion to dismiss.”

III. DEFENSES

A. Abandonment

The defense of abandonment was at issue in Rockmore v. State. In this case, as Rockmore left a store without paying for goods in his possession, a store employee pursued him and caused him to drop the merchandise. The employee chased him to his car, where Rockmore displayed a firearm. At trial, he argued that no robbery had occurred because he had abandoned the goods before displaying the firearm. The trial court denied his motion for judgment of acquittal and his request for a special jury instruction on the defense of abandonment.

On appeal of his conviction for robbery with a firearm, the Fifth District considered both the meaning of the term “abandonment” and the effect of the 1987 amendments to Florida’s robbery statute. These amendments expanded robbery to include the use or threat of force “in the course of the taking.” This phrase includes acts “subsequent to the taking,” provided both the act and the taking are part of a “continuous series of acts or events.” The court defined the phrase “continuous series of acts or events” as an uninterrupted “sequence of related acts or events” that would include both flight and discarding stolen goods. The court also expressed doubt that discarding stolen merchandise when grabbed by a pursuing merchant is the same as “abandonment,” which typically excludes an involun

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373. See Morival, 75 So. 3d at 811–12 (quoting Fla. Stat. § 828.12(2)).
374. Id. at 812.
376. Id.
377. Id.
378. Id.
379. Id. at D534–35 (citing Simmons v. State, 551 So. 2d 607, 608 (Fla. 5th Dist. Ct. App. 1989) (per curiam); State v. Baker, 540 So. 2d 847, 848 (Fla. 3d Dist. Ct. App. 1989)).
382. Id. (quoting Fla. Stat. § 812.13(3)(b)).
tary act motivated by fear of apprehension. Even if Rockmore’s acts constituted abandonment, however, a judgment of acquittal was precluded by the factual dispute as to whether he had dropped all the merchandise before displaying the firearm. Moreover, no special jury instruction on abandonment was required, the court held, because the standard instruction tracks the statutory language and the proffered special instruction inaccurately stated the law. Upholding the conviction, the Fifth District acknowledged conflict with a line of cases holding that the taking and the force or threat are not a “continuous series of acts or events” if the property is abandoned before the defendant uses some force or threat to escape.

B. Prescription Defense

Section 893.13(6)(a) of the Florida Statutes sets out an affirmative defense to criminal charges based on possession of certain controlled substances that have been “lawfully obtained from a practitioner or pursuant to a valid prescription or order of a practitioner while acting in the course of his or her professional practice.” Section 499.03 of the Florida Statutes also provides a prescription defense to charges based on possession of a prescription drug or possession of a prescription drug “with intent to sell, dispense, or deliver” except when “obtained by a valid prescription of a practitioner licensed by law to prescribe the drug.” During the survey period, Florida’s appellate courts were called upon to interpret this defense in a variety of situations.

In the first category of cases, the issue was whether the prescription defense is available to an innocent possessor of another person’s prescribed drugs. Until the decision of the First District in McCoy v. State, no Flor-

386. Id. at D535 (citing State v. White, 891 So. 2d 502, 503 (Fla. 2004); State v. Hubbard, 751 So. 2d 552, 558 (Fla. 1999); City of Tampa v. Long, 638 So. 2d 35, 39 (Fla. 1994)).
389. Id. § 499.03(1).
391. E.g., McCoy, 56 So. 3d at 39.
392. 56 So. 3d 37 (Fla. 1st Dist. Ct. App. 2010).
ida court had ever decided this issue. McCoy was convicted of trafficking in hydrocodone based upon her possession of a pill bottle that contained Lor-cet tablets and bore a label in her husband’s name. She claimed that she was carrying the pills for her husband, who held a valid prescription. Re-versing her conviction, the court first noted that when the language of section 893.13(6)(a) is read in conjunction with other state pharmaceutical laws, the words “lawfully obtained” authorize possession pursuant to an agency relationship. The court held that the trial court’s failure to instruct the jury on the prescription defense constituted fundamental error, compounded by the prosecutor’s misleading and legally incorrect argument that McCoy had no right to carry her husband’s pills. In State v. Latona, the Fifth District applied the prescription defense in section 893.13(6)(a) to a home health care nurse charged with possession after three prescription bottles bearing her patient’s name were found in her purse during a traffic stop. Dismissal was warranted as a matter of law, the court held, based on the express terms of an executed durable power of attorney that expressly authorized her to hold her patient’s property, and based on the absence of any notice of revocation to the defendant of that authority.

In the second category of cases, the issue was whether a valid prescription defense is vitiated by a violation of Florida’s “doctor shopping” law. The doctor shopping statute prohibits individuals from seeking multiple prescriptions for controlled substances within a thirty-day period without disclosing the other prescriptions to one of the prescribing doctors. In Knipp

393. Id. at 39.
394. Id. at 38.
395. See id.
397. McCoy, 56 So. 3d at 40–41; see also Williams v. State, 85 So. 3d 1185, 1186 (Fla. 5th Dist. Ct. App. 2012) (finding error where the court failed to instruct the jury on the prescription defense in spite of the defendant’s evidence that she temporarily possessed the clo-nazepam “at the request of the prescription holder,” whose memory problems sometimes prevented her from taking her pills at the correct time); Ayotte v. State, 67 So. 3d 330, 331–32 (Fla. 1st Dist. Ct. App. 2011) (finding fundamental error where the court failed to instruct the jury on the prescription defense in spite of the defendant’s claim that he was holding the pills for his girlfriend who had a valid prescription).
398. 75 So. 3d 394 (Fla. 5th Dist. Ct. App. 2011).
399. Id. at 395 (analyzing Fla. Stat. § 893.13(6)(a)).
402. Id. at 378–79 (quoting Fla. Stat. § 893.13(7)(a)8.). Pursuant to section 893.13(7)(a)8. of the Florida Statutes, it is unlawful for any person:
v. State, the defendants were charged with doctor shopping and trafficking by possession, which occurs when the amount of the controlled substance in the individual’s possession “exceed[s] the legal limit set by the trafficking statute.” The trial court denied their motions to dismiss the doctor shopping charges but dismissed the trafficking charges because “each defendant possessed a valid prescription” written by a licensed physician. The Fourth District affirmed. The court rejected the State’s argument that the violations of the doctor shopping statute invalidated the defendants’ prescriptions as a matter of law, stating:

Nothing in either sections 499.03(2) or 893.13(7)(a)8., Florida Statutes, eliminates the valid prescription defense to trafficking or possession of a controlled substance if the prescription is obtained in violation of the doctor shopping statute. That may have been the intention of the Legislature, but we are constrained by the rules of statutory interpretation to follow the plain language of the statute.

The Fourth District applied Knipp in Wagner v. State where the defendant was charged with doctor shopping and trafficking by sale. Here, Wagner obtained Oxycodone prescriptions from two different physicians during a thirty-day period without disclosing the duplicate prescriptions to either doctor. He then brought four prescription bottles to sell to an individual who was a confidential informant and was arrested when he arrived at the sale. In a special jury instruction, the trial court limited the prescription defense to controlled substances “lawfully obtained for a lawful purpose

[To withhold information from a practitioner from whom the person seeks to obtain a controlled substance or a prescription for a controlled substance that the person making the request has received a controlled substance or a prescription for a controlled substance of like therapeutic use from another practitioner within the previous 30 days.

FLA. STAT. § 893.13(7)(a)8.
403. 67 So. 3d 376 (Fla. 4th Dist. Ct. App. 2011).
404. Id. at 377–78; see also Gonzalez v. State, 84 So. 3d 362, 363 (Fla. 4th Dist. Ct. App. 2012) (per curiam) (directing the trial court to vacate the conviction for trafficking by possession where the defendant obtained a valid prescription by misrepresenting to her physician that she had not obtained a narcotic prescription within the prior thirty days).
405. Knipp, 67 So. 3d at 378.
406. Id.
407. Id. at 380 (footnote omitted) (citing Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984)); see also FLA. STAT. §§ 499.03(2), 893.13(7)(a)8.
408. 88 So. 3d 250 (Fla. 4th Dist. Ct. App. 2012).
409. Id. at 251–53.
410. Id. at 251.
411. Id. at 251–52.
from a practitioner or pursuant to a valid prescription . . . ”412 The problem with this instruction was that it replaced the statutory phrase “‘while acting in the course of his or her professional practice’” with the phrase “‘for a lawful purpose.’”413 The jury convicted the defendant on all counts, and Wagner appealed.414 Citing *Knipp*, the Fourth District concluded that the validity of Wagner’s prescription was not affected by either his violation of the doctor shopping statute or his decision to sell the contents of that prescription.415 Because “the trial court’s jury instruction misstated the law, misled the jury, and negated Wagner’s only defense,” the appellate court reversed the trafficking conviction and remanded for a new trial on that charge.416

Although Wagner was charged with trafficking by sale, it is important to note that he was arrested before he could deliver the pills to any individual.417 It was not clear whether the prescription defense would have afforded him shelter if he had delivered or sold his prescription pills to a person without a prescription for that drug.418 The First District appeared to take this step, however, in *Glovacz v. State*,419 where the defendant was convicted of trafficking after she gave hydrocodone to an undercover officer.420 Glovacz presented a prescription defense at trial, claiming she expected the officer to return the pills in the same amount when the officer obtained her own prescription.421 The appellate court reversed the conviction for fundamental error because the jury was not instructed on the prescription defense and because the State suggested to the jury that Glovacz’s possession of her own pills before handing them to the officer could support a trafficking conviction.422 This case is noteworthy because the appellate court held that Glovacz was entitled to a jury instruction on the prescription defense even though she completed delivery of the controlled substance to the officer.423

412. *Id.* at 252 (alteration in original) (emphasis added).
413. *Wagner*, 88 So. 3d at 252.
414. *Id.*
415. *Id.* at 253 (citing *Knipp v. State*, 67 So. 3d 376, 380 (Fla. 4th Dist. Ct. App. 2011)).
416. *Id.*
417. *See id.* at 252.
418. *Compare Wagner*, 88 So. 3d at 253, with *Singleton v. Sec’y Dep’t of Corr.*, No. 8:07-cv-1419-T-33MAP, 2009 WL 975783, at *6 (M.D. Fla. Apr. 9, 2009) (acknowledging that the defendant’s valid prescription provided no defense to an attempted trafficking charge under Florida law).
419. 60 So. 3d 423 (Fla. 1st Dist. Ct. App. 2011).
420. *Id.* at 424.
421. *Id.*
422. *Id.* at 425–26.
423. *Id.* at 424–26.
C. **Self-Defense**

The Second District considered the forcible felony exception to self-defense in *Santiago v. State*.\(^ {424}\) This exception provides that self-defense is not available as a defense if the act occurred while the defendant was “attempting to commit, committing, or escaping after the commission of, a forcible felony.”\(^ {425}\) At trial, Santiago claimed that, on the date in question, he was approached by three men with whom he had an earlier altercation.\(^ {426}\) When one man appeared to reach for a gun, Santiago pulled out a handgun, fired, and killed one man.\(^ {427}\) As a result, he was charged with, and convicted of, first-degree murder and attempted first-degree murder.\(^ {428}\) The forcible felonies at issue concerned aggressive action taken by Santiago toward the police officers pursuing him as he fled from the scene.\(^ {429}\) These actions resulted in convictions for resisting arrest with violence and aggravated fleeing and eluding, and acquittals for “aggravated assault on a law enforcement officer.”\(^ {430}\)

Santiago’s motion for postconviction relief, which claimed ineffective assistance of counsel, was denied on the ground that the multiple murder and attempted murder charges were sufficient, in and of themselves, to require the forcible felony instruction.\(^ {431}\) The Second District reversed, holding that the facts “do not show that Santiago was engaged in a separate and independent forcible felony” at the time of the shooting.\(^ {432}\) First, the court wrote, “the applicability of the forcible felony instruction is not determined solely by the number of offenses with which the defendant is charged.”\(^ {433}\) Second, because Santiago raised self-defense to all homicide-related charges, no separately charged forcible felony remained to trigger the exception.\(^ {434}\) Third, the forcible felonies were temporally separate from his defensive act.\(^ {435}\) Finally, the aggravated assaults could not have constituted the forcible felonies in question, as the State argued on appeal, because the jury was instructed “at

\(^{424}\) 88 So. 3d 1020, 1022 (Fla. 2d Dist. Ct. App. 2012).

\(^{425}\) FLA. STAT. § 776.041(1) (2012).

\(^{426}\) *Santiago*, 88 So. 3d at 1023.

\(^{427}\) Id.

\(^{428}\) Id. at 1023–24.

\(^{429}\) Id. at 1023, 1025.

\(^{430}\) Id. at 1024 n.1.

\(^{431}\) *Santiago*, 88 So. 3d at 1024–25.

\(^{432}\) Id. at 1024.

\(^{433}\) Id. at 1025.

\(^{434}\) Id.

\(^{435}\) Id.
the State’s request, that the applicable forcible felony was murder.\textsuperscript{436} Therefore, finding that Santiago’s claim of ineffective assistance of counsel was facially sufficient, the court reversed the summary denial of his post-conviction claim and remanded for further proceedings.\textsuperscript{437}

The standard jury instructions on self-defense were called into question in \textit{Bassallo v. State},\textsuperscript{438} where the defendant was charged with aggravated assault with a deadly weapon after an altercation with a co-worker.\textsuperscript{439} At trial, the defense presented a theory of justifiable use of force in self-defense.\textsuperscript{440} Without a defense objection, the trial court gave the standard self-defense instruction, which states that self-defense applies only if the victim suffered an injury.\textsuperscript{441} However, the State presented no evidence of victim injury at trial and, during closing argument, pointed out that the self-defense instruction made no sense because the victim was not injured.\textsuperscript{442} On appeal of his conviction, the Fourth District agreed with Bassallo’s claim of fundamental error because the instruction inaccurately stated the law, injury was not an element of aggravated assault, and the State presented no evidence of injury to the victim.\textsuperscript{443} Moreover, the guilty verdict could not have been obtained without the instructional error,\textsuperscript{444} which was compounded by the prosecutor’s comments.\textsuperscript{445} The court therefore reversed his conviction and remanded for a new trial.\textsuperscript{446} As a result of the decision in \textit{Bassallo}, this instruction is presently under review by the Committee on Standard Jury Instructions in Criminal Cases.\textsuperscript{447}

In \textit{Montijo v. State},\textsuperscript{448} the Fifth District held that a trial court’s “inclusion of the phrase ‘beyond a reasonable doubt’ in [a] jury instruction” on

\begin{itemize}
\item \textsuperscript{436} Santiago, 88 So. 3d at 1025.
\item \textsuperscript{437} Id.
\item \textsuperscript{438} 46 So. 3d 1205 (Fla. 4th Dist. Ct. App. 2010).
\item \textsuperscript{439} Id. at 1207, 1210; \textit{see also} FLA. STD. JURY INSTR. (CRIM.) 3.6(f) (2010) (“It is a defense to the offense with which (defendant) is charged if the [death of] [injury to] (victim) resulted from the justifiable use of deadly force.”); id. 3.6(g).
\item \textsuperscript{440} Bassallo, 46 So. 3d at 1211.
\item \textsuperscript{441} Id. at 1210; \textit{see also} FLA. STD. JURY INSTR. (CRIM.) 3.6(f), (g).
\item \textsuperscript{442} Bassarlo, 46 So. 3d at 1210–11.
\item \textsuperscript{443} Id.
\item \textsuperscript{444} \textit{See} id. at 1209.
\item \textsuperscript{445} \textit{See} id. at 1211.
\item \textsuperscript{446} \textit{Id.}; \textit{see also} Brown v. State, 59 So. 3d 1217, 1219 (Fla. 4th Dist. Ct. App. 2011) (finding fundamental error in the giving of the standard self-defense instruction for battery on a law enforcement officer, where the statute did not require injury, the State did not prove injury, and the State argued that the instruction was inapplicable because the victim did not suffer injury).
\item \textsuperscript{447} Alerts – \textit{Criminal Jury Instructions}, \textit{supra} note 193.
\item \textsuperscript{448} 61 So. 3d 424 (Fla. 5th Dist. Ct. App. 2011).
\end{itemize}
self-defense constituted fundamental error because it shifted the burden to the defendant to prove self-defense, which in turn deprived him of a fair trial.\footnote{Id. at 427.} The court emphasized that because defendants are required only to “present enough evidence to support giving the [self-defense] instruction,” the trial court’s instruction should have referred only to the requisite elements and not to the burden of proof.\footnote{Id.; see also Alvarado v. State, 37 Fla. L. Weekly D1607, D1607 (5th Dist. Ct. App. July 6, 2012) (per curiam) (citing Montijo, 61 So. 3d at 427) (reversing the defendant’s convictions and remanding for a new trial on the authority of Montijo).} Accordingly, the Fifth District reversed the defendant’s conviction for manslaughter with a deadly weapon and referred the issue to the Committee on Standard Jury Instructions in Criminal Cases.\footnote{Montijo, 61 So. 3d at 427 & n.4.} The Committee has recommended that Instructions 3.6(f) and (g) on the justifiable use of force be amended to “omit any reference to burden of proof.”\footnote{Amendments to the Jury Instructions for Criminal Cases, FLA. B. NEWS, Apr. 1, 2012, at 22–23.}

D. \textit{Stand Your Ground Law}

Under Florida’s “Stand Your Ground” Law, which was signed into law on April 26, 2005, an individual is permitted to use defensive force, “without fear of prosecution or civil action,” against anyone who “unlawfully and forcibly enter[s] [the] dwelling, residence, or occupied vehicle” of another person.\footnote{Amendments to the Jury Instructions for Criminal Cases, FLA. B. NEWS, Apr. 1, 2012, at 22–23.} The law also abrogated the common law duty to retreat before using defensive force whenever the actor “is not engaged in an unlawful activity and . . . is attacked in any other place where he or she has a right to be.”\footnote{FLA. STAT. § 776.013(1)(a) (2012).} Until the recent fatal shooting of an unarmed teenager in Sanford, Florida, the law had generated scant controversy in Florida’s judicial system.\footnote{Frances Robles, \textit{Lt. Gov.: Stand Your Ground Is Not ‘Shoot First’ Law}, LEDGER (Lakeland), June 12, 2012.} When Trayvon Martin was shot and killed by George Zimmerman, who claimed that Martin had attacked him, the police cited the Stand Your Ground Law.\footnote{FLA. STAT. §§ 776.012–.013, .031–.032 (2012).}
Ground Law as the reason Zimmerman was not immediately arrested.\textsuperscript{458} Zimmerman has since been charged with second-degree murder, and Governor Rick Scott has convened a nineteen-member Task Force on Citizen Safety and Protection to address ambiguities in the Stand Your Ground Law.\textsuperscript{459}

Otherwise, the most contentious issue surrounding this law has involved the proper procedural vehicle to be employed in statutory immunity cases. This immunity is provided in section 776.032, which states that in certain circumstances a person may use deadly force to stand his ground against an attacker without fearing prosecution.\textsuperscript{460} The question dividing the district courts of appeal was whether factual disputes should be resolved at a pretrial evidentiary hearing or at trial.\textsuperscript{461}

This conflict was resolved during the survey period in \textit{Dennis v. State},\textsuperscript{462} where the Supreme Court of Florida concluded that when a defendant invokes immunity from prosecution in a pretrial motion, the trial court must conduct a pretrial evidentiary hearing and “decide the factual question of the applicability of the statutory immunity.”\textsuperscript{463} The court explained that the plain language of “[s]ection 776.032(1) expressly grants defendants a substantive right to not be arrested, detained, charged, or prosecuted as a result of the use of legally justified force.”\textsuperscript{464} This grant of immunity from criminal prosecution differs from the affirmative defense of self-defense and must be interpreted to “provide[] the defendant with more protection from prosecution for a justified use of force than the probable cause determination previously provided to the defendant by rule.”\textsuperscript{465} Otherwise, the legislature would have been an exercise in futility, the court said.\textsuperscript{466} The court nevertheless found that the error was harmless because Dennis never claimed that the trial was unfair, that the pretrial ruling limited his defense, or that the evi-

\textsuperscript{458} \textit{Id.}


\textsuperscript{460} \textit{See FLA. STAT. § 776.032(1).} The legislature passed the law that created section 776.032 because it determined “that it is proper for law-abiding people to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others.” Act effective Oct. 1, 2005, ch. 2005-27, § 776.013, 2005 Fla. Laws 199, 199–200 (codified as amended at FLA. STAT. §§ 776.012–.013, .031–.032 (2012)).

\textsuperscript{461} \textit{Dennis v. State, 51 So. 3d 456, 460 (Fla. 2010).}

\textsuperscript{462} \textit{51 So. 3d 456 (Fla. 2010).}

\textsuperscript{463} \textit{Id. at 458.}

\textsuperscript{464} \textit{Id. at 462 (citing FLA. STAT. § 776.032(1)).}

\textsuperscript{465} \textit{Id. at 463.}

\textsuperscript{466} \textit{See id. (quoting Martinez v. State, 981 So. 2d 449, 452 (Fla. 2008) (per curiam)).}
evidence he would have presented at a hearing differed from that presented at trial.\textsuperscript{467} Accordingly, the court affirmed the Fourth District’s decision that Dennis was not entitled to relief.\textsuperscript{468}

In \textit{Mocio v. State},\textsuperscript{469} the Second District held that when challenging a trial court’s denial of a motion to dismiss under the Stand Your Ground Law, the proper remedy is a petition for writ of prohibition.\textsuperscript{470} In this case, which involved a domestic battery, the county court held the required evidentiary hearing, concluded that Mocio’s actions were unreasonable, and denied his motion to dismiss.\textsuperscript{471} The circuit court then denied his petition for writ of prohibition on the ground that it was the wrong vehicle to challenge the county court’s exercise of jurisdiction over him and that he “had an adequate remedy via direct appeal if convicted.”\textsuperscript{472} The Second District disagreed because settled law clearly establishes “that a writ of prohibition is a proper remedy for an accused who is challenging his continued prosecution based on grounds of immunity.”\textsuperscript{473} If the petition is denied on the merits, however, “res judicata bars re-litigation of the immunity claims on appeal.”\textsuperscript{474} This was the decision of the First District in \textit{Rice v. State},\textsuperscript{475} where the court reasoned that “denial of the petition . . . reflects this court’s determination that the trial court did not err in denying Rice’s claim of immunity under the Stand Your Ground [L]aw.”\textsuperscript{476}

A different issue arose in \textit{Dorsey v. State},\textsuperscript{477} where the Fourth District was called upon to decide how a jury should be instructed when the defendant is “‘engaged in an unlawful activity’ at the time . . . deadly force” is used against an attacker.\textsuperscript{478} This case involved a convicted felon’s use of a concealed firearm to kill two attackers who were part of a group that surrounded him as his back was against a vehicle.\textsuperscript{479} During the charging conference, the defense made two requests.\textsuperscript{480} The first request asked the court to
exclude the Stand Your Ground instruction because Dorsey was “engaged in an unlawful activity” and had no right to stand his ground without retreating. The second request asked the court to give a special instruction based on "the pre-2005 standard jury instruction [for] the justifiable use of deadly force," which would have informed the jury of the scope of the duty to retreat when a defendant is engaged in an unlawful activity. The court denied both requests and gave the jury the standard Stand Your Ground instruction based on section 776.013(3). Dorsey was convicted, inter alia, of two counts of second-degree murder.

On appeal, the Fourth District decided, as a threshold matter, “that possession of a firearm by a convicted felon qualifies as ‘unlawful activity’” under Florida’s Stand Your Ground Law. The court also decided that the common law retreat rule is available to a defendant whose unlawful activity has deprived him of the right to stand his ground, provided he faces imminent danger of death or great bodily harm and finds retreat to be impossible or futile. In this case, the standard instruction informed the jury that Dorsey’s unlawful activity deprived him of the right to stand his ground without retreating, but failed to explain the common law duty to retreat in Dorsey’s unique circumstances. This goal could have been accomplished, the court explained, by giving both the defendant’s specially requested instruction and the Stand Your Ground instruction, or by providing only the pre-2005 standard instruction on self-defense. Concluding that the evidence would support a conviction for manslaughter only, the court reversed the defendant’s second-degree murder convictions and remanded for retrial on manslaughter charges.

481. Id.; see also Fla. Stat. § 776.013(3).
482. Dorsey, 74 So. 3d at 526; see also Fla. Std. Jury Instr. (Crim.) 3.6(f) (2000) (amended 2010).
483. Dorsey, 74 So. 3d at 526; see also Fla. Stat. § 776.013(3).
484. Dorsey, 74 So. 3d at 522.
485. Id. at 527; see also Fla. Stat. § 776.013(3).
486. Dorsey, 74 So. 3d at 525–27 (quoting Fla. Stat. § 776.013(3); Fla. Std. Jury Instr. (Crim.) 3.6(f) (2010)) (citing State v. Rivera, 719 So. 2d 335, 338 (Fla. 5th Dist. Ct. App. 1998) (per curiam); Thompson v. State, 552 So. 2d 264, 266 (Fla. 2d Dist. Ct. App. 1989)).
487. Id. at 527.
488. Id. at 528.
489. Id. at 522, 528.
IV. CONSTITUTIONAL CLAIMS

A. Cruel and Unusual Punishment

During the survey period, Florida courts faced issues relating to the execution of mentally retarded defendants, the modification of the state’s lethal injection protocol, and the imposition of life-without-parole sentences on juvenile offenders.490

1. Execution of Mentally Retarded Defendants

In 2001, the Florida Legislature enacted legislation prohibiting the execution of mentally retarded defendants and establishing a procedure for determining which capital defendants are mentally retarded.491 The following year, in Atkins v. Virginia,492 the Supreme Court of the United States held that the execution of a mentally retarded criminal defendant constitutes cruel and unusual punishment.493 However, the Court relegated to the states the task of determining specific rules for classifying defendants as mentally retarded.494 Since then, Florida has required an IQ score of seventy or below to establish “significantly subaverage general intellectual functioning.”495

During the survey period, the Supreme Court of Florida addressed the constitutionality of this cut-off score in Franqui v. State,496 where the defendant argued that this threshold violated both the Eighth Amendment and the decision in Atkins because “Atkins approved a wider range of IQ . . . results that can meet the test for mental retardation.”497 The Franqui court rejected this argument, finding that Florida’s definition of mental retardation is consistent with diagnostic criteria used by the American Psychiatric Association and is

493. Id. at 321 (quoting Ford v. Wainwright, 477 U.S. 399, 405, 406 (1986)).
494. Id. at 317 (quoting Ford, 477 U.S. at 405, 416–17).
496. 59 So. 3d 82 (Fla. 2011) (per curiam), cert. denied, 132 S. Ct. 2110 (2012). The court affirmed the trial court’s order denying the defendant’s mental retardation claim. Id. at 90, 106.
497. Id. at 92.
within “the broad authority given in Atkins to the states to enact their own laws to determine who is mentally retarded, without any requirement that the states adhere to one definition over another.”498 The court therefore affirmed the trial court’s order denying the defendant’s mental retardation claim.499

2. Lethal Injection Protocol

In Valle v. State,500 the Supreme Court of Florida rejected a condemned inmate’s claim that the Florida Department of Correction’s modified lethal injection protocol, which substituted pentobarbital for sodium thiopental as the first drug in its three-drug sequence, constitutes cruel and unusual punishment.501 Valle argued that there were “serious concerns’ regarding the efficacy of pentobarbital to render an inmate unconscious.”502 The court held that Valle had not demonstrated that pentobarbital was “sure or very likely to cause serious illness and needless suffering or that its use will result in a substantial risk of serious harm,” so as to constitute cruel and unusual punishment under the Eighth Amendment.503 Accordingly, the court affirmed the trial court’s denial of post-conviction relief and vacated the temporary stay of execution.504

3. Life Sentences Without Parole for Juvenile Offenders

In 2010, in Graham v. Florida,505 the Supreme Court of the United States held that the Eighth Amendment's Cruel and Unusual Punishment Clause prohibits the imposition of a life-without-parole sentence on a juvenile offender for a nonhomicide offense.506 The Court specifically limited its holding to “those juvenile offenders sentenced to life-without-parole solely for a nonhomicide offense.”507 During the survey period, Florida’s appellate

498. Id. at 94 (citing Nixon v. State, 2 So. 3d 137, 143 (Fla. 2009) (per curiam)).
499. Id. at 90, 106; see also Herring I, 76 So. 3d 891, 895 (Fla. 2011) (per curiam), cert. denied, 80 U.S.L.W. 3707 (U.S. June 25, 2012) (citing Zack v. State, 911 So. 2d 1190, 1201 (Fla. 2005) (per curiam)) (confirming that the Supreme Court of Florida has adopted a bright-line rule that a death sentence is not precluded by a defendant’s intellectual disability unless the defendant’s IQ tests below seventy).
500. 70 So. 3d 530 (Fla.) (per curiam), cert. denied, 132 S. Ct. 1 (2011).
501. Id. at 538, 546.
502. Id. at 536–37.
503. Id. at 541, 546 (citing DeYoung v. Owens, 646 F.3d 1319, 1326 n.4 (11th Cir. 2011)).
504. Id. at 553.
506. Id. at 2030; see U.S. CONST. amend. VIII.

The Second District issued three opinions on the question of what constitutes a nonhomicide offense.\footnote{Id. at 97–98.} In \textit{Manuel v. State},\footnote{Id. at 97.} the defendant received a life sentence on one count of attempted first-degree murder, concurrent with forty years imprisonment on the second count.\footnote{Id. at 96.} The court declared that the life sentence was unconstitutional under \textit{Graham}’s bright-line rule, reasoning “that attempted murder is a nonhomicide offense because death, by definition, has not occurred.”\footnote{Id. at 97.} Accordingly, the court vacated the juvenile’s life sentence and remanded the case for resentencing.\footnote{Id. at 98.} The First and Fourth Districts have followed \textit{Manuel} to hold that attempted murder is a nonhomicide offense.\footnote{See \textit{Arrington v. State}, 37 Fla. L. Weekly at D156; \textit{Washington}, 37 Fla. L. Weekly at D155; \textit{Manuel}, 48 So. 3d at 97.}

In \textit{Arrington v. State},\footnote{48 So. 3d 94 (Fla. 2d Dist. Ct. App. 2010), \textit{review denied}, 63 So. 3d 750 (Fla. 2011), cert. denied, 132 S. Ct. 446 (2011).} the Second District decided that “felony murder is not a ‘nonhomicide’ offense for purposes of the categorical rule announced in \textit{Graham},” even when someone other than the juvenile offender actually committed the killing.\footnote{Id. at D156 (citing \textit{McCullum v. State}, 60 So. 3d 502, 504 (Fla. 1st Dist. Ct. App.) (per curiam), \textit{review denied}, 67 So. 3d 1050 (Fla. 2011); \textit{Manuel}, 48 So. 3d at 97); \textit{McCullum}, 60 So. 3d at 503–04 (holding that, under \textit{Graham} and \textit{Manuel}, the juvenile’s life sentence for attempted second-degree murder was unconstitutional).} Nevertheless, the court held that in this context, the trial court must have discretion to prevent a “grossly disproportionate” sentence in violation of the Eighth Amendment.\footnote{Id. at D158.} To this end, courts should engage in the three-prong, case-specific proportionality analysis endorsed in \textit{Graham}, comparing: (1) “[t]he gravity of the offense . . . to the severity of the sentence;” (2) the mandatory sentence “for juveniles involved in felony
murders with the sentences received by other [defendants] in Florida;” and (3) the mandatory sentence for juveniles involved in felony murders “with the sentences imposed for the same crime in other [states].” Applying this analysis to the facts of Arrington’s case, the Second District reversed and remanded on the ground that the mandatory life-without-parole sentence for felony murder was grossly disproportionate in this juvenile’s case. In La-Fountain v. State, the Second District declined to apply Arrington retroactively.

Finally, in Washington v. State, the Second District considered Graham’s “exception for juveniles who commit nonhomicide offenses in conjunction with homicide offenses.” Here, the defendant appealed his sentences of life-without-parole for kidnapping and felony murder offenses committed when he was a juvenile. In contrast to the juvenile in Arrington, “Washington was nearly eighteen at the time of [his crimes],” and he participated extensively in acts of exceptional cruelty. The appellate court remanded for resentencing, holding that the trial “court [was] required to resentence [the defendant] to life without possibility of parole for these homicides unless it determines under the facts of this case that such a penalty is disproportionate.” However, the court reversed the sentences for the kidnapping offenses, finding that their constitutionality “probably hinges on whether the trial court, on remand, imposes life-without-parole for felony murders.” In other words, after determining the appropriate sentences for the felony murders, the trial court might find the homicides to be “aggravating factor[s] in the sentencing of the [kidnapping] offense[s].” Until such a determination is made, however, the Second District was required to hold that the sentences of life-without-parole for kidnapping, a nonhomicide crime, constituted cruel and unusual punishment under Graham. Thus, the court reversed Washington’s sentences and directed the trial court to resen-

518. Id. at D157.
519. Id. at D158.
520. 83 So. 3d 881 (Fla. 2d Dist. Ct. App. 2012).
521. Id. at 883.
523. Id. at D155 (citing Graham v. Florida, 130 S. Ct. 2011, 2023 (2010)).
524. Id. at D154.
526. Id. (citing Arrington, 37 Fla. L. Weekly at D158).
528. Id. (citing Graham, 130 S. Ct. at 2023).
529. See id (citing Graham, 130 S. Ct. at 2030).
tence for the kidnapping convictions after ascertaining appropriate sentences for the felony murders.\footnote{530

Florida’s appellate courts have also considered whether a term-of-years sentence for a juvenile is the “functional equivalent” of a life sentence.\footnote{531

In \textit{Thomas v. State},\footnote{532

the First District held that a fifty-year sentence was not a de facto sentence of life-without-parole because if Thomas served his entire sentence, he “would be in his late sixties when he [wa]s released from prison.”\footnote{533

The court reached the same result in \textit{Gridine v. State (Gridine I)}\footnote{534

regarding a seventy-year sentence but later certified the following question as one of great public importance: “Does the United States Supreme Court decision in \textit{Graham v. Florida} prohibit sentencing a fourteen-year-old to a prison sentence of seventy years for the crime of attempted first-degree murder?”\footnote{535

In \textit{Floyd v. State},\footnote{536

the First District held that an eighty-year sentence was the functional equivalent of a life sentence without parole and thus constituted cruel and unusual punishment.\footnote{537

However, in \textit{Henry v. State},\footnote{538

the Fifth District concluded that a ninety-year aggregate term-of-years sentence, without the possibility of parole, for multiple nonhomicide offenses was not a de facto life sentence under \textit{Graham}.\footnote{539

The court did make the following observation:

There is language in the \textit{Graham} majority opinion that suggests that no matter the number of offenses or victims or type of crime, a juvenile may not receive a sentence that will cause him to spend his entire life incarcerated without a chance for rehabilitation, in which case it would make no logical difference whether the sentence is “life” or 107 years. Without any tools to work with, how-

\footnote{530. \textit{Id.}
\footnote{532. 78 So. 3d 644 (Fla. 1st Dist. Ct. App. 2011) (per curiam).
\footnote{533. \textit{Id.} at 646.
\footnote{534. 89 So. 3d 909 (Fla. 1st Dist. Ct. App. 2011).
\footnote{536. 87 So. 3d 45 (Fla. 1st Dist. Ct. App. 2012) (per curiam).
\footnote{537. \textit{Id.} at 45, 47; \textit{see also Graham}, 130 S. Ct. at 2034.
\footnote{538. 82 So. 3d 1084 (Fla. 5th Dist. Ct. App. 2012).
\footnote{539. \textit{Id.} at 1086, 1089; \textit{see also Graham}, 130 S. Ct. at 2034.}
ever, we can only apply *Graham* as it is written. If the Supreme Court has more in mind, it will have to say what that is.\footnote{540}{Henry, 82 So. 3d at 1089 (footnote omitted); see also *Graham*, 130 S. Ct. at 2034.}

The issue was reframed by Judge Padovano in a concurring opinion in *Smith v. State*,\footnote{541}{93 So. 3d 371 (Fla. 1st Dist. Ct. App. 2012).} where he criticized judicial efforts to determine whether a particular sentence of a term-of-years without parole is a de facto life sentence.\footnote{542}{See id. at 375 (Padovano, J., concurring).} These efforts are misdirected, he wrote, because the question under *Graham* is not whether a defendant “will . . . have a meaningful portion of his life left” upon release or “a significant part of his life remaining at the end of the sentence.”\footnote{543}{Id.} Instead, the question is “whether the defendant will have a reasonable opportunity to show that he has been rehabilitated during the course of the sentence and is therefore deserving of release at some point before the sentence expires.”\footnote{544}{Id.}

In *Miller v. Alabama (Miller II)*,\footnote{545}{132 S. Ct. 2455 (2012).} the Supreme Court of the United States held, in a five-to-four decision, that mandatory sentences of life without the possibility of parole are unconstitutional for juvenile offenders convicted of homicide.\footnote{546}{Id. at 2455 (2012).} Such sentences violate the Eighth Amendment’s prohibition of cruel and unusual punishment, the Court wrote, because they disallow individualized sentencing that considers the age and maturity of the offender, the “family and home environment,” and the nature and circumstances of the crime.\footnote{547}{Id. at 2460, 2468.} Absent these considerations, the Court explained, mandatory life-without-parole “poses too great a risk of disproportionate punishment.”\footnote{548}{Id. at 2469.} Both cases addressed on appeal were remanded to the state courts to make individualized sentencing decisions.\footnote{549}{Id. at 2468.} While not ruling out the possibility that such individualized sentencing might result in a life-without-parole sentence, the Court opined that “appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.”\footnote{550}{*Miller II*, 132 S. Ct. at 2469.}
B. Double Jeopardy

1. Oral Sentencing Error

An oral sentencing error did not subject a defendant to double jeopardy in *Dunbar v. State (Dunbar II)*, the Supreme Court of Florida held. This case began when “the trial court orally pronounced a life sentence for [Dunbar’s conviction for] robbery with a firearm” without mentioning “the ten-year mandatory minimum sentence” for that crime. The judge corrected the error in a written order on the same day. On appeal, the defendant argued that the late addition of the mandatory minimum violated his double jeopardy rights. The Fifth District disagreed, explaining that “the later addition of harsher terms” did not implicate double jeopardy concerns “because the original sentence was invalid.” Dunbar sought review of this decision for express and direct conflict with the Second District’s decision in *Gardner v. State*. The Supreme Court of Florida held that double jeopardy concerns were not implicated in Dunbar’s case because defendants have “no legitimate expectation of finality” of invalid sentences. “[I]f the prosecution had properly appealed the sentence as orally pronounced, the sentence would have been reversed and remanded with instructions to impose the term,” the court observed. Nevertheless, the court remanded the case for resentencing on the ground that the defendant had a due process right to be present when the terms of his sentence were increased even though no new evidence would be produced at that hearing. Chief Justice Charles T. Canady dissented from this latter part of the majority’s opinion, writing that the defendant’s presence would not “contribute to the fairness of the proce-

551. 89 So. 3d 901 (Fla. 2012).
552. Id. at 906–07.
553. Id. at 903 (citing Fla. Stat. § 775.087(2) (2012); Dunbar v. State (Dunbar I), 46 So. 3d 81, 82–83 (Fla. 5th Dist. Ct. App. 2010) (en banc), review granted, 58 So. 3d 260 (Fla. 2011), and approved in part, quashed in part, 89 So. 3d 901 (Fla. 2012)).
554. Id. (citing Dunbar I, 46 So. 3d at 82).
555. Id. at 904.
556. Dunbar II, 89 So. 3d at 903 (citing Dunbar I, 46 So. 3d at 83).
557. Id. at 902–03 (citing Gardner v. State, 30 So. 3d 629, 632 (Fla. 2d Dist. Ct. App. 2010)).
558. Id. at 906.
560. Id. at 907 (citing Jackson v. State, 767 So. 2d 1156, 1160 (Fla. 2000) (per curiam)).
dunre,” but rather would be useless in light of the sentencing court’s duty to impose the minimum sentence.

2. Separate Offenses

Although the rule of double jeopardy “prohibits subjecting a person to multiple prosecutions, convictions, and punishments for the same criminal offense, . . . no constitutional prohibition [exists] against multiple punishments for different offenses arising out of the same criminal transaction as long as the Legislature intends to authorize separate punishments.” Absent clear legislative intent, however, courts utilize section 775.021(4)(b) of the Florida Statutes to determine whether separate offenses exist. That section sets out three exceptions to the general rule that the legislature intends “to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent.”

One of these exceptions, section 775.021(4)(b)(2), precludes multiple convictions for offenses that are “degrees of the same offense as provided by statute.” In Valdes v. State, the Supreme Court of Florida interpreted this section to preclude multiple convictions for crimes arising from the same criminal transaction if these crimes are “degrees of the same offense” as provided by statute. Shortly after Valdes was decided, however, a conflict arose between two district courts of appeal. In Shazer v. State, the Fourth District held that “dual convictions for robbery with a deadly weapon

561. Dunbar II, 89 So. 3d at 908 (Canady, C.J., dissenting) (quoting Kentucky v. Stincer, 482 U.S. 730, 745 (1987)).
562. Id. (citing Stincer, 482 U.S. at 745).
563. Valdes v. State, 3 So. 3d 1067, 1069 (Fla. 2009) (citing Hayes v. State, 803 So. 2d 695, 699 (Fla. 2001)).
564. Hayes, 803 So. 2d at 700 (citing Sirmons v. State, 634 So. 2d 153, 153–54 (Fla. 1994) (per curiam)). Section 775.021(4)(b) prohibits multiple convictions and punishments for “(1) offenses which require identical elements of proof; (2) offenses which are degrees of the same offense as provided by statute; and (3) offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.” FLA. STAT. § 775.021(4)(b)(1)–(3) (2012).
565. Valdes, 3 So. 3d at 1072 (quoting FLA. STAT. § 775.021(4)(b)).
566. FLA. STAT. § 775.021(4)(b)(2).
567. 3 So. 3d 1067 (Fla. 2009).
568. Id. at 1077 (construing FLA. STAT. § 775.021(4)(b)(2)).
569. See id. at 1078; McKinney v. State (McKinney II), 24 So. 3d 682, 683–84 (Fla. 5th Dist. Ct. App. 2009), aff’d, 66 So. 3d 852 (Fla. 2011), cert. denied, 132 S. Ct. 527 (2011); Shazer v. State, 3 So. 3d 453, 454 (Fla. 4th Dist. Ct. App. 2009) (per curiam).
570. 3 So. 3d 453 (Fla. 4th Dist. Ct. App. 2009) (per curiam).
and grand theft violate[d] double jeopardy rights because the same property formed the basis for both convictions."  

However, in *McKinney v. State (McKinney I)*, the Fifth District disagreed, holding that the rule against double jeopardy is not violated by dual convictions for grand theft and robbery with a firearm arising out of “a single taking of cash and a cell phone at gunpoint.” Reasoning that “robbery is not a degree of theft nor is theft a degree of robbery,” the court upheld McKinney’s convictions and certified express and direct conflict with *Shazer*. 

The Supreme Court of Florida accepted jurisdiction in *McKinney v. State (McKinney II)*, affirmed the Fifth District’s decision in *McKinney I*, and disapproved *Shazer*. The latter decision, the court wrote, “failed to follow *Valdes* in its decision, or to note a reason for its departure from controlling precedent.” In so ruling, the court addressed three of McKinney’s arguments. First, the court dismissed his claim “that robbery and theft are simply aggravated forms of the same underlying offense.” Because “robbery is not a degree of theft [and theft is not] a degree of robbery,” section 775.021(4)(b)2. did not bar McKinney’s dual convictions for these crimes. Second, McKinney’s convictions were not exempt under section 775.021(4)(b)1., which precludes multiple convictions for offenses requiring identical elements of proof. “Robbery requires that the State show that ‘force, violence, assault, or putting in fear was used in the course of the taking,’ and grand theft requires that the State show the value of the property taken,” the court wrote. For the same reason, the court rejected his third argument that section 775.021(4)(b)3. barred his dual convictions because grand theft was a lesser-included offense of robbery, reasoning that “neither offense is wholly subsumed by the other.”

Justice Lewis wrote a dissenting opinion, in which Justice Quince joined, criticizing the court’s decision in *Valdes* as “wrong when this Court

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571. *Id.* at 454 (reversing the grand theft conviction and remanding with directions to the trial court to vacate the conviction and sentence).


573. *Id.* at 683–84.

574. *Id.* at 684 (citing *Shazer*, 3 So. 3d at 454).

575. 66 So. 3d 852, 853 (Fla.) (per curiam), *cert. denied*, 132 S. Ct. 527 (2011).

576. *Id.*

577. *Id.* at 856 n.4.

578. *See id.* at 856–57 (quoting *McKinney I*, 24 So. 3d at 683–84).

579. *Id.* (citing *McKinney I*, 24 So. 3d at 684).

580. *McKinney I*, 24 So. 3d at 684; *see also* FLA. STAT. § 775.021(4)(b)2. (2012).

581. *See McKinney II*, 66 So. 3d at 854, 856–57; *see also* FLA. STAT. § 775.021(4)(b)1.

582. *McKinney II*, 66 So. 3d at 857 (quoting FLA. STAT. § 812.13(1)).

583. *Id.*; *see also* FLA. STAT. § 775.021(4)(b)3.
issued it, and . . . wrong in application today.”  

Valdes, he stated, “departed from decades of well-established law” when it discarded the primary evil approach to double jeopardy challenges “[w]ithout reference to any decisional law from this Court or Florida’s district courts of appeal that exhibited the impracticality of that approach, any necessity to abrogate it, or any miscarriage of justice . . . .” Grand theft and robbery “involve the same evil,” he continued, because each crime punishes the defendant for depriving another person of property. Therefore, according to the dissent, dual convictions for grand theft and robbery “in a single episode and single act punish[] an individual twice for the same evil and violate[] double jeopardy.”

In Ivey v. State, the Third District considered Valdes in the context of convictions for leaving the scene of a fatal accident, vehicular homicide, and DUI manslaughter. Holding “that Valdes did not overrule the well-settled principle that a single death cannot give rise to dual homicide convictions,” the court concluded that the dual homicide convictions arising from a single death violated double jeopardy. The court therefore “vacate[d] the convictions for vehicular homicide and leaving the scene of a fatal accident, and affirm[ed] the DUI manslaughter conviction and sentence.”

In Avila v. State, the Second District held that double jeopardy did not preclude a defendant’s retrial after the jury deadlocked on that charge at the defendant’s first trial. In this case, the defendant was charged, inter alia, with sexual battery with a deadly weapon. After a preliminary vote, the first jury sent a note to the court advising that there was unanimous agreement to a lesser charge on the sexual battery count, but no agreement on the

584. See McKinney II, 66 So. 3d at 857, 859 (Lewis, J., dissenting); see also Valdes v. State, 3 So. 3d 1067, 1078 (Fla. 2009).
585. McKinney II, 66 So. 3d at 857–58 (Lewis, J., dissenting) (citing Valdes, 3 So. 3d at 1075).
586. Id. at 859.
587. Id.
588. 47 So. 3d 908 (Fla. 3d Dist. Ct. App. 2010) (per curiam).
589. See id. at 910–11; see also Valdes, 3 So. 3d at 1078.
590. Ivey, 47 So. 3d at 911.
591. Id.; see also State v. Merriex, 42 So. 3d 934, 936 (Fla. 2d Dist. Ct. App. 2010) (holding that the defendant’s conviction for third-degree felony murder barred him from being convicted for vehicular homicide for the death of the same victim).
592. 86 So. 3d 511 (Fla. 2d Dist. Ct. App. 2012).
593. Id. at 516; see also Blueford v. Arkansas, 132 S. Ct. 2044, 2053 (2012) (holding that the Double Jeopardy Clause does not bar retrial on murder charges where a trial judge declared a mistrial after a jury reported that it had unanimously voted to acquit on murder charges but had reached an impasse on a charged lesser-included offense).
594. Avila, 86 So. 3d at 512.
false imprisonment count. At the court’s request, the jury returned to deliberations, ultimately deadlocking on the sexual battery count. The defendant was convicted on that count when he was retried. On appeal, Avila argued that this conviction violated double jeopardy because the jury’s note in the first trial reflecting unanimity should be binding. The Second District disagreed, concluding that double jeopardy could be triggered only by an “actual verdict,” which must be “announced in the courtroom in the presence of the jurors and the defendant.” Neither the jury’s preliminary vote in the jury room nor its deadlock on the lesser charge constituted an actual verdict, the court ruled, so double jeopardy did not prevent the State from retrying Avila on the sexual battery charge. Accordingly, the court affirmed Avila’s convictions and sentences.

In Headley v. State, the Third District held that a defendant could be convicted of an “aggravated white collar crime and the underlying predicate” crimes without violating double jeopardy guarantees. Analyzing the language, structure, and legislative intent of the white collar crime statute, the court concluded that the statute sought to enhance punishment by establishing “a separate and distinct offense” from the predicate crimes. This conclusion was reinforced by cases holding that double jeopardy is not violated when separate punishments are imposed for RICO crimes and the predicate crimes that comprise the racketeering pattern, the court explained.

In State v. Morse, the Fifth District held that conviction and punishment for two charges of attempted second-degree murder of the same person in two different counties did not violate the defendant’s constitutional right

595. Id.
596. Id. at 512–13.
597. Id. at 513.
598. Id.
599. Avila, 86 So. 3d at 514; see also Delgado v. Fla. Dep’t of Corr., 659 F.3d 1311, 1326–27 (11th Cir. 2011) (holding that the Supreme Court of Florida’s setting aside of a defendant’s original convictions for a “legal ‘error in the proceedings,’” rather than for factual insufficiency, did not constitute an acquittal that triggered double jeopardy protection) (quoting United States v. Tateo, 377 U.S. 463, 465 (1964)).
600. Avila, 86 So. 3d at 516.
601. Id.
602. 90 So. 3d 912 (Fla. 3d Dist. Ct. App. 2012) (per curiam).
603. Id. at 915.
604. Id. (citing State v. Traylor, 77 So. 3d 224, 226–27 (Fla. 5th Dist. Ct. App. 2011) (per curiam)).
605. See id.; see also Gross v. State, 728 So. 2d 1206, 1208 (Fla. 4th Dist. Ct. App.), review granted, 741 So. 2d 1135 (Fla. 1999); Haggerty v. State, 531 So. 2d 364, 365 (Fla. 1st Dist. Ct. App. 1988).
606. 77 So. 3d 748 (Fla. 5th Dist. Ct. App. 2011) (per curiam).
against double jeopardy where each attempt was a separate criminal episode.\textsuperscript{607} Morse’s crimes were committed in both Orange County and Seminole County in the course of a police chase.\textsuperscript{608} During the chase in Orange County, he repeatedly turned from the wheel of his vehicle to shoot at the pursuing officer, reloaded his firearm, and then fired again after both vehicles crossed into Seminole County.\textsuperscript{609} He was “convicted and sentenced in Seminole County for the [crime] he committed there.”\textsuperscript{610} After his conviction in Orange County, however, the trial judge ruled that double jeopardy considerations entitled Morse to a new trial.\textsuperscript{611} On appeal by the State, the Fifth District held that the two shootings were separate criminal episodes because they were separated by “obvious time and distance,” and the defendant had numerous opportunities “to pause and reflect on his actions as he repeatedly ceased and then restarted” shooting at his pursuers.\textsuperscript{612} Thus, punishments for both shootings would not violate defendant’s right against double jeopardy.\textsuperscript{613}

C. \textit{Due Process}

1. Uncharged Crimes

In \textit{Jaimes v. State (Jaimes II)},\textsuperscript{614} the Supreme Court of Florida held that a jury instruction resulting in the defendant’s conviction for an uncharged crime violated his due process rights and constituted fundamental error.\textsuperscript{615} In this case, the defendant was charged with aggravated battery with a deadly weapon but the jury convicted him of the uncharged crime of aggravated battery causing great bodily harm.\textsuperscript{616} On appeal, Jaimes argued that it was an error to convict him of an uncharged crime.\textsuperscript{617} The Second District affirmed, however, because the failure to object to the flawed jury instructions and

\begin{itemize}
\item \textsuperscript{607} Id. at 751.
\item \textsuperscript{608} Id. at 749.
\item \textsuperscript{609} Id. at 751.
\item \textsuperscript{610} Morse, 77 So. 3d at 749.
\item \textsuperscript{611} Id. at 751 (citing Beahr v. State, 992 So. 2d 844, 846 (Fla. 1st Dist. Ct. App. 2008), \textit{abrogated on other grounds by Smith v. State, 41 So. 3d 1041 (Fla. 1st Dist. Ct. App. 2010))}.
\item \textsuperscript{612} Id. (citing Beahr, 992 So. 2d at 846).
\item \textsuperscript{613} 51 So. 3d 445 (Fla. 2010).
\item \textsuperscript{614} Id. at 449, 451 (citing State v. Gray, 435 So. 2d 816, 818 (Fla. 1983)).
\item \textsuperscript{615} Id. at 447 (emphasis omitted); see also \textit{FLA. STAT. § 784.045(1)(a) (2012)}.
\item \textsuperscript{616} \textit{Jaimes II}, 51 So. 3d at 447 (citing \textit{Jaimes v. State (Jaimes I)}, 19 So. 3d 347, 348 (Fla. 2d Dist. Ct. App. 2009) (per curiam), \textit{review granted}, 29 So. 3d 291 (Fla. 2010), \textit{and rev’d}, 51 So. 3d 445 (Fla. 2010)).
\end{itemize}
verdict form did not constitute fundamental error. Jaimes sought review on the ground that the Second District’s decision was in conflict with the decision of the state high court in *State v. Weaver.*

The Supreme Court of Florida agreed, holding that the defendant’s conviction for aggravated battery violated his due process rights because it was based on causing great bodily harm, “which requires an element not contained in the charging document” and therefore not addressed at trial. The erroneous jury instruction that resulted in this conviction constituted fundamental error “by definition,” the court held, and was subject to correction on appeal even in the absence of contemporaneous objection. In so ruling, the court distinguished its decision in *Weaver,* which held that a trial court’s error in instructing on an alternative theory does not constitute fundamental error when that alternative theory is never at issue in the trial and “it may be assumed that the defendant was convicted of the form of the offense on which the state actually based its arguments.” In *Jaimes II,* however, the verdict was based specifically on the jury’s determination that Jaimes had caused the victim great bodily harm, and so the court could not assume, as it had done “in *Weaver,* that the improper instruction had no effect on the jury’s decision.” In such case, the fundamental error exception is justified based on a violation of the defendant’s due process rights. Accordingly, the court directed entry of a verdict for the lesser included crime of simple battery, which was “supported by the charging document and the proof at trial, and each element of the offense was determined by the jury beyond a reasonable doubt.”

The Second District followed *Jaimes II in Harris v. State,* where the defendant was charged with attempted robbery with a firearm but convicted of robbery with a firearm after evidence was presented at trial that the robbery had been completed. On appeal, the court reversed and remanded for a new trial, citing *Jaimes II* as authority for the conclusion that due process is denied when a defendant is convicted “of a crime that the State has not

618. *Id.* (quoting *Jaimes I,* 19 So. 3d at 348).
619. *Id.* at 447–48 (citing *State v. Weaver,* 957 So. 2d 586, 589 (Fla. 2007), *abrogated by Sanders v. State,* 959 So. 2d 1232 (Fla. 2d Dist. Ct. App. 2007), *overruled by Beasley v. State,* 971 So. 2d 228 (Fla. 4th Dist. Ct. App. 2008)).
620. *Id.* at 449.
621. *Id.*
622. *Jaimes II,* 51 So. 3d at 451 (citing *Weaver,* 957 So. 2d at 589).
623. *Id.; see Weaver,* 957 So. 2d at 589.
624. *Jaimes II,* 51 So. 3d at 451 (citing *State v. Gray,* 435 So. 2d 816, 818 (Fla. 1983)).
625. *Id.* at 452 (citing *State v. Sigler,* 967 So. 2d 835, 842 (Fla. 2007)).
626. 76 So. 3d 1080 (Fla. 2d Dist. Ct. App. 2011).
627. *Id.* at 1081 (citing *Jaimes II,* 51 So. 3d at 451).
charged.”628 The court rejected the State’s argument that the case should be remanded for sentencing on attempted robbery because there was no evidence or finding that the robbery was incomplete, as would be required for an attempt conviction.629 The court cautioned that, on remand, “the State may not be limited to proceeding on the existing charge of attempted robbery with a firearm.”630 In other words, the State could charge Harris with the completed robbery, thereby exposing him “to the same mandatory life sentence he is currently serving.”631

2. Florida Comprehensive Drug Abuse Prevention and Control Act

Section 893.13 of the Florida Comprehensive Drug Abuse Prevention and Control Act (the Act) provides that, except as otherwise authorized, “it is unlawful for any person to sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance” or “to be in actual or constructive possession of a controlled substance.”632 Section 893.101 specifies “that knowledge of the illicit nature of a controlled substance is not an element of” a drug possession or distribution charge.633 Instead, the accused may establish lack of knowledge as an affirmative defense.634 When this affirmative defense is raised, actual or constructive possession “shall give rise to a permissive presumption that the possessor knew of the illicit nature of the substance.”635 In Shelton v. Secretary, Department of Corrections,636 the United States District Court for the Middle District of Florida held that section 893.13 violates due process and is unconstitutional on its face.637 In arriving at this conclusion, Judge Scriven characterized Florida’s law as a “draconian” approach that subjects an innocent actor to “the Hobson’s choice of pleading guilty or going to trial where he . . . must

628.    Id. at 1081, 1083 (citing Jaimes II, 51 So. 3d at 448); see also Deleon v. State, 66 So. 3d 391, 394–95 (Fla. 2d Dist. Ct. App. 2011) (holding that, where the defendant was charged with carjacking with a firearm, it was fundamental error to instruct the jury on the uncharged offense of carjacking with a deadly weapon, which was not a lesser-included crime of the charged offense).
629.    Harris, 76 So. 3d at 1082–83.
630.    Id. at 1083.
631.    Id. (Villanti, J., concurring).
633.    Id. § 893.101(2).
634.    Id.
635.    Id. § 893.101(3).
637.    Id. at 1297; see also FLA. STAT. § 893.13.
then prove his innocence for lack of knowledge against the permissive presumption the statute imposes that he does in fact have guilty knowledge."  

Almost immediately, Florida's trial courts were inundated with “Shelton motions” seeking to dismiss drug possession and trafficking charges on the ground that section 893.13 was unconstitutional. The district courts of appeal were quick to respond, uniformly concluding that section 893.13 does not violate the requirements of due process. In *State v. Adkins (Adkins I)*, however, the Second District declined to consider the merits of *Shelton* and instead certified the constitutional issue to the Supreme Court of Florida for immediate resolution. The court accepted jurisdiction and rendered its opinion on July 12, 2012. Concluding that section 893.13 is constitutional, the court deferred to the legislature’s broad authority to define the elements of a crime, while “recogniz[ing] that due process ordinarily does not preclude the creation of an offense without a guilty knowledge element.” The court then considered “the limited circumstances in which the absence of a guilty knowledge element has resulted in a holding that the requirements of

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639. See e.g., *State v. Washington (Washington I)*, 18 Fla. L. Weekly Supp. 1129, 1129, 1133 (11th Cir. Ct. Aug. 17, 2011) (finding *Shelton* to be binding on state trial courts and dismissing thirty-nine cases on the ground that section 893.13 was unconstitutional), rev’d, 37 Fla. L. Weekly D1535 (3d Dist. Ct. App. June 27, 2012); *State v. Barnett*, No. 11-CF-003124, slip op. at 3, 6 (Fla. 13th Cir. Ct. Aug. 12, 2011) (finding *Shelton* to constitute persuasive authority in state trial courts, but holding that the legislature had not entirely eliminated the element of knowledge from section 893.13 because a “general intent [element] remains intact”); see also FLA. STAT. § 893.13; *State v. Anderson*, No. F99-12435(A), slip op. at 3, 6 (Fla. 11th Cir. Ct. Aug. 11, 2011) (holding that state trial courts are barred from following *Shelton* because the state appellate courts have upheld the constitutionality of section 893.13).
641. 71 So. 3d 184 (Fla. 2d Dist. Ct. App.) (per curiam), review granted, 71 So. 3d 117 (Fla. 2011).
642. *Id.* at 185–86.
644. *Id.* at S450.
due process were not satisfied.\textsuperscript{645} The statutes were found unconstitutional in those cases, the court explained, because they penalized omissions that otherwise amounted to innocent conduct, criminalized constitutionally protected conduct, or were not rationally related to achieving a legitimate legislative purpose.\textsuperscript{646}

The court advanced several reasons in support of its conclusion. First, because the State is required to prove the defendant’s “affirmative act of selling, manufacturing, delivering, or possessing a controlled substance,” the statute does not punish inaction.\textsuperscript{647} Second, the statute does not penalize innocent conduct without notice, given that lack of knowledge may be asserted as an affirmative defense.\textsuperscript{648} Third, sections 893.13 and 893.101 do not impinge on any constitutionally protected rights or freedoms, particularly as “[t]here is no [protected] right to possess contraband” or “to be ignorant of the nature of the property in one’s possession.”\textsuperscript{649} Fourth, “‘common sense and experience’” support a conclusion that “possession without awareness of the illicit nature of the substance is highly unusual.”\textsuperscript{650} Fifth, section 893.13 is “rationally related to the Legislature’s goal of controlling substances that have a high potential for abuse” because it is narrowly tailored to permit medical use and handling of controlled substances and “to prohibit non-medically necessary uses of those substances.”\textsuperscript{651} Finally, the “decision to [define] lack of . . . knowledge as an affirmative defense does not unconstitutionally shift the burden of proof of a criminal offense to the defendant” because it does not require the defendant to refute an element that the State is required to prove in order to convict.\textsuperscript{652} To the contrary, the court wrote, the affirmative defense provides the defendant with the opportunity to concede the elements of the crime while explaining why the crime should not be punished.\textsuperscript{653} Accordingly, the court reversed the circuit court’s order granting the motions to dismiss.\textsuperscript{654}

\textsuperscript{645} Id.
\textsuperscript{646} Id. at S451.
\textsuperscript{647} Id. at S452.
\textsuperscript{648} Adkins II, 37 Fla. L. Weekly at S452.
\textsuperscript{651} Id.; see Fla. Stat. § 893.13.
\textsuperscript{652} Adkins II, 37 Fla. L. Weekly at S452.
\textsuperscript{653} Id. at S453.
\textsuperscript{654} Id.
Justice Pariente concurred in the result but wrote separately to state that she would not rule out a successful “as-applied challenge . . . on due process grounds” if criminalizing the innocent conduct of a specific defendant would subject that individual to a substantial prison term.\footnote{Id. (Pariente, J., concurring).} The relevant standard jury instruction supports such a challenge, she explained, because it allows a jury to presume a defendant’s guilty knowledge once “the affirmative defense is raised.”\footnote{Id. at S455 (citing FLA. STD. JURY INSTR. (CRIM.) 25.2 (2007)).} Justice Perry dissented, writing that the majority’s decision “shatters bedrock constitutional principles and builds on a foundation of flawed ‘common sense.’”\footnote{Adkins II, 37 Fla. L. Weekly at S456 (Perry, J., dissenting).} Innocent possession is more common than the court stated, he wrote, and the permissive presumption of guilty knowledge requires an innocent defendant “to shoulder the burden of proof and present evidence to overcome that presumption.”\footnote{Id. at S457 (citing Stimus v. State, 995 So. 2d 1149, 1151 (Fla. 5th Dist. Ct. App. 2008)).} This, he concluded, “makes neither legal nor common sense, . . . offends all notions of due process, and threatens core principles of the presumption of innocence and burden of proof.”\footnote{Id. at S458.}

D. Ex Post Facto Laws

In \textit{Shenfeld v. State (Shenfeld II)},\footnote{Id. at S458.} the Supreme Court of Florida examined the constitutional provision prohibiting ex post facto laws.\footnote{Id. at 98; see also FLA. CONST. art. 1, § 10.} At issue was whether an amendment to a probation tolling statute, which allows adjudication of a probation violation without an arrest warrant, “may constitutionally be applied to a probationer who was placed on probation before the amendment became effective.”\footnote{Shenfeld II, 44 So. 3d at 98; see also FLA. CONST. art 1, § 10; FLA. STAT. § 948.06(1) (2001) (current version at FLA. STAT. § 948.06(1)(a) (2012)).} In this case, based on the new tolling law and alleged probation violations, the trial court revoked Shenfeld’s probation and sentenced him to fifteen years.\footnote{Shenfeld II, 44 So. 3d at 99; see also Shenfeld v. State (Shenfeld I), 14 So. 3d 1021, 1023 (Fla. 4th Dist. Ct. App.), review granted, 29 So. 3d 292 (Fla. 2009), and aff’d, 44 So. 3d 96 (Fla. 2010).} The Fourth District affirmed, holding that the amendment was merely procedural and did not deprive the trial court of jurisdiction to revoke Shenfeld’s probation and to sentence
him. Approving this decision, the Supreme Court of Florida concluded that the amended tolling provision did not fall within any of the four categories of ex post facto laws because it did not criminalize an act that was innocent when the law passed, aggravate a crime previously committed, inflict a greater punishment than that in effect when the crime was committed, or change the proof necessary to convict. Instead, the court held, it merely modified the applicable tolling procedures. The amendment was analogous to a “statutory extension of a statute of limitations” that takes effect before prosecution is time-barred, the court wrote, concluding that if the limitations period for prosecution “may constitutionally be extended before the prosecution has been time-barred, it follows that a [tolling provision] may be applied to [an unexpired] probationary term.”

In Witchard v. State, the Fourth District held that retroactive imposition of mandatory electronic monitoring provisions to the defendant’s crimes violated the prohibition against ex post facto laws. In this case, the relevant statute took effect after Witchard’s crimes were committed. Because it mandated a greater punishment than that in effect when he committed his crimes, its retroactive application violated the constitutional prohibition against ex post facto laws. The court remanded the case “for resentencing to allow the trial court to exercise its discretion to determine whether electronic monitoring should be imposed.”

E. Freedom of Speech and Association

The constitutionality of Florida’s vehicle noise statute was the subject of two district court opinions during the survey period. Section 316.3045, the statute at issue, makes it unlawful for the sound from a car stereo system to be “[p]lainly audible at a distance of 25 feet or more from the motor vehicle,” except when that vehicle uses sound making devices in the normal

664. Shenfeld I, 14 So. 3d at 1024.
665. Shenfeld II, 44 So. 3d at 100–02 (citing Stogner v. California, 539 U.S. 607, 612 (2003)).
666. Id. at 101.
667. Id.
668. 68 So. 3d 407 (Fla. 4th Dist. Ct. App. 2011).
669. Id. at 409, 411.
670. Id. at 408; see FLA. STAT. § 948.063(1) (2012).
671. Witchard, 68 So. 3d at 409, 410–11.
672. Id. at 411 (quoting Donohue v. State, 979 So. 2d 1060, 1062 (Fla. 4th Dist. Ct. App. 2008) (per curiam)).
course of “business or political purposes.” In State v. Catalano, the Second District held that the statute is unconstitutional for two reasons. First, it is not content-neutral because it “does not ‘apply equally to music, political speech, and advertising.’” Second, no compelling governmental interest requires the different treatment of amplified music and political or commercial speech. Accordingly, the court denied the petition and certified the following question of great public importance: “Is the ‘plainly audible’ language in section 316.3045(1)(a), Florida Statutes, unconstitutionally vague, overbroad, arbitrarily enforceable, or impinging on free speech rights?”

The Fifth District reached the same result in Montgomery v. State, where the trial court denied the defendant’s motion to suppress evidence obtained when his vehicle was stopped for a noise violation. The appellate court rejected Montgomery’s vagueness challenge on the ground that the statute “provides fair notice of the prohibited conduct” and clear guidelines to those charged with its enforcement. The overbreadth challenge was meritorious, however, because the statute “distinguish[es] between different types of recorded noise or particular viewpoints.” The court nevertheless upheld Montgomery’s conviction on the ground that the officer’s good faith reliance on the statute was objectively reasonable and could not serve as an exception to the exclusionary rule.

In Enoch v. State, the First District struck down section 874.11 of the Florida Statutes, which prohibits certain electronic communication by criminal gangs, but upheld section 874.05(1), which makes it a felony to recruit new gang members if commission of a crime is a condition of membership or continued membership. The court first addressed the question whether

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675. 60 So. 3d 1139 (Fla. 2d Dist. Ct. App. 2011).
676. Id. at 1144, 1146.
677. Id. at 1146 (quoting City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 428 (1993)).
678. Id. at 1144.
679. Id. (emphasis added).
680. 69 So. 3d 1023 (Fla. 5th Dist. Ct. App. 2011).
681. Id. at 1025–26, 1033.
682. Id. at 1027–28; see also FLA. ADMIN. CODE R. 15B-13.001 (2006).
683. Montgomery, 69 So. 3d at 1031–32.
684. Id. at 1033.
685. 95 So. 3d 344 (Fla. 1st Dist. Ct. App. 2012).
686. Id. at 347–48. The court also held that, because Enoch actually “engaged in specific conduct each statute proscribes,” he lacked standing to raise a vagueness challenge “as applied
these statutes violate the freedoms of speech and association.687 Both statutes were subject to a strict scrutiny analysis, the court stated, because they are content-based laws that focus on the recruiter’s words and conduct.688 The court concluded that both statutes serve compelling state interests, because they were aimed at preventing crime.689 However, only the gang recruitment statute was narrowly tailored to achieve this goal “without impermissibly intruding upon the rights of law-abiding persons or, for that matter, the discrete lawful activities of gang members.”690 Moreover, because the statute is limited to speech that intentionally furthers criminal activity, it did not dispense with a scienter requirement or reach protected speech as Enoch claimed.691 Finally, the recruitment statute did not violate the freedom of association, the court held, because “whatever associational rights a criminal gang may have, such rights do not extend to the inevitable and imminent criminal or delinquent conduct proscribed in section 874.05(1).”692 The First District, therefore, affirmed Enoch’s conviction and sentence under section 874.05(1).693

On the other hand, the court held that section 874.11, the electronic communications statute, was unconstitutionally overbroad and offended substantive due process.694 Because its “sweeping language” criminalizes innocent communications “without reference to actual or imminent criminal activity,” it impermissibly prohibits expressive and associational activity that seeks “to benefit, promote, or further even the non-criminal interests of a criminal gang.”695 Accordingly, the court reversed Enoch’s conviction and sentence under section 874.11.696

to the hypothetically innocent conduct of others.” Id. at 365–66 (citing Bryant v. State, 712 So. 2d 781, 783 (Fla. 2d Dist. Ct. App. 1998)). 687. Id. at 350. 688. Id. at 350, 357 (citing United States v. Playboy Entm’t Grp., Inc., 529 U.S. 803, 811–13 (2000); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994)). 689. Enoch, 95 So. 3d at 351–52, 357 (citing New York v. Ferber, 458 U.S. 747, 757 (1982); State v. J.P., 907 So. 2d 1101, 1116–17 (Fla. 2004); State v. T.B.D., 656 So. 2d 479, 482 (Fla. 1995)). 690. Id. at 355 (citing FLA. STAT. § 874.02(1) (2012)). 691. Id. at 352–53; see also FLA. STAT. § 874.05(1). 692. Enoch, 95 So. 3d at 357 (citing State v. Beasley, 317 So. 2d 750, 753 (Fla. 1975)); see also FLA. STAT. § 874.05(1). 693. Enoch, 95 So. 3d at 366; see also FLA. STAT. § 874.05(1). 694. Enoch, 95 So. 3d at 358, 364; see also FLA. STAT. § 874.11 (2012), declared unconstitutional by Enoch v. State, 95 So. 3d 344 (2012). 695. Enoch, 95 So. 3d at 358, 364 (citing City of Harvard v. Gaut, 660 N.E.2d 259, 264 (Ill. App. Ct. 1996)). 696. Id. at 366; see also FLA. STAT. § 874.11.
F. The Right to Bear Arms

In a brief opinion in *Epps v. State*, the First District upheld the constitutionality of a Florida statute making possession of a firearm by a convicted felon unlawful. The court rejected the defendant’s argument that the statute violated his Second Amendment right to bear arms and found that recent decisions of the Supreme Court of the United States did not undermine state precedent upholding the constitutionality of section 790.23(1)(a) of the *Florida Statutes*. Those cases were distinguishable, the court wrote, because they involved broad state prohibitions against possession of handguns by “general populations . . . within the home for self-defense.” They did not call into question the validity of “prohibitions on the possession of firearms by felons.” The First District therefore affirmed Epps’ conviction.

V. CONCLUSION

During the survey period, the Supreme Court of Florida settled several conflicts among Florida’s District Courts of Appeal and interpreted a number of statutes, defenses, common law doctrines, and constitutional principles. The district courts were active as well, certifying several conflicts and questions of great public importance to the court. The appellate courts also struggled with the proper application of *Montgomery II* to myriad issues involving the jury instructions for manslaughter and attempted manslaughter. The resulting confusion will not be resolved until the court approves separate jury instructions for voluntary and involuntary manslaughter.

697. 55 So. 3d 710 (Fla. 1st Dist. Ct. App. 2011).
698. Id. at 711 (citing FLA. STAT. § 790.231(a)).
699. Id. (citing McDonald v. City of Chi., Ill., 130 S. Ct. 3020, 3047, 3050 (2010); District of Columbia v. Heller, 554 U.S. 570, 635 (2008)); see also FLA. STAT. § 790.231(a).
700. *Epps*, 55 So. 3d at 711 (citing *McDonald*, 130 S. Ct. at 3047, 3050; *Heller*, 554 U.S. at 635).
701. Id. (quoting *McDonald*, 130 S. Ct. at 3047; *Heller*, 554 U.S. at 626).
702. Id.