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Criminal Law: 2010-2012 Survey of Florida Law

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Criminal Law: 2010-2012 Survey of Florida Law

Pearl Goldman*

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CRIMINAL LAW: 2010–2012 SURVEY OF FLORIDA LAW

PEARL GOLDMAN*

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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."¹ In *Colbert v. State*,² 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.³ Noting that Florida's judicial treatment of this term demonstrates only "what

1. FLA. STAT. §§ 810.02(3), 810.011(2) (2012); FLA. STD. JURY INSTR. (CRIM.) 13.1 (2008).

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.”⁴ In contrast, the area from which the defendant had taken the bicycle, a concrete pad and mulch, “was open to unknown, uninvited people.”⁵ It was therefore not an attached porch.⁶ For this reason, the court reversed the defendant’s conviction.⁷

The definition of the term “dwelling” also includes the “curtilage,”⁸ which must be enclosed.⁹ The question of what constitutes an enclosure is frequently the subject of debate, however.¹⁰ In *J.L. v. State*,¹¹ 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.¹² 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.”¹³ Concluding that this result would not comport with legislative intent,¹⁴ the court reversed the defendant’s burglary conviction and directed entry of judgment for trespass.¹⁵

In *Jacobs v. State*,¹⁶ on the other hand, the First District held that “[t]he 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.¹⁷

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.

8. FLA. STAT. § 810.011(2); *see* FLA. STD. JURY INSTR. (CRIM.) 13.1 (2008).

9. FLA. STAT. § 810.011(2); *see also* *State v. Hamilton*, 660 So. 2d 1038, 1044 (Fla. 1995).

10. *See* FLA. STAT. § 810.011(2); *J.L. v. State*, 57 So. 3d 924, 925–26 (Fla. 5th Dist. Ct. App. 2011) (quoting *Hamilton*, 660 So. 2d at 1044); *Jacobs v. State*, 41 So. 3d 1004, 1005–06 (Fla. 1st Dist. Ct. App. 2010) (quoting *Hamilton*, 660 So. 2d at 1044), *review denied*, 79 So. 3d 744 (Fla. 2012).

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 “fenc[ed] on three sides,” with a “low-walled ‘stoop’ in . . . front” and an “opening for the driveway.”¹⁸ The court also rejected the defendant’s argument that the house ceased to be a “dwelling” after it was damaged in a fire.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.”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.”²¹ As authority, the court cited *Munoz v. State*,²² a Second District opinion that was called into question in two cases during the survey period.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.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.²⁵ In *Michael v. State*,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.”²⁷ Instead, the *Michael* court adopted the dissenting opinion in *Munoz*,²⁸ which had eschewed the majority’s reasoning on two grounds.²⁹ First, the majority’s reasoning in *Munoz* was inconsistent with the plain language of the statute, which re-

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).

19. *Jacobs*, 41 So. 3d at 1005–06.

20. *Id.* at 1006.

21. *Id.* at 1007.

22. 937 So. 2d 686 (Fla. 2d Dist. Ct. App. 2006).

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).

24. *Munoz*, 937 So. 2d at 689 (citing *Perkins v. State (Perkins II)*, 682 So. 2d 1083, 1084 (Fla. 1996) (per curiam)).

25. *Id.* at 688–89 (relying on *Perkins II*, 682 So. 2d at 1084).

26. 51 So. 3d 574 (Fla. 5th Dist. Ct. App. 2010).

27. *Id.* at 575; see also *Munoz*, 937 So. 2d at 689.

28. *Michael*, 51 So. 3d at 575.

29. *Id.*; see also *Munoz*, 937 So. 2d at 690–91 (Canady, J., dissenting).

quired only that a “dwelling” be “designed” for habitation.³⁰ Second, it was inconsistent with the decision of the Supreme Court of Florida in *Perkins v. State (Perkins II)*,³¹ which made clear that in determining whether a structure qualified as a dwelling, “the design of the structure” . . . is ‘paramount.’”³² Therefore, according to the *Munoz* dissent, the home’s temporary transformation had not altered its use for human habitation.³³ Adopting this reasoning, the *Michael* court affirmed the defendant’s conviction for burglary of a dwelling and certified conflict with *Munoz*.³⁴ The Fifth District again certified conflict with *Munoz* in *Young v. State (Young I)*.³⁵ The Supreme Court of Florida has accepted jurisdiction in *Young v. State (Young II)*.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.”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.³⁸ In *Pierre v. State*,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.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.⁴¹ The court found no conclusive evidence that the defendant had abandoned his possessory interest in the apartment.⁴² His possessions

30. *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)).

31. 682 So. 2d 1083 (Fla. 1996) (per curiam).

32. *Munoz*, 937 So. 2d at 691 (Canady, J., dissenting) (quoting *Perkins v. State (Perkins I)*, 630 So. 2d 1180, 1181 (Fla. 1st Dist. Ct. App. 1994), *review granted per curiam*, 673 So. 2d 30 (Fla. 1996)).

33. *Id.*

34. *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)).

35. 73 So. 3d 825, 825 (Fla. 5th Dist. Ct. App. 2011) (per curiam), *review granted*, 84 So. 3d 1033 (Fla. 2012); *see also Munoz*, 937 So. 2d at 689–90.

36. 84 So. 3d 1033, 1033 (Fla. 2012) (unpublished table decision).

37. *D.S.S. v. State*, 850 So. 2d 459, 461 (Fla. 2003) (citing *In re M.E.*, 370 So. 2d 795, 796 (Fla. 1979)).

38. *Pierre v. State*, 77 So. 3d 699, 701 (Fla. 3d Dist. Ct. App. 2011) (quoting *Whetstone v. State*, 778 So. 2d 338, 342 (Fla. 1st Dist. Ct. App. 2000)).

39. 77 So. 3d 699 (Fla. 3d Dist. Ct. App. 2011).

40. *Id.* at 702.

41. *Id.* at 700.

42. *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.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.”⁶⁶ In so ruling, the court disapproved *Jackson v. State*,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.⁶⁸ The court held that *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.⁶⁹ However, the jury may not do so if the state fails to prove the value of property that is capable of valuation.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.”⁷¹

C. *Homicide*

1. *Felony Murder*

a. *Merger Doctrine*

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

65. *Marrero II*, 71 So. 3d at 891.

66. *Id.* at 887, 889.

67. 413 So. 2d 112 (Fla. 2d Dist. Ct. App. 1982).

68. *Marrero II*, 71 So. 3d at 888–89 (citing *Jackson*, 413 So. 2d at 112); see FLA. STAT. § 812.012(10)(b) (2012).

69. *Marrero II*, 71 So. 3d at 888–89 (citing *Jackson*, 413 So. 2d at 112); see FLA. STAT. § 812.012(10)(b).

70. *Marrero II*, 71 So. 3d at 889 (citing *Jackson*, 413 So. 2d at 112).

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).

72. 94 So. 3d 434 (Fla. 2012).

73. 918 So. 2d 181 (Fla. 2005) (per curiam), *abrogated in part* by *State v. Sturdivant*, 94 So. 3d 434 (Fla. 2012).

act of aggravated child abuse.”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.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.”⁷⁶

The court began by examining the merger doctrine as a doctrine of statutory construction distinct from the constitutional principle of double jeopardy.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.”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.”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.⁸⁰ The court concluded that *Brooks* was incorrectly decided on two levels.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.”⁸² Second, the decision “improperly extended and relied upon”⁸³ *Mills v. State*,⁸⁴ where the court held that an aggravated battery conviction merged with a homicide conviction because both were based on a

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).

75. *Sturdivant*, 94 So. 3d at 436.

76. *Id.* at 437 (citing FLA. STAT. § 782.04(1)(a)2. (2012)).

77. *Id.* at 437 n.3.

78. *Id.* at 440 (alteration in original) (quoting FLA. STAT. § 782.04(1)(a)2.h.).

79. *Id.*; see also § 782.04(1)(a)2.h.

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)).

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.

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

83. *Sturdivant*, 94 So. 3d at 441.

84. 476 So. 2d 172 (Fla. 1985) (per curiam).

single gunshot blast.⁸⁵ *Mills* was inapposite, the court explained, because the underlying crime in that case was an unenumerated felony.⁸⁶ The felony murder statute has been amended since *Mills*⁸⁷ to include aggravated child abuse as an enumerated predicate felony.⁸⁸ Accordingly, the court quashed the decision of the First District, receded from *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.”⁸⁹

In *Williams v. State*,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.”⁹¹ The defendant in this case was convicted, *inter alia*, of attempted premeditated first-degree murder and attempted felony murder after he fired multiple shots at his fleeing victim.⁹² In support of his argument that his convictions violated the principle against double jeopardy, he cited case law addressing the merger principle.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.⁹⁴ However, the merger principle “is an exception to the standard double jeopardy analysis,” the court wrote.⁹⁵ Because the defendant’s “pursuit of the victim constituted one criminal act or one attempted murder,” the dual convictions were impermissible.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

85. *Id.* at 177; *see also Sturdivant*, 94 So. 3d at 442 (citing *Mills*, 476 So. 2d at 177).

86. *Sturdivant*, 94 So. 3d at 442 (citing *Mills*, 476 So. 2d at 177).

87. *Mills*, 476 So. 2d at 177. Although *Mills* was decided in 1985, the court relied on the 1979 statute. *Id.*; *see also* FLA. STAT. § 782.04(1)(a) (1979), *amended by* FLA. STAT. § 782.04(1)(a)2.h. (Supp. 1984).

88. FLA. STAT. § 782.04(1)(a)2.h. (2012).

89. *Sturdivant*, 94 So. 3d at 442.

90. 90 So. 3d 931 (Fla. 1st Dist. Ct. App. 2012).

91. *Id.* at 932–33.

92. *Id.*

93. *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)).

94. *Id.*; *see also* *Blockburger v. United States*, 284 U.S. 299, 304 (1932) (citing *Gavieres v. United States*, 220 U.S. 338, 342 (1911)).

95. *Williams*, 90 So. 3d at 934.

96. *Id.* at 935.

merger principle.⁹⁷ Accordingly, the court affirmed Williams' conviction for attempted premeditated first-degree murder and reversed his conviction for attempted felony murder.⁹⁸

b. Underlying Felony

In *Hernandez v. State (Hernandez II)*,⁹⁹ 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.¹⁰⁰ 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.¹⁰¹ 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.¹⁰² The Supreme Court of Florida granted discretionary review based on conflict with *Williams v. State*,¹⁰³ 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.'"¹⁰⁴ This, then, was the context for the decision of the Supreme Court of Florida in *Hernandez*.¹⁰⁵

The court decided that, as in *Williams*, the evidence was insufficient to establish the predicate crime.¹⁰⁶ 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.

103. 592 So. 2d 737 (Fla. 1st Dist. Ct. App. 1992).

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.¹⁰⁷ The inference that Hernandez believed that the transaction was going to be for \$30,000 was also insufficient.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.”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.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.¹¹¹ Accordingly, the court vacated his first-degree felony murder convictions and directed entry of judgment for third-degree felony murder.¹¹²

2. Second-Degree Depraved Mind Murder

In *Black v. State*,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.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.”¹¹⁵ He then drove into a parking lot and accelerated directly into a group of people.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.¹¹⁷ A jury convicted the defendant, *inter alia*, of two counts of second-degree murder and one count of attempted second-degree murder.¹¹⁸ On appeal, he argued that extreme recklessness alone is legally insufficient to establish the actual malice element of second-degree

107. *Id.* at 760–61 (citing *Hernandez I*, 994 So. 2d at 490).

108. *Id.* at 761–62.

109. *Id.* at 762.

110. *Hernandez II*, 56 So. 3d at 761.

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).

112. *Hernandez II*, 56 So. 3d at 754, 764.

113. 37 Fla. L. Weekly D593 (2d Dist. Ct. App. Mar. 9, 2012).

114. *Id.* at D594.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Black*, 37 Fla. L. Weekly at D593.

murder.¹¹⁹ The court disagreed and distinguished the decisional law on which Black relied.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.”¹²¹ No evidence established that those defendants acted with malice toward their victims.¹²² In contrast, because Black drove directly into his victims, the jury could reasonably infer that he was trying to carry out his threat.¹²³ The court affirmed Black’s convictions, writing that a plan such as that one demonstrated the requisite malice for second-degree murder.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.¹²⁵ In 2010, in *State v. Montgomery (Montgomery II)*,¹²⁶ the Supreme Court of Florida held that where the defendant was charged with second-degree murder, it was fundamentally erroneous¹²⁷ 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.¹²⁸ The 2006 jury instruction that proved problematic in *Montgomery II* required

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)).

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

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

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

123. *Black*, 37 Fla. L. Weekly at D594.

124. *Id.* at D594–95.

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)).

126. 39 So. 3d 252 (Fla. 2010).

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. *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).

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).

130. Compare FLA. STD. JURY INSTR. (CRIM.) 7.7, with FLA. STAT. § 782.07(1) (2012).

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.

137. See *In re Standard Jury Instructions in Criminal Cases*, 997 So. 2d at 404 (citing FLA. STD. JURY INSTR. (CRIM.) 7.7).

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.”¹³⁹ After receiving comments about the 2010 instruction, the court issued the most recent instruction—the 2011 instruction.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.”¹⁴¹

Together with these amendments, the *Montgomery II* decision has unleashed a veritable tsunami of conflicting decisions on the applicability of that ruling in myriad situations.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 *Montgomery II* ruling.¹⁴³ The first court to analyze the 2008 instruction was the First District in *Riesel v. State*,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.”¹⁴⁵ The Second and Third Districts disagreed, however.¹⁴⁶

139. *In re Amendments to Instruction 7.7 I*, 41 So. 3d at 855.

140. *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).

141. *Id.* at 212 app. (emphasis omitted).

142. *See infra* Part II.C.3.a.i.

143. *Compare* *Riesel v. State*, 48 So. 3d 885, 886 (Fla. 1st Dist. Ct. App. 2010) (per curiam) (citing *Montgomery II*, 39 So. 3d at 256, 259), *with* *Figueroa v. State*, 77 So. 3d 714, 714 (Fla. 3d Dist. Ct. App. 2011), *and* *Daniels v. State (Daniels I)*, 72 So. 3d 227, 230 (Fla. 2d Dist. Ct. App. 2011), *review granted*, 79 So. 3d 744 (Fla. 2012); *see also In re Standard Jury Instructions in Criminal Cases—Report No. 2007-10*, 997 So. 2d 403, 404 (Fla. 2008) (per curiam).

144. 48 So. 3d 885 (Fla. 1st Dist. Ct. App. 2010) (per curiam), *review denied*, 66 So. 3d 304 (Fla. 2011).

145. *Id.* at 886 (citing *Montgomery II*, 39 So. 3d at 256, 259). The First District reaffirmed *Riesel*. *See* *Richards v. State*, 84 So. 3d 1167, 1169 (Fla. 1st Dist. Ct. App. 2012); *Noack v. State*, 61 So. 3d 1208, 1208 (Fla. 1st Dist. Ct. App. 2011) (per curiam) (citing *Herring v. State*, 43 So. 3d 823, 824 (Fla. 1st Dist. Ct. App. 2010) (per curiam); *Lamb v. State*, 18 So. 3d 734, 735 (Fla. 1st Dist. Ct. App. 2009) (per curiam)); *Williams v. State*, 50 So. 3d 1207, 1208 (Fla. 1st Dist. Ct. App. 2010) (per curiam) (discussing *Riesel*, 48 So. 3d at 886; *Pryor v. State*, 48 So. 3d 159, 161 (Fla. 1st Dist. Ct. App. 2010), *review dismissed*, 66 So. 3d 304 (Fla. 2011)).

146. *Compare Daniels I*, 72 So. 3d at 230, *with Figueroa*, 77 So. 3d at 714, 716.

In *Figueroa v. State*,¹⁴⁷ the Third District held that the amendment of the 2008 instruction in 2010 did “not render the giving of the 2008 instruction fundamental error.”¹⁴⁸ 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.¹⁴⁹ The Third District therefore certified conflict with the First District’s opinion in *Riesel*.¹⁵⁰

Similarly, in *Daniels v. State (Daniels I)*,¹⁵¹ the Second District determined that the 2008 instruction did not require proof of intent-to-kill.¹⁵² First, the court wrote, the *Montgomery II* decision specifically concluded that the clarifying language in the 2008 instruction had cured any apparent defect.¹⁵³ 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.”¹⁵⁴ 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[d]ed to commit an act [that] caused death.’”¹⁵⁵ According to the appellate court, this language correctly defined the intent element of manslaughter.¹⁵⁶ The Second District nevertheless certified conflict with the decision of the First District in *Riesel*.¹⁵⁷ The Supreme Court of Florida has accepted jurisdiction in *Daniels v. State (Daniels II)*.¹⁵⁸

147. 77 So. 3d 714 (Fla. 3d Dist. Ct. App. 2011).

148. *Id.* at 714.

149. *Id.* at 715 (citing *Montgomery II*, 39 So. 3d at 256–57); see also *Page v. State*, 81 So. 3d 525, 526 (Fla. 3d Dist. Ct. App. 2012) (“[I]t is difficult to believe, much less hold, that the [s]upreme [c]ourt would even ‘authorize’ a purportedly curative instruction which was fundamentally wrong.”).

150. *Figueroa*, 77 So. 3d at 715–16 (certifying conflict with *Noack*, 61 So. 3d at 1208, *Pryor*, 48 So. 3d at 162–63, and *Riesel*, 48 So. 3d at 886).

151. 72 So. 3d 227 (Fla. 2d Dist. Ct. App. 2011), review granted, 79 So. 3d 744 (Fla. 2012).

152. *Id.* at 230.

153. *Id.* (citing *Montgomery II*, 39 So. 3d at 257).

154. *Id.* at 232. The Second District reaffirmed *Daniels I*. *Berube v. State*, 84 So. 3d 436, 436 (Fla. 2d Dist. Ct. App. 2012); *Black v. State*, 37 Fla. L. Weekly D593, D595 (2d Dist. Ct. App. Mar. 9, 2012); *Pharisien v. State*, 74 So. 3d 156, 157 (Fla. 2d Dist. Ct. App. 2011).

155. *Daniels I*, 72 So. 3d at 230, 232 (quoting *Montgomery II*, 39 So. 3d at 257).

156. *Id.* at 232.

157. *Id.*; see also *Riesel v. State*, 48 So. 3d 885, 886–87 (Fla. 1st Dist. Ct. App. 2010) (per curiam), review denied, 66 So. 3d 304 (Fla. 2011).

158. 79 So. 3d 744, 744 (Fla. 2012) (unpublished table decision).

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.¹⁵⁹ 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.¹⁶⁰ 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.¹⁶¹

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.¹⁶² This was the problem confronting the Second District in *Haygood v. State (Haygood I)*,¹⁶³ 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.¹⁶⁴ 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.”¹⁶⁵ This meant that if the jury be-

159. See, e.g., *Paul v. State*, 63 So. 3d 828, 830 (Fla. 5th Dist. Ct. App. 2011); *Guerra v. State*, 44 So. 3d 226, 226 (Fla. 3d Dist. Ct. App. 2010); *Barros-Dias v. State*, 41 So. 3d 370, 372 (Fla. 2d Dist. Ct. App. 2010); *Singh v. State*, 36 So. 3d 848, 851 (Fla. 4th Dist. Ct. App. 2010); *Salonko v. State*, 42 So. 3d 801, 802–03 (Fla. 1st Dist. Ct. App. 2010) (per curiam) (citing *Nieves v. State*, 22 So. 3d 691, 692 (Fla. 2d Dist. Ct. App. 2009)).

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.¹⁶⁶ Although the evidence supported the second-degree murder verdict, the court found it “impossible to speculate what the jury would have found had it been properly instructed that manslaughter by act does not require the intent-to-kill.”¹⁶⁷ 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?¹⁶⁸

The Supreme Court of Florida has accepted discretionary review of *Haygood I*.¹⁶⁹

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*,¹⁷⁰ the corresponding instruction for attempted manslaughter has remained unchanged.¹⁷¹ 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.¹⁷² 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).

168. *Haygood I*, 54 So. 3d at 1038; see also *Pierre-Louis v. State*, 37 Fla. L. Weekly D1732, D1733 (2d Dist. Ct. App. July 20, 2012); *Garrido v. State*, 76 So. 3d 378, 378 (Fla. 3d Dist. Ct. App. 2011) (per curiam); *McNealy v. State*, 67 So. 3d 1187, 1188 (Fla. 2d Dist. Ct. App. 2011) (per curiam).

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).

171. See FLA. STD. JURY INSTR. (CRIM.) 6.6 (1994).

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*.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.¹⁷⁴

During the last survey period, the First District decided *Lamb v. State*¹⁷⁵ and *Rushing v. State*,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.¹⁷⁷ The Fourth District rejected this argument in *Williams v. State (Williams I)*.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.”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.”¹⁸⁰ The Fourth District certified conflict with *Lamb* and also “certif[ied] 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*]?”¹⁸¹

More recently, in *Houston v. State*,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

173. See, e.g., *Fenster v. State*, 61 So. 3d 465, 466–67 (Fla. 4th Dist. Ct. App. 2011) (applying *Williams v. State (Williams I)*, 40 So. 3d 72, 75 (Fla. 4th Dist. Ct. App. 2010), review granted, 64 So. 3d 1262 (Fla. 2011)); *Rushing v. State*, 35 Fla. L. Weekly D1376, D1377 (1st Dist. Ct. App. June 21, 2010) (citing *Lamb v. State*, 18 So. 3d 734, 735 (Fla. 1st Dist. Ct. App. 2009) (per curiam)); see also *Montgomery II*, 39 So. 3d at 254.

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.

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

176. 35 Fla. L. Weekly D1376 (1st Dist. Ct. App. June 21, 2010).

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).

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).

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

180. *Id.* at 75.

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

182. 87 So. 3d 1 (Fla. 2d Dist. Ct. App.), appeal dismissed, 73 So. 3d 760 (Fla. 2011).

error.¹⁸³ Nothing in either the manslaughter statute¹⁸⁴ or the attempt statute¹⁸⁵ “suggests that the crime of attempted manslaughter requires an intent-to-kill,” the court wrote.¹⁸⁶ Reversing for a new trial on the charge of attempted second-degree murder, the court also certified conflict with *Williams I*.¹⁸⁷ The First,¹⁸⁸ Third,¹⁸⁹ and Fifth¹⁹⁰ Districts have followed *Houston* and certified conflict with *Williams I*.¹⁹¹

The Supreme Court of Florida has granted review of *Williams I* to resolve this conflict,¹⁹² and Instruction 6.6 for attempted voluntary manslaughter is currently under review by the Committee on Standard Jury Instructions in Criminal Cases.¹⁹³ The proposed instruction seeks to remove the phrase “intended to cause the death of [the] victim” and to add the word “intention-

183. *Id.* at 3–4; see also *Montgomery II*, 39 So. 3d 252, 259–60 (Fla. 2010).

184. See FLA. STAT. § 782.07 (2012).

185. See *id.* § 777.04.

186. *Houston*, 87 So. 3d at 2 (citing *Bass v. State*, 45 So. 3d 970, 971 (Fla. 3d Dist. Ct. App. 2010) (per curiam); *Lamb v. State*, 18 So. 3d 734, 735 (Fla. 1st Dist. Ct. App. 2009) (per curiam)).

187. *Id.* at 4. Conflict was also certified in *Pierre-Louis v. State*. *Pierre-Louis v. State*, 37 Fla. L. Weekly D1732, D1733 (2d Dist. Ct. App. July 20, 2012).

188. *Moore v. State*, 78 So. 3d 118, 118 (Fla. 1st Dist. Ct. App. 2012) (per curiam) (“certify[ing] the following question of great public importance: Is attempted manslaughter a viable offense in light of [*Montgomery II*]?”); *Minnich v. State*, 36 Fla. L. Weekly D216, D217 (1st Dist. Ct. App. Jan. 28, 2011) (per curiam) (“certify[ing] conflict with *Williams I*], [and certifying] 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*]?”).

189. *Gordon v. State*, 36 Fla. L. Weekly D2590, D2590 (3d Dist. Ct. App. Nov. 30, 2011); *Burrows v. State*, 62 So. 3d 1258, 1259 (Fla. 3d Dist. Ct. App. 2011) (finding the attempted manslaughter instruction to be fundamental error and certifying conflict with *Williams I*).

190. *Thomas v. State*, 91 So. 3d 880, 882 (Fla. 5th Dist. Ct. App. 2012) (finding the attempted manslaughter instruction to be fundamental error because “the jury could reasonably have concluded that the offenses were presented in descending order of seriousness and that attempted voluntary manslaughter was less serious than aggravated battery,” and certifying conflict with *Williams I*). But see *Pavolko v. State*, 78 So. 3d 86, 87–88 (Fla. 5th Dist. Ct. App. 2012) (per curiam) (emphasis omitted) (finding that a non-standard instruction requiring the state to prove that the defendant “intentionally committed an act, which would have resulted in the death of [the victim] except that someone prevented [the defendant] from killing [the victim] or he failed to do so,” could not have been reasonably understood by the jury “as including an [element of] intent to cause death”).

191. See *supra* notes 188–90 and accompanying text.

192. *Williams v. State (Williams II)*, 64 So. 3d 1262, 1262 (Fla. 2011) (unpublished table decision).

193. Alerts – Criminal Jury Instructions, FLA. SUPREME CT., http://www.floridasupremecourt.org/jury_instructions/alerts.shtml (last updated Oct. 7, 2011).

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-

194. *Proposed Amendments to the Jury Instructions in Criminal Cases*, FLA B. NEWS, Feb. 15, 2011, <http://www.floridabar.org/DIVCOM/JN/JNNNews01.nsf/Articles/CEC66F4B11B4438285257830004DB637>.

195. *Id.*

196. See *Bonilla v. State*, 87 So. 3d 1222, 1222–23 (Fla. 3d Dist. Ct. App. 2012) (per curiam); *Cooper v. State*, 83 So. 3d 998, 999 (Fla. 4th Dist. Ct. App. 2012) (per curiam); *Ferrer v. State*, 69 So. 3d 360, 361–62 (Fla. 2d Dist. Ct. App. 2011); *Hartley v. State*, 65 So. 3d 584, 584–85 (Fla. 1st Dist. Ct. App. 2011) (per curiam); *Hodges v. State*, 64 So. 3d 142, 142–43 (Fla. 5th Dist. Ct. App. 2011) (per curiam), *mandamus denied*, 88 So. 3d 149 (Fla. 2012).

197. 70 So. 3d 603 (Fla. 1st Dist. Ct. App. 2009), *aff’d*, 39 So. 3d 252 (Fla. 2010).

198. *Lopez v. State*, 68 So. 3d 332, 333, 335 (Fla. 5th Dist. Ct. App. 2011); *Asberry v. State*, 32 So. 3d 718, 719 (Fla. 1st Dist. Ct. App. 2010) (per curiam).

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.²⁰¹ 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.²⁰² Manslaughter 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.”²⁰³ In *Taylor v. State*,²⁰⁴ 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.²⁰⁵ 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.”²⁰⁶

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.²⁰⁷ Separate jury instructions for voluntary manslaughter and involuntary manslaughter could eliminate the seemingly endless interpretive problems described in this section.²⁰⁸

b. *Manslaughter by Culpable Negligence*

*Santarelli v. State*²⁰⁹ was the first manslaughter case to be decided under Florida’s Open House Party statute,²¹⁰ which prohibits a person in charge of a

201. *Hall v. State*, 951 So. 2d 91, 95–96 (Fla. 2d Dist. Ct. App. 2007) (en banc).

202. *Montgomery II*, 39 So. 3d at 258. Courts recognize a “narrow exception” when the erroneous manslaughter by act instruction is accompanied by the manslaughter by culpable negligence instruction because the latter option permits the jury to return a manslaughter verdict without finding an intent-to-kill. See *Sullivan v. State*, 50 So. 3d 33, 34 (Fla. 1st Dist. Ct. App. 2010) (citing *Joyner v. State*, 41 So. 3d 306, 306–07 (Fla. 1st Dist. Ct. App. 2010)), review denied, 67 So. 3d 1050 (Fla. 2011).

203. *Fortner*, 161 So. at 96 (Brown, J., concurring).

204. 444 So. 2d 931 (Fla. 1983).

205. See *id.* at 933 (quoting *Williams v. State*, 26 So. 184, 186 (Fla. 1899)).

206. See *id.* at 934 (citing *Anthony v. State*, 409 N.E.2d 632, 636 (Ind. 1980); *Commonwealth v. Hebert*, 368 N.E.2d 1204, 1206 (Mass. 1977); *People v. Genes*, 227 N.W.2d 241, 242–43 (Mich. Ct. App. 1975); *State v. Norman*, 580 P.2d 237, 240 (Utah 1978)).

207. See *id.* at 934; *Fortner*, 161 So. at 96 (Brown, J., concurring).

208. 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”).

209. 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.²¹¹ 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.

217. *Santarelli*, 62 So. 3d at 1214–15 (citing *Commonwealth v. McCloskey*, 835 A.2d 801, 808 (Pa. Super. Ct. 2003)).

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. 75 So. 3d 192 (Fla. 2011).

223. *Id.* at 193, 197.

224. *Id.* at 192–94.

225. *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).

226. *Id.* at 7 (citing *Johnson v. State*, 637 So. 2d 3, 4 (Fla. 3d Dist. Ct. App. 1994) (per curiam)).

227. *Id.* (quoting *Lafleur v. State*, 661 So. 2d 346, 349 (Fla. 3d Dist. Ct. App. 1995)).

228. 764 So. 2d 729 (Fla. 2d Dist. Ct. App. 2000).

229. *Davila I*, 26 So. 3d at 7 (citing *Muniz*, 764 So. 2d at 731).

230. *See Davila II*, 75 So. 3d 192, 197 (Fla. 2011) (citing *Muniz*, 764 So. 2d at 729).

231. *Id.*

232. *Id.* at 196; *see also* FLA. STAT. § 787.01(1)(a) (2012).

233. *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.’”²³⁷ In other words, the statute could be read to “exempt custodial parents from criminal liability for kidnapping their own children who are under thirteen.”²³⁸ 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.”²³⁹ 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.”²⁴⁰

The second case was *Delgado v. State (Delgado II)*,²⁴¹ 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.²⁴² 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.²⁴³ Based on these acts, he was convicted of, *inter alia*, “kidnapping with the intent to commit or facilitate a felony.”²⁴⁴ The Third District upheld the conviction on the ground that the three-part test set out in *Faison v.*

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.

*State*²⁴⁵ 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 conviction,

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 kidnapping conviction.²⁵⁴

E. *Sexual Offenses*

During the survey period, the Second District decided two child pornography 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, concluding 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 statutory²⁷⁴ and decisional law²⁷⁵ and defined this term as "'the penetration of the female sex organ by the male sex organ.'"²⁷⁶ 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.²⁷⁷ The Second District reversed and remanded with directions that the trial court discharge the defendant.²⁷⁸

F. *Theft*

In *Sanders v. State*,²⁷⁹ the Fourth District considered the limits of Florida's jurisdiction over a defendant whose" offense occurred "on a commercial

266. *Id.* at 458 (Morris, J., concurring in part and dissenting in part) (citing *Stelmack*, 58 So. 3d at 877).

267. *Id.*

268. *Parker*, 81 So. 3d at 453 (majority opinion).

269. *Id.* at 457.

270. 62 So. 3d 693 (Fla. 2d Dist. Ct. App. 2011).

271. *Id.* at 694–95; *see also* FLA. STAT. § 384.24(2) (2012).

272. FLA. STAT. § 384.24(2).

273. *L.A.P.*, 62 So. 3d at 694; *see also* FLA. STAT. § 384.24(2).

274. *L.A.P.*, 62 So. 3d at 694; *see also* FLA. STAT. § 826.04.

275. *L.A.P.*, 62 So. 3d at 694–95 (quoting *Green v. State*, 765 So. 2d 910, 913 (Fla. 2d Dist. Ct. App. 2000)).

276. *Id.* at 694 (quoting FLA. STAT. § 826.04).

277. *Id.*; *see also* FLA. STAT. § 384.24(2).

278. *L.A.P.*, 62 So. 3d at 695.

279. 77 So. 3d 914 (Fla. 4th Dist. Ct. App. 2012).

flight from Arizona before it entered Florida airspace.²⁸⁰ 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.²⁸¹ The plane was not in Florida's airspace when the theft or recovery of the stolen funds occurred.²⁸² Sanders was charged with grand theft.²⁸³

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.²⁸⁴ 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.²⁸⁵ After the trial court denied her motion to dismiss, Sanders pled no contest and reserved her right to appeal.²⁸⁶ The Fourth District reversed.²⁸⁷ The court first noted that the crime of theft includes "both the completed offense and the attempt[ed] . . . offense."²⁸⁸ 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."²⁸⁹ "This means that the theft was not 'committed . . . within' Florida" under section 910.005(1)(a).²⁹⁰ 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).²⁹¹ The case was remanded with instructions for the trial court to grant the motion to dismiss.²⁹²

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*.²⁹³ 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.²⁹⁴ 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*,²⁹⁵ 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.²⁹⁶ The court reasoned that a properly instructed jury could have found the defendant guilty of only theft, the lesser offense.²⁹⁷ In *Blackmon v. State*,²⁹⁸ on the other hand, the First District held that the proper remedy is to vacate the conviction for the lesser offense.²⁹⁹ “[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.³⁰⁰ Additionally, it comports with the decision of the Supreme Court of Florida in *Hall v. State*,³⁰¹ where the case was remanded with directions to reverse one count and to resentence the defendant on the remaining count.³⁰² 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.”³⁰³

The Second District arrived at the same conclusion in *Williams v. State*,³⁰⁴ 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-

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).

victed the defendant on both counts.³⁰⁵ The appellate court determined that no new trial was warranted³⁰⁶ and that pursuant to the policy of double jeopardy, the defendant could be sentenced based on the greater offense.³⁰⁷ However, the court also criticized section 812.025 for its legislative policy and its lack of guidance for juries.³⁰⁸ 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.³⁰⁹ 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.³¹⁰

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?³¹¹

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*,³¹² the Fourth District reaffirmed the approach it took in *Kiss* and certified conflict with *Blackmon* and *Williams*.³¹³

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.³¹⁴ 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."³¹⁵

In *D.J. v. State (D.J. I)*,³¹⁶ the defendant "was found to have trespassed on school property" after being warned by a school security guard not to enter school property.³¹⁷ 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).³¹⁸ 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.³¹⁹ Because D.J. did not contest the security guard's authority at trial, the Third District affirmed the conviction.³²⁰ 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*.³²¹ In contrast, in *B.C. v. State*,³²² the First District held that, "the State must prove the involvement of the principal or his/her designee to establish a violation of section

312. 36 Fla. L. Weekly D2358 (4th Dist. Ct. App. Oct. 26, 2011).

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)).

314. FLA. STAT. § 810.097(2) (2012); *see also* FLA. STD. JURY INSTR. (CRIM.) 13.5(b) (2007).

315. *D.J. v. State (D.J. II)*, 67 So. 3d 1029, 1033 (Fla. 2011).

316. 43 So. 3d 176 (Fla. 3d 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).”³²³ 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. State*³³⁴ 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).

329. *Dye*, 346 So. 2d at 541 (citing FLA. STAT. § 810.09(2)(a) (1975) (current version at FLA. STAT. § 810.09(2)(b) (2012))).

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.

334. 17 So. 3d 894 (Fla. 1st Dist. Ct. App. 2009) (per curiam), *abrogated by* *Anderson v. State*, 87 So. 3d 774 (Fla. 2012).

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 sequestering 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

335. 764 So. 2d 741 (Fla. 4th Dist. Ct. App. 2000) (per curiam), *overruled in part by* Anderson v. State, 87 So. 3d 774 (Fla. 2012).

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).

344. 585 So. 2d 1077 (Fla. 1st Dist. Ct. App. 1991).

345. *Estrada*, 76 So. 3d at 373 n.5 (quoting *Hatch*, 585 So. 2d at 1079).

courts to estimate the retail price of cannabis.³⁴⁶ Accordingly, the Third District reversed the order dismissing the charges.³⁴⁷

In *Pinkney v. State*,³⁴⁸ the Second District clarified the mental state required for assault under section 784.011(1) of the *Florida Statutes*.³⁴⁹ This defendant was charged with aggravated assault because he backed his vehicle in the direction of a police officer.³⁵⁰ On appeal, Pinkney argued that the State had not proven his “specific intent to do violence to [his] victim,”³⁵¹ as required by the Second District in *State v. Shorette*.³⁵² 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.³⁵³ 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.”³⁵⁴ 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.³⁵⁵ Thus, the “subjective intent to cause the particular result is irrelevant,” the court explained.³⁵⁶ 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.³⁵⁷

The issue confronting the First District in *Wess v. State*³⁵⁸ 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.”³⁵⁹ The victim in this case was sitting on a bench with her purse next to her, touching her hip.³⁶⁰ 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.

352. 404 So. 2d 816, 817 (Fla. 2d Dist. Ct. App. 1981) (citing FLA. STAT. §§ 784.011, .021).

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.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.”³⁶² The appellate court interpreted this phrase to require the property to be “on” the person of the victim.³⁶³ The essential difference between this crime and robbery, which applies when property is taken from a “victim’s immediate vicinity and/or control,”³⁶⁴ is that robbery by sudden snatching requires property to be “‘abruptly and unexpectedly plucked from the embrace of the person.’”³⁶⁵ It is not enough that the property is next to her, even if it is touching her or within her reach or control.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.³⁶⁷

In *State v. Morival*,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.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*.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.”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.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

361. *Id.*

362. *Id.* at 1134–35 (quoting FLA. STAT. § 812.131(1) (2012)).

363. *Wess*, 67 So. 3d at 1137.

364. *Id.* at 1135.

365. *Id.* (quoting *Brown v. State*, 848 So. 2d 361, 364 (Fla. 4th Dist. Ct. App. 2003)).

366. *See id.* at 1136–37.

367. *Id.* at 1137.

368. 75 So. 3d 810 (Fla. 2d Dist. Ct. App. 2011).

369. *Id.* at 810, 812.

370. *Id.* at 810–11 (citing FLA. 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. FLA. STAT. § 828.12(2).

371. *Morival*, 75 So. 3d at 811.

372. *Id.* at 812; *see also* FLA. STAT. § 828.12(1)–(2).

provision.³⁷³ The court therefore reversed and remanded on the ground that the issue could not “be resolved by a motion to dismiss.”³⁷⁴

III. DEFENSES

A. Abandonment

The defense of abandonment was at issue in *Rockmore v. State*.³⁷⁵ 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.³⁷⁶ The employee chased him to his car, where Rockmore displayed a firearm.³⁷⁷ At trial, he argued that no robbery had occurred because he had abandoned the goods before displaying the firearm.³⁷⁸ The trial court denied his motion for judgment of acquittal and his request for a special jury instruction on the defense of abandonment.³⁷⁹

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.³⁸⁰ These amendments expanded robbery to include the use or threat of force “in the course of the taking.”³⁸¹ 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.”³⁸² 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.³⁸³ 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-

373. See *Morival*, 75 So. 3d at 811–12 (quoting FLA. STAT. § 828.12(2)).

374. *Id.* at 812.

375. 37 Fla. L. Weekly D533, D534 (5th Dist. Ct. App. Mar. 2, 2012).

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)).

380. *Rockmore*, 37 Fla. L. Weekly at D534–35; see also FLA. STAT. § 812.13(3)(b) (2012); Act effective Oct. 1, 1987, ch. 87-315, § 812.13, 1987 Fla. Laws 2052, 2052 (amending FLA. STAT. § 812.13 (1986)).

381. *Rockmore*, 37 Fla. L. Weekly at D534 (quoting FLA. STAT. § 812.13(3)(b) (2012)).

382. *Id.* (quoting FLA. STAT. § 812.13(3)(b)).

383. *Id.* at D535 (citing *Series*, OXFORD DICTIONARIES, <http://oxforddictionaries.com/definition/english/series?q=series> (last visited Oct. 28, 2012)); see also FLA. STAT. § 812.13(3)(b).

tary act motivated by fear of apprehension.³⁸⁴ 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.³⁸⁵ 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.³⁸⁶ 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.³⁸⁷

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."³⁸⁸ 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."³⁸⁹ During the survey period, Florida's appellate courts were called upon to interpret this defense in a variety of situations.³⁹⁰

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.³⁹¹ Until the decision of the First District in *McCoy v. State*,³⁹² no Flor-

384. *Rockmore*, 37 Fla. L. Weekly at D534–35, D536 n.2; see also FLA. STAT. § 777.04(5)(a).

385. *Rockmore*, 37 Fla. L. Weekly at D534–35.

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)).

387. *Id.* at D534–35 (citing *Peterson v. State*, 24 So. 3d 686, 690 (Fla. 2d Dist. Ct. App. 2009); *Simmons v. State*, 551 So. 2d 607, 608 (Fla. 5th Dist. Ct. App. 1989) (per curiam); *State v. Baker*, 540 So. 2d 847, 847–48 (Fla. 3d Dist. Ct. App. 1989)); see also FLA. STAT. § 812.13(3)(b).

388. FLA. STAT. § 893.13(6)(a).

389. *Id.* § 499.03(1).

390. See, e.g., *Knipp v. State*, 67 So. 3d 376, 378 (Fla. 4th Dist. Ct. App. 2011) (analyzing FLA. STAT. §§ 499.03(1), 893.13); *McCoy v. State*, 56 So. 3d 37, 39 (Fla. 1st Dist. Ct. App. 2010).

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.³⁹³ McCoy was convicted of trafficking in hydrocodone based upon her possession of a pill bottle that contained Lorcet tablets and bore a label in her husband's name.³⁹⁴ She claimed that she was carrying the pills for her husband, who held a valid prescription.³⁹⁵ Reversing 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.³⁹⁶ 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.³⁹⁷ In *State v. Latona*,³⁹⁸ 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.³⁹⁹ 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.⁴⁰⁰

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.⁴⁰¹ 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.⁴⁰² In *Knipp*

393. *Id.* at 39.

394. *Id.* at 38.

395. *See id.*

396. *Id.* at 39 (construing FLA. STAT. §§ 465.003(6), 893.04(2)(a) (2012)); *see also* FLA. STAT. § 893.13(6)(a).

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 clonazepam "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)).

400. *Id.* at 395-96 (citing *Fla.-Ga. Chem., Inc. v. Nat'l Labs. Inc.*, 153 So. 2d 752, 754 (Fla. 1st Dist. Ct. App. 1963)).

401. *E.g.*, *Knipp v. State*, 67 So. 3d 376, 378 (Fla. 4th Dist. Ct. App. 2011) (analyzing FLA. STAT. § 893.13(7)(a)8.).

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,⁴⁰³ 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."⁴⁰⁴ 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.⁴⁰⁵ The Fourth District affirmed.⁴⁰⁶ 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:

[N]othing 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.⁴⁰⁷

The Fourth District applied *Knipp* in *Wagner v. State*,⁴⁰⁸ where the defendant was charged with doctor shopping and trafficking by sale.⁴⁰⁹ Here, Wagner obtained Oxycodone prescriptions from two different physicians during a thirty-day period without disclosing the duplicate prescriptions to either doctor.⁴¹⁰ 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.⁴¹¹ In a special jury instruction, the trial court limited the prescription defense to controlled substances "lawfully obtained for a lawful purpose

[To] [w]ithhold 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."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.⁴³⁷

The standard jury instructions on self-defense were called into question in *Bassallo v. State*,⁴³⁸ where the defendant was charged with aggravated assault with a deadly weapon after an altercation with a co-worker.⁴³⁹ At trial, the defense presented a theory of justifiable use of force in self-defense.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.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.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.⁴⁴³ Moreover, the guilty verdict could not have been obtained without the instructional error,⁴⁴⁴ which was compounded by the prosecutor's comments.⁴⁴⁵ The court therefore reversed his conviction and remanded for a new trial.⁴⁴⁶ As a result of the decision in *Bassallo*, this instruction is presently under review by the Committee on Standard Jury Instructions in Criminal Cases.⁴⁴⁷

In *Montijo v. State*,⁴⁴⁸ the Fifth District held that a trial court's "inclusion of the phrase 'beyond a reasonable doubt' in [a] jury instruction" on

436. *Santiago*, 88 So. 3d at 1025.

437. *Id.*

438. 46 So. 3d 1205 (Fla. 4th Dist. Ct. App. 2010).

439. *Id.* at 1207, 1210; *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).

440. *Basallo*, 46 So. 3d at 1211.

441. *Id.* at 1210; *see also* FLA. STD. JURY INSTR. (CRIM.) 3.6(f), (g).

442. *Basallo*, 46 So. 3d at 1210-11.

443. *Id.*

444. *See id.* at 1209.

445. *See id.* at 1211.

446. *Id.*; *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).

447. *Alerts – Criminal Jury Instructions*, *supra* note 193.

448. 61 So. 3d 424 (Fla. 5th Dist. Ct. App. 2011).

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.⁴⁴⁹ 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.⁴⁵⁰ 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.⁴⁵¹ 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.”⁴⁵²

D. *Stand Your Ground Law*

Under Florida’s “Stand Your Ground” Law,⁴⁵³ which was signed into law on April 26, 2005, an individual is permitted to use defensive force, “without fear of prosecution or civil action,”⁴⁵⁴ against anyone who “unlawfully and forcibly enter[s] [the] dwelling, residence, or occupied vehicle” of another person.⁴⁵⁵ 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.”⁴⁵⁶ Until the recent fatal shooting of an unarmed teenager in Sanford, Florida, the law had generated scant controversy in Florida’s judicial system.⁴⁵⁷ When Trayvon Martin was shot and killed by George Zimmerman, who claimed that Martin had attacked him, the police cited the Stand Your

449. *Id.* at 427.

450. *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*).

451. *Montijo*, 61 So. 3d at 427 & n.4.

452. *Amendments to the Jury Instructions for Criminal Cases*, FLA. B. NEWS, Apr. 1, 2012, at 22–23.

453. The term “Stand Your Ground Law” refers to sections 776.012–.013 and 776.031–.032 of the *Florida Statutes* collectively. *Montanez v. State*, 24 So. 3d 799, 801 (Fla. 2d Dist. Ct. App. 2010); see also FLA. STAT. §§ 776.012–.013, .031–.032 (2012).

454. Act effective Oct. 1, 2005, ch. 2005-27, § 5, 2005 Fla. Laws 199, 202 (codified as amended at FLA. STAT. §§ 776.012–.013, .031–.032 (2012)). Compare FLA. STAT. §§ 776.012, .031 (2004) (amended 2005), with FLA. STAT. §§ 776.012–.013, .031–.032 (2012).

455. FLA. STAT. § 776.013(1)(a) (2012).

456. *Id.* § 776.013(2)(a).

457. Frances Robles, *Lt. Gov.: Stand Your Ground Is Not ‘Shoot First’ Law*, LEDGER (Lakeland), June 12, 2012.

Ground Law as the reason Zimmerman was not immediately arrested.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.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.⁴⁶⁰ The question dividing the district courts of appeal was whether factual disputes should be resolved at a pretrial evidentiary hearing or at trial.⁴⁶¹

This conflict was resolved during the survey period in *Dennis v. State*,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.”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.”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.”⁴⁶⁵ Otherwise, the legislation would have been an exercise in futility, the court said.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-

458. *Id.*

459. *Id.*; see *Governor Rick Scott Announces New State Attorney and Task Force in Response to Trayvon Martin Incident*, RICK SCOTT: 45TH GOVERNOR OF FLA. (Mar. 22, 2012), <http://www.flgov.com/2012/03/22/governor-rick-scott-announces-new-state-attorney-and-task-force-in-response-to-trayvon-martin-incident/>.

460. 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)).

461. *Dennis v. State*, 51 So. 3d 456, 460 (Fla. 2010).

462. 51 So. 3d 456 (Fla. 2010).

463. *Id.* at 458.

464. *Id.* at 462 (citing FLA. STAT. § 776.032(1)).

465. *Id.* at 463.

466. See *id.* (quoting *Martinez v. State*, 981 So. 2d 449, 452 (Fla. 2008) (per curiam)).

dence he would have presented at a hearing differed from that presented at trial.⁴⁶⁷ Accordingly, the court affirmed the Fourth District's decision that Dennis was not entitled to relief.⁴⁶⁸

In *Mocio v. State*,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.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.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."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."⁴⁷³ If the petition is denied on the merits, however, "res judicata bars re-litigation of the immunity claims on appeal."⁴⁷⁴ This was the decision of the First District in *Rice v. State*,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."⁴⁷⁶

A different issue arose in *Dorsey v. State*,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.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.⁴⁷⁹ During the charging conference, the defense made two requests.⁴⁸⁰ The first request asked the court to

467. *Dennis*, 51 So. 3d at 463–64.

468. *Id.* at 463–64.

469. 37 Fla. L. Weekly D1746 (2d Dist. Ct. App. July 25, 2012).

470. *Id.* at D1746.

471. *Id.*

472. *Id.*

473. *Id.* (citing *Tsavaris v. Scruggs*, 360 So. 2d 745, 747 (Fla. 1977); *State ex rel. Reynolds v. Newell*, 102 So. 2d 613, 615 (Fla. 1958); *State ex rel. Marshall v. Petteway*, 164 So. 872, 874 (Fla. 1935) (en banc)).

474. *Rice v. State*, 90 So. 3d 929, 929, 931 (Fla. 1st Dist. Ct. App. 2012).

475. 90 So. 3d 929 (Fla. 1st Dist. Ct. App. 2012).

476. *Id.* at 931.

477. 74 So. 3d 521 (Fla. 4th Dist. Ct. App. 2011).

478. *See id.* at 525–26; *see also* FLA. STAT. § 776.013 (2012).

479. *Dorsey*, 74 So. 3d at 522–23.

480. *Id.* at 525–26.

exclude the Stand Your Ground instruction because Dorsey was “engaged in an unlawful activity” and had no right to stand his ground without retreating.⁴⁸¹ 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.⁴⁸² The court denied both requests and gave the jury the standard Stand Your Ground instruction based on section 776.013(3).⁴⁸³ Dorsey was convicted, *inter alia*, of two counts of second-degree murder.⁴⁸⁴

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.⁴⁸⁵ 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.⁴⁸⁶ 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.⁴⁸⁷ 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.⁴⁸⁸ 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.⁴⁸⁹

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

490. See *Franqui v. State*, 59 So. 3d 82, 92 (Fla. 2011) (per curiam), *cert. denied*, 132 S. Ct. 2110 (2012); *Valle v. State*, 70 So. 3d 530, 538 (Fla.) (per curiam), *cert. denied*, 132 S. Ct. 1 (2011); *Manuel v. State*, 48 So. 3d 94, 97 (Fla. 2d Dist. Ct. App. 2010), *review denied*, 63 So. 3d 750 (Fla.), *cert. denied*, 132 S. Ct. 446 (2011).

491. FLA. STAT. § 921.137(2), (4); see also *State v. Herring (Herring I)*, 76 So. 3d 891, 894 (Fla. 2011) (per curiam) (citing FLA. STAT. § 921.137), *cert. denied*, 80 U.S.L.W. 3707 (U.S. June 25, 2012).

492. 536 U.S. 304 (2002).

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).

495. *Dufour v. State*, 69 So. 3d 235, 246 (Fla. 2011) (per curiam) (quoting FLA. STAT. § 921.137(1)), *cert. denied*, 132 S. Ct. 1150 (2012).

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.

505. 130 S. Ct. 2011 (2010).

506. *Id.* at 2030; *see* U.S. CONST. amend. VIII.

507. *Graham*, 130 S. Ct. at 2023.

courts have been called upon to consider whether *Graham* applies to convictions for attempted murder, felony murder, and nonhomicide offenses committed in conjunction with homicide offenses, and to determine what constitutes a life-without-parole sentence.⁵⁰⁸

The Second District issued three opinions on the question of what constitutes a nonhomicide offense.⁵⁰⁹ In *Manuel v. State*,⁵¹⁰ the defendant received a life sentence on one count of attempted first-degree murder, concurrent with forty years imprisonment on the second count.⁵¹¹ The court declared that the life sentence was unconstitutional under *Graham*'s bright-line rule, reasoning "that attempted murder is a nonhomicide offense because death, by definition, has not occurred."⁵¹² Accordingly, the court vacated the juvenile's life sentence and remanded the case for resentencing.⁵¹³ The First and Fourth Districts have followed *Manuel* to hold that attempted murder is a nonhomicide offense.⁵¹⁴

In *Arrington v. State*,⁵¹⁵ the Second District decided that "felony murder is not a 'nonhomicide' offense for purposes of the categorical rule announced in *Graham*," even when someone other than the juvenile offender actually committed the killing.⁵¹⁶ 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.⁵¹⁷ To this end, courts should engage in the three-prong, case-specific proportionality analysis endorsed in *Graham*, comparing: (1) "[t]he gravity of the offense . . . to the severity of the sentence;" (2) the mandatory sentence "for juveniles involved in felony

508. See *Arrington v. State*, 37 Fla. L. Weekly D155, D156 (2d Dist. Ct. App. Jan. 18, 2012); *Washington v. State*, 37 Fla. L. Weekly D154, D155 (2d Dist. Ct. App. Jan. 18, 2012); *Thomas v. State*, 78 So. 3d 644, 646 (Fla. 1st Dist. Ct. App. 2011) (per curiam); *Manuel v. State*, 48 So. 3d 94, 95–97 (Fla. 2d Dist. Ct. App. 2010), *review denied*, 63 So. 3d 750 (Fla. 2011), *cert. denied*, 132 S. Ct. 446 (2011).

509. See *Arrington*, 37 Fla. L. Weekly at D156; *Washington*, 37 Fla. L. Weekly at D155; *Manuel*, 48 So. 3d at 97.

510. 48 So. 3d 94 (Fla. 2d Dist. Ct. App. 2010), *review denied*, 63 So. 3d 750 (Fla. 2011), *cert. denied*, 132 S. Ct. 446 (2011).

511. *Id.* at 96.

512. *Id.* at 97.

513. *Id.* at 97–98.

514. *Cunningham v. State*, 74 So. 3d 568, 569–70 (Fla. 4th Dist. Ct. App. 2011) (citing *McCullum v. State*, 60 So. 3d 502, 504 (Fla. 1st Dist. Ct. App.) (per curiam), *review denied*, 67 So. 3d 1050 (Fla. 2011); *Manuel*, 48 So. 3d at 97); *McCullum*, 60 So. 3d at 503–04 (holding that, under *Graham* and *Manuel*, the juvenile's life sentence for attempted second-degree murder was unconstitutional).

515. 37 Fla. L. Weekly D155 (2d Dist. Ct. App. Jan. 18, 2012).

516. *Id.* at D156 (citing *Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010)).

517. *Id.* at D158.

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].”⁵¹⁸ 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.⁵¹⁹ In *La-Fountain v. State*,⁵²⁰ the Second District declined to apply *Arrington* retroactively.⁵²¹

Finally, in *Washington v. State*,⁵²² the Second District considered *Graham*’s “exception for juveniles who commit nonhomicide offenses in conjunction with homicide offenses.”⁵²³ Here, the defendant appealed his sentences of life-without-parole for kidnapping and felony murder offenses committed when he was a juvenile.⁵²⁴ 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.⁵²⁵ 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.”⁵²⁶ 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.”⁵²⁷ 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].”⁵²⁸ 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*.⁵²⁹ 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.

522. 37 Fla. L. Weekly D154 (2d Dist. Ct. App. Jan. 18, 2012).

523. *Id.* at D155 (citing *Graham v. Florida*, 130 S. Ct. 2011, 2023 (2010)).

524. *Id.* at D154.

525. *Id.* at D155 (contrasting *Arrington v. State*, 37 Fla. L. Weekly D155, D156 (2d Dist. Ct. App. Jan. 18, 2012)).

526. *Id.* (citing *Arrington*, 37 Fla. L. Weekly at D158).

527. *Washington*, 37 Fla. L. Weekly at D155.

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.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.⁵³¹ In *Thomas v. State*,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."⁵³³ The court reached the same result in *Gridine v. State (Gridine I)*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 *Graham v. Florida* prohibit sentencing a fourteen-year-old to a prison sentence of seventy years for the crime of attempted first-degree murder?"⁵³⁵

In *Floyd v. State*,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.⁵³⁷ However, in *Henry v. State*,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 *Graham*.⁵³⁹ The court did make the following observation:

There is language in the *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-

530. *Id.*

531. *Floyd v. State*, 87 So. 3d 45, 47 (Fla. 1st Dist. Ct. App. 2012) (per curiam); *Gridine v. State (Gridine I)*, 89 So. 3d 909, 911 (Fla. 1st Dist. Ct. App. 2011); *Thomas v. State*, 78 So. 3d 644, 646 (Fla. 1st Dist. Ct. App. 2011) (per curiam).

532. 78 So. 3d 644 (Fla. 1st Dist. Ct. App. 2011) (per curiam).

533. *Id.* at 646.

534. 89 So. 3d 909 (Fla. 1st Dist. Ct. App. 2011).

535. *Gridine v. State (Gridine II)*, 37 Fla. L. Weekly D1264, D1264 (1st Dist. Ct. App. May 29, 2012) (per curiam) (citations omitted); *see also Gridine I*, 89 So. 3d at 911; *Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010).

536. 87 So. 3d 45 (Fla. 1st Dist. Ct. App. 2012) (per curiam).

537. *Id.* at 45, 47; *see also Graham*, 130 S. Ct. at 2034.

538. 82 So. 3d 1084 (Fla. 5th Dist. Ct. App. 2012).

539. *Id.* at 1086, 1089; *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.⁵⁴⁰

The issue was reframed by Judge Padovano in a concurring opinion in *Smith v. State*,⁵⁴¹ where he criticized judicial efforts to determine whether a particular sentence of a term-of-years without parole is a de facto life sentence.⁵⁴² 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.”⁵⁴³ 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.”⁵⁴⁴

In *Miller v. Alabama (Miller II)*,⁵⁴⁵ 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.⁵⁴⁶ 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.⁵⁴⁷ Absent these considerations, the Court explained, mandatory life-without-parole “poses too great a risk of disproportionate punishment.”⁵⁴⁸ Both cases addressed on appeal were remanded to the state courts to make individualized sentencing decisions.⁵⁴⁹ 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.”⁵⁵⁰

540. *Henry*, 82 So. 3d at 1089 (footnote omitted); see also *Graham*, 130 S. Ct. at 2034.

541. 93 So. 3d 371 (Fla. 1st Dist. Ct. App. 2012).

542. See *id.* at 375 (Padovano, J., concurring).

543. *Id.*

544. *Id.*

545. 132 S. Ct. 2455 (2012).

546. *Id.* at 2460, 2475, 2477.

547. *Id.* at 2460, 2468.

548. *Id.* at 2469.

549. *Id.* at 2475.

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)*,⁵⁵¹ the Supreme Court of Florida held.⁵⁵² 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.⁵⁵³ The judge corrected the error in a written order on the same day.⁵⁵⁴ On appeal, the defendant argued that the late addition of the mandatory minimum violated his double jeopardy rights.⁵⁵⁵ The Fifth District disagreed, explaining that “the later addition of harsher terms” did not implicate double jeopardy concerns “because the original sentence was invalid.”⁵⁵⁶ Dunbar sought review of this decision for express and direct conflict with the Second District’s decision in *Gardner v. State*.⁵⁵⁷ 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.⁵⁵⁸ “[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.⁵⁵⁹ 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.⁵⁶⁰ 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.

559. *Id.* (citing *State v. Scanes*, 973 So. 2d 659, 661 (Fla. 3d Dist. Ct. App. 2008); *State v. Couch*, 896 So. 2d 799, 799–800 (Fla. 1st Dist. Ct. App. 2005) (per curiam); *State v. Strazdins*, 890 So. 2d 334, 334 (Fla. 2d Dist. Ct. App. 2004); *State v. Brendell*, 656 So. 2d 594, 594 (Fla. 5th Dist. Ct. App. 1995)).

560. *Id.* at 907 (citing *Jackson v. State*, 767 So. 2d 1156, 1160 (Fla. 2000) (per curiam)).

ture,”⁵⁶¹ but rather would be useless in light of the sentencing court’s duty to impose the minimum sentence.⁵⁶²

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.”⁵⁶³ Absent clear legislative intent, however, courts utilize section 775.021(4)(b) of the *Florida Statutes* to determine whether separate offenses exist.⁵⁶⁴ 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.”⁵⁶⁵

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.”⁵⁶⁶ In *Valdes v. State*,⁵⁶⁷ 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.⁵⁶⁸ Shortly after *Valdes* was decided, however, a conflict arose between two district courts of appeal.⁵⁶⁹ In *Shazer v. State*,⁵⁷⁰ 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) [o]ffenses which require identical elements of proof; (2) [o]ffenses which are degrees of the same offense as provided by statute; [and] (3) [o]ffenses 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 I)*, 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.”⁵⁷¹ However, in *McKinney v. State* (*McKinney I*),⁵⁷² 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.”⁵⁷³ 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*.⁵⁷⁴

The Supreme Court of Florida accepted jurisdiction in *McKinney v. State* (*McKinney II*),⁵⁷⁵ affirmed the Fifth District’s decision in *McKinney I*, and disapproved *Shazer*.⁵⁷⁶ The latter decision, the court wrote, “failed to follow *Valdes* in its decision, or to note a reason for its departure from controlling precedent.”⁵⁷⁷ In so ruling, the court addressed three of McKinney’s arguments.⁵⁷⁸ First, the court dismissed his claim “that robbery and theft are simply aggravated forms of the same underlying offense.”⁵⁷⁹ 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.⁵⁸⁰ 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.⁵⁸¹ “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.⁵⁸² 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.”⁵⁸³

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

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

572. 24 So. 3d 682 (Fla. 5th Dist. Ct. App. 2009), *aff’d*, 66 So. 3d 852 (Fla. 2011), *cert. denied*, 132 S. Ct. 527 (2011).

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.”⁵⁸⁴ *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”⁵⁸⁵ Grand theft and robbery “involve the same evil,” he continued, because each crime punishes the defendant for depriving another person of property.⁵⁸⁶ 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.”⁵⁸⁷

In *Ivey v. State*,⁵⁸⁸ the Third District considered *Valdes* in the context of convictions for leaving the scene of a fatal accident, vehicular homicide, and DUI manslaughter.⁵⁸⁹ 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.⁵⁹⁰ 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.”⁵⁹¹

In *Avila v. State*,⁵⁹² 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.⁵⁹³ In this case, the defendant was charged, *inter alia*, with sexual battery with a deadly weapon.⁵⁹⁴ 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.⁵⁹⁵ At the court's request, the jury returned to deliberations, ultimately deadlocking on the sexual battery count.⁵⁹⁶ The defendant was convicted on that count when he was retried.⁵⁹⁷ On appeal, Avila argued that this conviction violated double jeopardy because the jury's note in the first trial reflecting unanimity should be binding.⁵⁹⁸ 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."⁵⁹⁹ 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.⁶⁰⁰ Accordingly, the court affirmed Avila's convictions and sentences.⁶⁰¹

In *Headley v. State*,⁶⁰² 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.⁶⁰³ 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.⁶⁰⁴ 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.⁶⁰⁵

In *State v. Morse*,⁶⁰⁶ 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.⁶⁰⁷ Morse's crimes were committed in both Orange County and Seminole County in the course of a police chase.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.⁶⁰⁹ He was "convicted and sentenced in Seminole County for the [crime] he committed there."⁶¹⁰ After his conviction in Orange County, however, the trial judge ruled that double jeopardy considerations entitled Morse to a new trial.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.⁶¹² Thus, punishments for both shootings would not violate defendant's right against double jeopardy.⁶¹³

C. Due Process

1. Uncharged Crimes

In *Jaimes v. State (Jaimes II)*,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.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.⁶¹⁶ On appeal, Jaimes argued that it was an error to convict him of an uncharged crime.⁶¹⁷ The Second District affirmed, however, because the failure to object to the flawed jury instructions and

607. *Id.* at 751.

608. *Id.* at 749.

609. *Id.* at 751.

610. *Id.* at 749.

611. *Morse*, 77 So. 3d at 749.

612. *Id.* at 751 (citing *Beahr v. State*, 992 So. 2d 844, 846 (Fla. 1st Dist. Ct. App. 2008), *abrogated on other grounds by Smith v. State*, 41 So. 3d 1041 (Fla. 1st Dist. Ct. App. 2010)).

613. *Id.* (citing *Beahr*, 992 So. 2d at 846).

614. 51 So. 3d 445 (Fla. 2010).

615. *Id.* at 449, 451 (citing *State v. Gray*, 435 So. 2d 816, 818 (Fla. 1983)).

616. *Id.* at 447 (emphasis omitted); *see also* FLA. STAT. § 784.045(1)(a) (2012).

617. *Jaimes II*, 51 So. 3d at 447 (citing *Jaimes v. State (Jaimes I)*, 19 So. 3d 347, 348 (Fla. 2d Dist. Ct. App. 2009) (per curiam), *review granted*, 29 So. 3d 291 (Fla. 2010), *and rev'd*, 51 So. 3d 445 (Fla. 2010)).

verdict form did not constitute fundamental error.⁶¹⁸ 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*.⁶¹⁹

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.⁶²⁰ 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.⁶²¹ 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."⁶²² 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."⁶²³ In such case, the fundamental error exception is justified based on a violation of the defendant's due process rights.⁶²⁴ 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."⁶²⁵

The Second District followed *Jaimes II* in *Harris v. State*,⁶²⁶ 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.⁶²⁷ 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).

632. FLA. STAT. § 893.13(1)(a), (6)(a) (2012).

633. *Id.* § 893.101(2).

634. *Id.*

635. *Id.* § 893.101(3).

636. 802 F. Supp. 2d 1289 (M.D. Fla. 2011), *rev’d*, 691 F.3d 1348 (11th Cir. 2012).

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.”⁶³⁸

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.⁶³⁹ The district courts of appeal were quick to respond, uniformly concluding that section 893.13 does not violate the requirements of due process.⁶⁴⁰ In *State v. Adkins (Adkins I)*,⁶⁴¹ 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.⁶⁴² The court accepted jurisdiction and rendered its opinion on July 12, 2012.⁶⁴³ 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.”⁶⁴⁴ 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

638. *Shelton*, 802 F. Supp. 2d at 1295, 1308.

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).

640. *State v. Washington (Washington II)*, 37 Fla. L. Weekly D1535, D1538 (3d Dist. Ct. App. June 27, 2012); *Maestas v. State*, 76 So. 3d 991, 993–94, 996 (Fla. 4th Dist. Ct. App. 2011); *Lanier v. State*, 74 So. 3d 1130, 1131 (Fla. 5th Dist. Ct. App. 2011) (citing *Flagg v. State*, 74 So. 3d 138, 141 (Fla. 1st Dist. Ct. App. 2011)); see *McCain v. State*, 84 So. 3d 1284, 1284 (Fla. 1st Dist. Ct. App. 2012) (per curiam) (citing *Flagg*, 74 So. 3d at 141); *Holcy v. State*, 83 So. 3d 778, 778 (Fla. 5th Dist. Ct. App. 2011) (per curiam) (citing *Flagg*, 74 So. 3d at 141); *Williams v. State*, 45 So. 3d 14, 15–16 (Fla. 1st Dist. Ct. App. 2010) (per curiam), *review denied*, 53 So. 3d 1022 (Fla. 2011); *Harris v. State*, 932 So. 2d 551, 552 (Fla. 1st Dist. Ct. App. 2006) (per curiam); see also FLA. STAT. § 893.13; *Mack v. State*, 91 So. 3d 868, 869 (Fla. 2d Dist. Ct. App. 2012) (affirming the denial of the defendant’s motion for post-conviction relief because *Shelton* applied only to the amended version of section 893.13 and not to the version of statute that governed his actions in 2001).

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.

643. *State v. Adkins (Adkins II)*, 37 Fla. L. Weekly S449, S449 (July 12, 2012).

644. *Id.* at S450.

due process were not satisfied.”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.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.⁶⁴⁷ Second, the statute does not penalize innocent conduct without notice, given that lack of knowledge may be asserted as an affirmative defense.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.”⁶⁴⁹ Fourth, “‘common sense and experience’” support a conclusion that “possession without awareness of the illicit nature of the substance is highly unusual.”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.”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.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.⁶⁵³ Accordingly, the court reversed the circuit court’s order granting the motions to dismiss.⁶⁵⁴

645. *Id.*

646. *Id.* at S451.

647. *Id.* at S452.

648. *Adkins II*, 37 Fla. L. Weekly at S452.

649. *Id.* (citing *Turner v. United States*, 396 U.S. 398, 417 (1970)); *see* FLA. STAT. §§ 893.101, .13 (2012).

650. *Adkins II*, 37 Fla. L. Weekly at S452 (quoting *Barnes v. United States*, 412 U.S. 837, 845 (1973)) (citing *United States v. Bunton*, No. 8:10-cr-327-T-30EAJ, 2011 WL 5080307, at *8 (M.D. Fla. Oct. 26, 2011)).

651. *Id.*; *see* FLA. STAT. § 893.13.

652. *Adkins II*, 37 Fla. L. Weekly at S452.

653. *Id.* at S453.

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.⁶⁵⁵ 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.”⁶⁵⁶ Justice Perry dissented, writing that the majority’s decision “shatters bedrock constitutional principles and builds on a foundation of flawed ‘common sense.’”⁶⁵⁷ 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.”⁶⁵⁸ 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.”⁶⁵⁹

D. *Ex Post Facto* Laws

In *Shenfeld v. State* (*Shenfeld II*),⁶⁶⁰ the Supreme Court of Florida examined the constitutional provision prohibiting ex post facto laws.⁶⁶¹ 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.”⁶⁶² 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.⁶⁶³ 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

655. *Id.* (Pariente, J., concurring).

656. *Id.* at S455 (citing FLA. STD. JURY INSTR. (CRIM.) 25.2 (2007)).

657. *Adkins II*, 37 Fla. L. Weekly at S456 (Perry, J., dissenting).

658. *Id.* at S457 (citing *Stimus v. State*, 995 So. 2d 1149, 1151 (Fla. 5th Dist. Ct. App. 2008)).

659. *Id.* at S458.

660. 44 So. 3d 96 (Fla. 2010).

661. *Id.* at 98; *see also* FLA. CONST. art. 1, § 10.

662. *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)).

663. *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).

him.⁶⁶⁴ 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.⁶⁶⁵ Instead, the court held, it merely modified the applicable tolling procedures.⁶⁶⁶ 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.”⁶⁶⁷

In *Witchard v. State*,⁶⁶⁸ 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.⁶⁶⁹ In this case, the relevant statute took effect after Witchard’s crimes were committed.⁶⁷⁰ 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.⁶⁷¹ The court remanded the case “for resentencing to allow the trial court to exercise its discretion to determine whether electronic monitoring should be imposed.”⁶⁷²

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.⁶⁷³ 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)).

673. *Montgomery v. State*, 69 So. 3d 1023, 1031–32 (Fla. 5th Dist. Ct. App. 2011); *State v. Catalano*, 60 So. 3d 1139, 1141–42 (Fla. 2d Dist. Ct. App. 2011).

course of “business or political purposes.”⁶⁷⁴ In *State v. Catalano*,⁶⁷⁵ the Second District held that the statute is unconstitutional for two reasons.⁶⁷⁶ First, it is not content-neutral because it “does not ‘apply equally to music, political speech, and advertising.’”⁶⁷⁷ Second, no compelling governmental interest requires the different treatment of amplified music and political or commercial speech.⁶⁷⁸ 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?”⁶⁷⁹

The Fifth District reached the same result in *Montgomery v. State*,⁶⁸⁰ where the trial court denied the defendant’s motion to suppress evidence obtained when his vehicle was stopped for a noise violation.⁶⁸¹ 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.⁶⁸² The overbreadth challenge was meritorious, however, because the statute “distinguish[es] between different types of recorded noise or particular viewpoints.”⁶⁸³ 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.⁶⁸⁴

In *Enoch v. State*,⁶⁸⁵ 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.⁶⁸⁶ The court first addressed the question whether

674. FLA. STAT. § 316.3045 (2012), *declared unconstitutional by* *Montgomery v. State*, 69 So. 3d 1023 (Fla. 5th Dist. Ct. App. 2011), *State v. Catalano*, 60 So. 3d 1139 (Fla. 2d Dist. Ct. App. 2011).

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*,⁶⁹⁷ the First District upheld the constitutionality of a Florida statute making possession of a firearm by a convicted felon unlawful.⁶⁹⁸ 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*.⁶⁹⁹ 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."⁷⁰⁰ They did not call into question the validity of "'prohibitions on the possession of firearms by felons.'"⁷⁰¹ The First District therefore affirmed Epps' conviction.⁷⁰²

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. § 790.23(1)(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. § 790.23(1)(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.*