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Criminal Law

Mark M. Dobson*

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Criminal Law: 1995 Survey of Florida Law

Mark M. Dobson*

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I. INTRODUCTION

This article discusses Supreme Court of Florida decisions in the area of substantive criminal law handed down between July 1, 1994 and July 1,

* Professor of Law, Nova Southeastern University, Shepard Broad Law Center, Fort Lauderdale, Florida; LL.M., Temple University, 1978; J.D., Catholic University, 1973; B.A., Georgetown University.

1995.[1] As with past survey articles on criminal law, this one does not discuss issues regarding the death penalty as that topic is so specialized that it deserves special treatment on its own. Likewise, the application of Florida's sentencing guidelines is also a special topic excluded from this article's discussion. Cases from Florida's district courts of appeal are mentioned in the footnotes to the extent that their inclusion supplements the textual discussion. Similarly, new legislation is mentioned when it relates to the continuing importance of a discussed case.

Even after cases mainly involving the death penalty and the sentencing guidelines are eliminated, the survey still does not discuss every Supreme Court of Florida case. Those cases which merely discuss the application of standard, or fairly standard, fact situations to a well-settled rule of law have also been eliminated. This article is divided into two main parts. The first part discusses Supreme Court of Florida cases concerning major questions of substantive criminal law that do not involve constitutional questions. The second part discusses supreme court cases concerning constitutional challenges to some of Florida's substantive criminal law statutes.

II. NONCONSTITUTIONAL DECISIONS

A. *Felony Petit Theft*

Florida Statutes section 812.014 defines the crime of theft.[2]

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1. The author has chosen for his cut-off point decisions reported up to, and including 655 So. 2d. Thus, some Supreme Court of Florida cases decided before July 1, 1995 are not included in this article.

2. FLA. STAT. § 812.014(1) (Supp. 1994) defines theft as:

> knowingly obtain[ing] or us[ing], or endeavor[ing] to obtain or to use, the property of another with intent to, either temporarily or permanently:
> (a) Deprive the other person of a right to the property or a benefit therefrom.
> (b) Appropriate the property to [the accused's] own use or to the use of any person entitled thereto.

Id.

This subsection's language makes it clear that section 812.014 is intended to be an omnibus theft statute. Thus, the definition of theft not only includes the former common law offense of larceny but also includes such former offenses as embezzlement. *See, e.g.*, State v. Mischler, 488 So. 2d 523, 524 (Fla. 1986) (finding that a bookkeeper who stole her employer's business assets would now be guilty of theft under section 812.014(1)). The definition also includes what would otherwise be considered attempted thefts as well as completed thefts. State v. Sykes, 434 So. 2d 325, 327 (Fla. 1983). Thus, there is no crime of attempted theft in Florida. *Id.*

Section 812.014 also establishes various degrees of this offense.[3] A convicted defendant can be guilty of as low an offense as a second-degree misdemeanor and as high an offense as a first-degree felony for grand theft. The offense degree depends on the value of the property stolen or on the presence of special aggravating factors.

Theft of property worth less than $300 is a second-degree misdemeanor unless special factors exist to raise the offense's degree.[4] Generally, proof of the value of a stolen item, or items, is essential to establishing more than a second-degree misdemeanor petit theft,[5] unless a special aggravating factor exists.

There are two types of special aggravating factors: repeated thefts by the same person and the type of property stolen. While theft of property worth less than $300 is usually a second-degree misdemeanor, the crime becomes a first-degree misdemeanor if the offender has committed one previous theft, and becomes a third-degree felony if the offender has committed two or more previous thefts.[6]

Questions have arisen as to whether the circumstances making a theft more than a second-degree misdemeanor must be specifically alleged in the charging document. While the general answer to this was "yes," doubt still remained as to whether the state's failure to allege the prior theft convictions relied upon to aggravate a petit theft to a felony made raising the offense level impossible. In 1985, the Supreme Court of Florida in *State v.*

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3. FLA. STAT. § 812.014(2)(a)-(d). These subsections do not establish separate theft definitions but merely set the degree of the theft offense involved. For further discussion on the degrees of theft offenses, see Johnson v. State, 597 So. 2d 798 (Fla. 1992).

4. FLA. STAT. § 812.014(2)(d).

5. *E.g.*, M.H. v. State, 614 So. 2d 657, 658 (Fla. 2d Dist. Ct. App. 1993) (finding proof that stolen property worth $100 was insufficient to make the crime a grand theft because § 812.014(1)(c)1 made $300 the statutory dividing point between grand and petit theft); S.M.M. v. State, 569 So. 2d 1339, 1341 (Fla. 1st Dist. Ct. App. 1990) (finding proof of value essential to degree of theft offense); F.W. v. State, 459 So. 2d 1129, 1129 (Fla. 3d Dist. Ct. App. 1984) (finding the State's failure to prove value required reducing a grand theft conviction to a petit theft conviction).

6. FLA. STAT. § 812.014(2)(d). Until 1992, the previous conviction which would increase the degree of an otherwise second-degree misdemeanor petit theft was statutorily limited to previous petit thefts. Thus, in State v. Jackson, 526 So. 2d 58, 59 (Fla. 1988), the court found that two prior grand theft convictions could not be used to reclassify Jackson's petit theft. However, in 1992 the language of § 812.014(2)(d) was changed from "conviction for petit theft" to "conviction of any theft," thus indicating the legislature's intent to overrule *Jackson*. Ch. 92-79, §1, 1992 FLA. LAWS 741, 742 (codified at FLA. STAT. § 812.014(2)(d) (1993).

Phillips[7] held that a charge entitled "Felony Petit Theft" citing to the statute which defines the substantive crime and reciting facts which would support a conviction under the statute was not fundamentally defective for failing to allege the prior theft convictions which made the offense a felony when the defense had not moved to dismiss or object to the charge.[8] However, six years later in *State v. Rodriguez*,[9] while discussing the offense of felony DUI, the supreme court considered "whether a charging document must specifically allege . . . [the needed] prior convictions . . . when charging a defendant with felony DUI to confer jurisdiction on the circuit court and to comply with due process of law."[10] Since the State conceded that prior DUI convictions were essential elements of felony DUI, the court found that "it necessarily follows that the requisite notice . . . [of them] must be given in the charging document."[11] The *Rodriguez* court noted that the sole issue in *Phillips* was whether the charging document was so defective that it deprived the circuit court of jurisdiction over the case, not whether the charge was so defective that it could not support a conviction.[12] The court in *Rodriguez* agreed that a charging document, titled "Felony Petit Theft" and merely citing the appropriate subsection of section 812.014, was sufficient to invoke the circuit court's jurisdiction.[13] Thus, when the defense did not object to the court's jurisdiction beforehand, there was no defect in proceeding to trial. However, the court found that when the defense was not notified of any alleged prior convictions, the prior convictions could not be used afterwards to make the petit theft a felony.[14]

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7. 463 So. 2d 1136 (Fla. 1985).

8. *Id.* at 1137-38. *Phillips* arose in connection with a post-conviction objection to the circuit court's jurisdiction over the charge. *Id.* at 1137. Although the state did not allege the two prior theft convictions in the charge itself, the state gave written notice at the defendant's arraignment of its intention to enhance his offense to a felony based upon the two prior petit theft convictions. *Id.* While it was not specifically mentioned in the court's holding, this written notice appears to be a significant factor distinguishing the result in *Phillips* from later decisions.

9. 575 So. 2d 1262 (Fla. 1991).

10. *Id.* at 1263.

11. *Id.* at 1265.

12. *Id.* at 1264.

13. *Id.*

14. *Rodriguez*, 575 So. 2d at 1266-67. Unlike *Phillips*, the state in *Rodriguez* did not give pre-trial notice to the defense concerning any details of the accused's alleged prior convictions. *Id.*

Despite *Rodriguez,* there was still conflict among the district courts of appeal[15] over whether prior theft convictions must be alleged in the charging document itself to charge an accused with felony petit theft. During this past year, the Supreme Court of Florida appears to have conclusively resolved this issue with its decision in *Young v. State.*[16] There after his conviction for petit theft, the state moved successfully to enhance Young's offense to a felony.[17] The effect of this was to change Young's prison sentence from five to ten years.[18] The Second District Court of Appeal affirmed,[19] but the Supreme Court of Florida reversed.[20] The court noted that felony petit theft had long been considered a substantive offense in Florida.[21] Thus, the court found that to be consistent with *Rodriguez,* "precedent . . . require[d] that the elements of the felony petit larceny statute be alleged in the charging document."[22] In the short term, *Young* will no doubt lead to reversals in those cases where the state made no attempt at all to initially charge the elements of felony petit theft.[23] Even in the long run, *Young,* unfortunately, may not have provided as many answers as one would expect and desire. First, the court did not explicitly require that the state specifically allege the date and place of an accused's prior theft convictions. However, the opinion implies this is necessary.[24] Second, the court did not address whether *Young* also applies to those cases

15. *Compare* State v. Crocker, 519 So. 2d 32, 33 (Fla. 2d Dist. Ct. App. 1987) (not requiring such allegations of prior convictions) *with* Clay v. State, 595 So. 2d 1052, 1053 (Fla. 4th Dist. Ct. App. 1992) (finding such allegations required based on *Rodriguez*).

16. 641 So. 2d 401 (Fla. 1994).

17. *Id.* at 402.

18. *Id.* Young received the ten-year sentence as a habitual offender. *Id.*

19. Young v. State, 630 So. 2d 1113 (Fla. 2d Dist. Ct. App. 1993), *review granted,* 634 So. 2d 629 (Fla.), *and quashed by* 641 So. 2d 401 (Fla. 1994).

20. *Young,* 641 So. 2d at 403.

21. *Id.* at 402. *E.g.,* State v. Harris, 356 So. 2d 315 (Fla. 1978).

22. *Young,* 641 So. 2d at 403.

23. *E.g.,* Gallon v. State, 648 So. 2d 309, 309 (Fla. 2d Dist. Ct. App. 1995) (reversing a felony petit theft conviction where the elements of this offense were not specifically charged).

24. The *Young* decision requires the state to "include language to the effect that . . . [should] the defendant [be convicted] . . . of petit theft, the defendant is also charged with felony petit theft under section 812.014(2)(d) by reason of the previous convictions of two or more thefts *as thereafter described.*" 641 So. 2d at 403 n.4. (emphasis added).

This language appears to demand three things in a charging document alleging felony petit theft: 1) notice of the state's intent to increase any petit theft conviction; 2) an express citation to the subsection allowing such increase; and 3) descriptions of the prior convictions that will be relied upon to increase the offense.

where the state wishes to increase a petit theft conviction from a second-degree misdemeanor, to a first-degree misdemeanor due to the accused already having one theft conviction. Finally, the requirement in *Young* will be easy to satisfy where only petit theft offenses are being charged but what about those cases where grand theft or some other offense is involved? When the state wishes to retain the possibility of convicting a defendant of felony petit theft if the accused is found guilty of petit theft as a lesser included offense, must it charge in the alternative to satisfy *Young*?[25]

Young does provide the answer to one situation which has concerned the courts. The state will not have to prove the existence of the prior convictions during a trial itself. *Young* recognized that allowing such a procedure would present a high likelihood of unfairly prejudicing an accused. Instead, even in a jury trial, the state must prove the existence of the accused's previous theft convictions in a separate post-trial hearing before the trial court.[26] Indeed, in a jury trial all possible steps must be taken to keep the previous theft convictions from the jury, so that the accused's presumption of innocence is preserved.[27]

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25. Two cases illustrate that this scenario is possible and the barrier *Young* may raise to securing felony petit theft convictions. In *Crocker*, 519 So. 2d at 33, the accused was charged with resisting an officer with violence and grand theft. Crocker was convicted of the resisting charge and of petit theft. The district court of appeal held the petit theft conviction could be reclassified to felony petit theft despite the State's failure to allege the prior theft convictions. *Id.* at 33-34. The court reasoned that otherwise "the state would have to charge . . . felony petit theft, in the alternative, in every case that a jury could find the defendant guilty of petit theft as a lesser included offense of the crime actually charged." *Id.* at 33.

However, the Supreme Court of Florida rejected *Crocker* in *Young*. 641 So. 2d at 403. Even when theft charges are not initially involved, *Young* may cause later problems. Theft is considered a lesser included offense of robbery. Thus, when robbery is charged, the state sometimes does not separately allege a theft. However, if an accused is acquitted of robbery and merely found guilty of petit theft, no enhancement would be possible unless the state alternatively alleged first-degree misdemeanor or felony petit theft.

26. The court noted with approval that such a process was mandated in *Rodriguez*, which itself cited with approval the court's earlier decision in *Harris*, on this point. *Rodriguez*, 575 So. 2d at 1264-65. Both *Harris* and *Rodriguez* were once again approved in *Young*. 641 So. 2d at 402-03.

27. Thus, if a charging document is allowed into the jury room, all mention of a felony petit theft charge and of the prior convictions must be excised from it. *Young*, 641 So. 2d at 403 n.4.

Although *Young* does not explicitly say so, its decision suggests that where prior theft convictions are the sole basis for increasing a theft charge, neither the court nor the prosecutor should refer to the charge as "felony petit theft" in the jury's presence.

B. *Robbery*

Robbery at common law was a combination of two other common law offenses: larceny and assault. The distinguishing feature between a larceny and a robbery was force. Larceny was a theft accomplished without force, while robbery was a theft accomplished by force or the threat of force. The Florida statutory codifications of these two offenses have retained this common law distinction.[28] Under present Florida law, a mere wrongful taking cannot be a robbery. The present definition of robbery contains two act requirements: 1) there must be a taking of another's property from that person's custody, and 2) during this taking there must be "the use of force, violence, assault, or putting in fear."[29] Prior to 1987, a series of Florida cases reversed robbery convictions based upon the conclusion that while the defendant used force, this force was not used to gain possession of the property involved so only a theft had occurred.[30] Florida courts consistently found that use of force in an escape, or an attempt to escape after a wrongful taking, did not make the taking a robbery.[31] In so doing, the courts rejected the argument that former *Florida Statutes* section 812.13(3), now section 812.13(3)(a), broadened the definition of robbery in section 812.13(1).[32] The 1987 Florida Legislature remedied this situation by

28. Since the Florida statutory definition only requires that an assault, and not an actual battery accompany the taking, a defendant can be convicted of both robbery and battery for the same incident in Florida without creating double jeopardy problems. FLA. STAT. § 812.13(1). For a recent case holding that such multiple convictions are possible, see Hamrick v. State, 648 So. 2d 274, 275 (Fla. 4th Dist. Ct. App. 1995).

29. FLA. STAT. § 812.13(1).

30. *E.g.*, Royal v. State, 490 So. 2d 44 (Fla. 1986). The *Royal* court found that defendants, who pushed aside a store detective and then pointed a gun at another employee during their escape, could not be convicted of robbery since they had already obtained wrongful possession of the goods involved before these acts occurred. *Id.* at 45-46. The court held that the statutorily required "'force, violence, assault, or putting in fear' must occur prior to or contemporaneous with the taking of property." *Id.* at 45.

31. *E.g.*, Milam v. State, 505 So. 2d 34, 34 (Fla. 5th Dist. Ct. App. 1987) (holding that force used in an attempted escape from a store after goods have been taken came too late to make the crime a robbery). *See also* Walker v. State, 493 So. 2d 77, 78 (Fla. 4th Dist. Ct. App. 1986) (holding that the act of violence outside of the store following actual theft did not support a robbery charge).

32. *Royal*, 490 So. 2d at 46 (citing FLA. STAT. § 812.13(3)(a) (1983)). *Florida Statutes* section 812.13(3)(a) states that "[a]n act shall be deemed 'in the course of committing the robbery' if it occurs in an attempt to commit robbery or in flight after the attempt or commission." FLA. STAT. § 812.13(3) (1983). Rather than broadening the definition of robbery in section 812.13(1), the Supreme Court of Florida found that section 812.13(3) was only intended to broaden the scope of robbery for purposes of deciding the degree involved under section 812.13(2). *Royal*, 490 So. 2d at 46.

passing section 812.13(3)(b) which broadened the traditional scope of a common law taking to include an act occurring after the taking "if it and the act of taking constitute a continuous series of acts or events."[33] Under such language, force used immediately after a wrongful taking occurs appears to be sufficient to convert the theft into a robbery.[34]

Jones v. State[35] recently settled any question about the sufficiency of this language to produce such a result. There, among other issues raised about his convictions and sentences, the defendant claimed that the force involved was not sufficient to sustain his two convictions for armed robbery. The jury had found Jones guilty of the first-degree murders and armed robberies of his former employer and the employer's wife. Both victims were found stabbed to death in their place of business, where Jones was found suffering from a bullet wound. Besides Jones there was no eyewitness to the homicides. From the evidence it appeared that one victim had been stabbed from behind and that the second victim had been stabbed in the chest. Jones claimed that he should have been acquitted of the two armed robbery charges since the victims never perceived the use of force or violence in connection with the taking of their property. Jones further contended that the evidence was only sufficient to establish a "posthumous theft" rather than a robbery as both victims could have been dead at the time he actually took their property. In an important decision, the Supreme Court of Florida rejected both arguments and affirmed Jones' armed robbery convictions.[36]

The court first focused on the language in section 812.13(3)(b), defining what constitutes "in the course of the taking" for purposes of a

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33. FLA. STAT. § 812.13(3)(b) (1987).

34. *E.g.*, Santilli v. State, 570 So. 2d 400, 402 (Fla. 5th Dist. Ct. App. 1990) (finding that a defendant who shoplifted from a store and then tried to hit the store's security guard with his car when confronted about the theft used force "in the course of taking" and thus committed robbery). *Santilli* rejected the argument that as long as the accused does not abandon the stolen property, there will always be a sufficient nexus between the wrongful taking and later force to convert the theft into a robbery. *Id.* at 401-02. Instead, the court suggested that an examination be made of the time and space between the theft and the use of force. *Id.*

If a defendant abandons the stolen property and only then tries to use some force or threat to escape, some courts have held that there is not "a continuous series of acts or events" between the taking and the force or threat to constitute a robbery. *E.g.*, Garcia v. State, 614 So. 2d 568 (Fla. 2d Dist. Ct. App. 1993); Simmons v. State, 551 So. 2d 607 (Fla. 5th Dist. Ct. App. 1989); State v. Baker, 540 So. 2d 847 (Fla. 3d Dist. Ct. App. 1989).

35. 652 So. 2d 346 (Fla.), *cert. denied*, 116 S. Ct. 202 (1995).

36. *Id.* at 353.

robbery. According to the court, this language meant that a "taking of property that otherwise would be considered a theft constitutes robbery"[37] when the necessary element of force is present. This force or violence element under the added statutory language could occur before, contemporaneously with, or even after the taking of the property, "so long as both the act of violence or intimidation and the taking constitute a continuous series of acts or events."[38]

The court also rejected the argument that a victim has to know that force or violence is being used upon the victim's person in order for there to be a robbery.[39] Looking at the statute's plain language, the court found that the basic definition in section 812.13(1) only requires the use of force during the taking and does not require that the victim be aware of the use of force.[40] As the court stated, "where the defendant employs force or violence that renders the victim unaware of the taking, the force or violence component of the robbery statute is satisfied."[41] Thus, even if the two victims here were unaware that Jones was attacking them to take their property, the force element needed for robbery was met. The court found that the murders and the taking of the property were clearly part of one continuous series of events and thus the accused had been properly convicted of robbery.[42]

C. *Sexual Offenses Involving Children*

The Supreme Court of Florida handed down four important decisions concerning sexual offenses involving children in the past year. Two of these decisions concerned constitutional challenges to sections of the *Florida Statutes*, while the two other decisions involved issues of statutory

37. *Id.* at 349.
38. *Id.*
39. *Id.*
40. *Jones*, 652 So. 2d at 349.
41. *Id.* at 350.
42. *Id.* Jones also argued that he had been improperly convicted of one of the robberies because there was no evidence the property involved in that crime had been "'taken from . . . [the victim's] person or from . . . [the victim's] immediate custody or control.'" *Id.* The court rejected the argument that the property taken must be on the victim's person or in the victim's presence. *Id.* If the property was "sufficiently under the victim's control so that the victim could have prevented the taking if . . . not . . . subjected to violence or intimidation by the robber," then the requirement in § 812.13(1) that the property be taken "'from the person or custody of another'" is met. *Jones*, 652 So. 2d at 350.

construction. The latter two decisions are discussed below, while the others are discussed later in this survey.[43]

The two decisions that did not involve constitutional challenges both involved questions concerning former *Florida Statutes* section 794.041, which relates to "[s]exual activity with child by or at solicitation of person in familial or custodial authority; penalties."[44] Both decisions were handed down on the same date. One decision, *Thompson v. State*,[45] addressed the issue of whether a defendant could be convicted of both sexual activity while in custodial authority of a child and of sexual battery on a physically incapacitated victim[46] based on evidence of a single sexual act. Thompson had been convicted of both offenses and sentenced to two concurrent nine-year terms based on a single sexual act. The First District Court of Appeal affirmed these convictions but noted possible conflict with other district courts of appeal's decisions.[47] In a short opinion, the Supreme Court of Florida reversed a finding that the prohibition against multiple punishments had been violated.[48] In earlier decisions, the court had found "multiple punishments impermissible [when] based on a single act if the various offenses are distinguished only by degree elements."[49] The court found,

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43. See discussion *infra* part III.B. for the two cases involving the constitutional challenges.

44. The Florida Legislature repealed this section in 1993. Ch. 93-156, § 4, 1993 Fla. Laws 907, 911. However, the provisions of this former section were replaced by present section 794.011(8)(a)-(b). FLA. STAT. § 794.011(8)(a)-(b) (Supp. 1994).

45. 650 So. 2d 969 (Fla. 1994).

46. FLA. STAT. § 794.011(4)(f). Unlike § 794.041, this section has not been amended or repealed.

47. Thompson v. State, 627 So. 2d 74, 74 (Fla. 1st Dist. Ct. App. 1993), *quashed by* 650 So. 2d 969 (Fla. 1994). The court noted possible conflict with the decision in George v. State, 488 So. 2d 589, 590 (Fla. 2d Dist. Ct. App. 1986) (finding only one sexual battery conviction was proper once the evidence established only one unlawful penetration). *Thompson*, 627 So. 2d at 74.

48. *Thompson*, 650 So. 2d at 969.

49. *Id.* The supreme court relied on its decisions in Sirmons v. State, 634 So. 2d 153 (Fla. 1994) and Goodwin v. State, 634 So. 2d 157 (Fla. 1994), for its decision in *Thompson*. *Id.* In *Sirmons*, the court held that an accused could not be convicted of both grand theft auto and robbery with a weapon based on a single taking of an automobile at knifepoint. 634 So. 2d at 154. The court found that only one base offense, theft, was factually involved and that both charges were merely varying degrees of this base offense. *Id.* In *Goodwin*, the court relied on *Sirmons* to find that convictions for both vehicular manslaughter and for unlawful blood alcohol level ("UBAL") manslaughter, stemming from one death, was not permissible. 634 So. 2d at 157.

without discussion, that such was clearly the case here.[50] Thus, two convictions and punishments, even when they were to run concurrently, were not permissible.[51]

The second case provided a much more intensive and important discussion of *Florida Statutes* section 794.041. In *Hallberg v. State*,[52] the Supreme Court of Florida decided what it means for a person to be "in a position of . . . custodial authority."[53] Hallberg had been convicted of five counts of lewd acts upon a child and three counts of engaging a child in sexual activities by a person in a position of familial or custodial authority. For each of the lewd acts he was sentenced to ten years imprisonment and for each of the sexual activities by a custodial authority, he received twenty-seven years imprisonment. All sentences were to run concurrently. Hallberg appealed his convictions of sexual activity by a person in a position of familial or custodial authority contending that he did not stand in such a relationship to the victim here. Hallberg was clearly not a parent or other relative of the victim, thus the State conceded that he could not be in a position of "familial" authority. The question remained whether he could be in a position of "custodial" authority at the time of the sexual activity involved.

Hallberg was employed as a junior high school teacher, and his victim was enrolled in one of his honors classes during her eighth grade year. Following the eighth grade year, the victim planned to take another honors class with Hallberg the next year. During the summer recess, Hallberg went to the victim's home where he committed the sexual acts involved. This particular visit to the victim's home occurred at a time when Hallberg had no teaching or other supervisory responsibility over the student-victim. As the court noted in its opinion, "[i]t is undisputed that these events did not occur during the school year and that they did not occur in connection with Hallberg's assigned teaching responsibilities or a recognized extracurricular event."[54] The State still raised three arguments to support Hallberg's

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50. Although the opinion does not state such, the supreme court must have found that both convictions were merely aggravated forms of one base offense, sexual battery.

51. Both *Sirmons* and *Goodwin* had cited FLA. STAT. § 775.021(4)(b)(2) in concluding that the dual convictions were impermissible in those cases. *Sirmons*, 634 So. 2d at 153-54; *Goodwin*, 634 So. 2d at 157. In *Thompson*, the court did not cite the present version of § 775.021, but instead cited directly to article I, section 9 of the *Florida Constitution*. 650 So. 2d at 969.

52. 649 So. 2d 1355 (Fla. 1994).

53. *Id.* at 1355 (quoting FLA. STAT. § 794.041(2) (1987)). Similar language is now found in FLA. STAT. § 794.011(8).

54. *Id.* at 1356.

convictions. First, the State argued that as a teacher, Hallberg always stood in a position of *in loco parentis* over his students and thus was legally responsible for their welfare. Secondly, the State contended that the victim's parents consented to Hallberg's visit and thus vested him during that time with custodial authority over her. Finally, the state argued that the close relationship between Hallberg and the victim placed him in a custodial status over her. The court rejected these arguments and found that "teachers are not, by reason of their chosen profession, custodians of their students at all times, particularly when school is recessed for the summer."[55] Instead, the court agreed with the analysis set forth in Judge Altenbernd's dissent to the Second District Court of Appeal's affirmance of Hallberg's convictions. Judge Altenbernd, after first noting the events did not occur during the school year or on school property, nor in connection with any sort of school extracurricular activity, noted that the victim's parents, while aware that the defendant wanted the victim to help him prepare for an upcoming class over the summer, did not consent to his visits to their home, nor did they have knowledge of such. Judge Altenbernd turned to the dictionary definition of custodian. According to *Webster's Third International Dictionary*, the definition of "custodian" was "someone who has custody of another,"[56] custody implies a duty or obligation to care for the other person. As there was no school activity going on and the victim's parents had not placed the defendant in a custodial authority over her, Judge Altenbernd believed this was not satisfied. The Supreme Court of Florida agreed with this reasoning finding that "the term 'custodial,' absent a statutory definition, must be construed in accordance with the commonly understood definition as one having custody and control of another."[57] The court found that if the state's broad definition of custody were agreed to, it would be possible that an accused might not even know that he had custody over a child when engaging the child in sexual activity.[58] Based upon the rule of leniency that a criminal statute should be construed most favorably to the accused,

55. *Id.* at 1357.

56. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 559 (1986) (quoted in Hallberg v. State, 621 So. 2d 693, 705 (Fla. 2d Dist. Ct. App. 1993) (Altenbernd, J., concurring in part and dissenting in part), and *Hallberg*, 649 So. 2d at 1357).

57. *Hallberg*, 649 So. 2d at 1358.

58. *Id.*

the court found that such a broad construction should be rejected and a narrower one as urged by Judge Altenbernd accepted.[59]

Justice Shaw, in an extensive dissent, argued that the court's definition ignored the plain language of section 794.041.[60] Justice Shaw focused on the language in section 794.041(2) stating, any person "who stands in a position of [familial or] custodial authority."[61] In his view, a teacher stands in the position of custodial authority over a student at all times, even during the summer.[62] Thus, in Justice Shaw's view, one need not have actual custodial authority over a child victim as long as one stands in such a potential position. Since teachers hold the power position over their students, he believed that this was enough to violate section 794.01 and would have affirmed Hallberg's conviction.[63] Indeed, in this particular case, Justice Shaw found that a direct connection between the accused's position as a teacher and the victim's position as a student led to the victim giving in to the teacher's sexual demands, thus, in his view, violating section 791.041.[64]

The Florida Legislature repealed *Florida Statutes* section 794.041, the main section discussed in both these cases, in 1993.[65] However, in so doing, the legislature added a new subsection, section 794.011(8), to section 794.011, which discusses sexual battery.[66] Sexual battery by a person in a position of familial or custodial authority has thus even more clearly been made a degree of the basic offense of sexual battery. This would seem to show legislative agreement with the decision in *Thompson* and demonstrate that decision's continued applicability. The supreme court's decision in *Hallberg* will be of even more importance. Various subsections of *Florida Statutes* section 794.011(8) make it a third, first, or life felony, for a "person who is in a position of familial or custodial authority to a person less than 18 years of age"[67] to solicit or actually commit a sexual battery on a minor. Like former section 794.041, section 794.011(8) does not define "in

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59. Thus, Hallberg's three convictions for sexual activity with a child by a person in custodial authority were reversed and his case remanded for further proceedings. *Id.* The obvious practical result for Hallberg will be a resentencing where he will most likely receive a substantially shorter sentence.

60. *Id.*

61. *Id.* (citing FLA. STAT. § 794.041(2) (1987)) (emphasis omitted).

62. *Hallberg*, 649 So. 2d at 1360-61.

63. *Id.* at 1358.

64. *Id.*

65. Ch. 93-156, § 4, 1993 Fla. Laws 907, 911.

66. FLA. STAT. § 794.011(8).

67. *Id.*

a position of familial or custodial authority." Thus, *Hallberg* will be looked to for guidance and authority on this subject.

D. *Leaving an Accident Involving Death or Personal Injury*

This year, the Supreme Court of Florida handed down an important decision regarding *Florida Statutes* section 316.027, which discusses accidents involving death or personal injuries. In *State v. Mancuso*,[68] Dennis Mancuso was charged with leaving the scene of an accident involving death or personal injury under section 316.027 of the *Florida Statutes*.[69] Mancuso had allegedly struck two pedestrians in the early morning hours of December 6, 1992. Later that day, he went to the local police department and reported his car had been involved in an accident. Mancuso claimed he did not know his vehicle had hit anything or anyone. Instead, he told the police that his windshield had suddenly cracked while he was driving but that no debris or other signs of an accident were visible when he pulled over to inspect the damage to his car. Mancuso eventually left his car near the scene and walked home. One of the victims died and the other was seriously injured. Therefore, the State criminally charged Mancuso for leaving the scene of an accident involving death or personal injury.

At trial, Mancuso requested that the jury be instructed that the State must prove he knew he was involved in an accident resulting in personal injury to another and then willfully left the scene and willfully failed to aid

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68. 652 So. 2d 370 (Fla. 1995).

69. *Id.* *Florida Statutes* section 316.027(1)(a) states:

> The driver of any vehicle involved in an accident resulting in injury or death of any person shall immediately stop such vehicle at the scene of the accident, or as close thereto as possible, and shall forthwith return to, and in every event shall remain at the scene of, the accident, until he has fulfilled the requirements of s. 316.062.

FLA. STAT. § 316.027(1)(a) (1991).

Subsection (2) provided that any person willfully failing to comply with the requirements of subsection (1) was guilty of a third-degree felony. *Id.* § 316.027(2). *Florida Statutes* section 316.062 requires a driver involved in an accident to stop and exchange certain information and to render aid to persons injured in the accident. FLA. STAT. § 316.062 (Supp. 1994). *Florida Statutes* section 316.027 was amended in 1993. Ch. 93-140, § 1, 1993 Fla. Laws 805, 806. However, the only major change was to make leaving the scene of an accident involving death a second-degree felony. FLA. STAT. § 316.027(1) (1993). Willfully leaving the scene of an accident involving personal injury but not death remains a second-degree felony. FLA. STAT. § 316.027(2) (Supp. 1994).

the victims.[70] The trial court denied this instruction and instead gave an instruction that omitted any requirement concerning knowledge of the injury. The jurors were told that they only had to find Mancuso was involved in an accident resulting in death or injury, that he knew or should have known that he was involved in an accident, and that he willfully failed to stop at the accident scene. Mancuso was convicted of violating section 316.027 and appealed his conviction.

The Fourth District Court of Appeal reversed Mancuso's conviction, because the jury instructions did not contain any instruction on "constructive knowledge" of the death or injury of the victims.[71] The State contended the jurors were properly instructed as they only needed to determine that Mancuso knew, or should have known, that he was involved in an accident and that an injury or death had resulted therefrom. The Fourth District Court of Appeal briefly examined cases from other jurisdictions agreeing with the State's argument that knowledge of the injury is not a separate element which the jury must be instructed upon. The court noted that those decisions involved the interpretation of statutory language significantly different from Florida's. Specifically, the court noted that *Florida Statutes* section 316.027 contains a "willfulness" requirement that these other states' laws did not.[72] Thus, the other states' laws were "strict liability laws" while Florida's was not. Although it found that Mancuso's conviction should be reversed, the district court of appeal certified this issue to the Supreme Court of Florida as one involving a question of great public importance.[73]

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70. The exact instruction Mancuso requested was as follows:

> 3. That Dennis Mancuso knew that he was involved in an accident which resulted in personal injury to another;
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> 4. That Dennis Mancuso, knowing he was in an accident which resulted in personal injury to another:
>
> a. Willfully left the scene; and/or
>
> b. Willfully failed to give . . . [certain information to the others] involved in the accident . . . or to a police officer at the scene. . . .
>
> c. Willfully failed to render aid to any injured person at the scene.

Mancuso v. State, 636 So. 2d 753, 754 (Fla. 4th Dist. Ct. App. 1994), *aff'd*, 652 So. 2d 370 (Fla. 1995). "'Willfully' is defined to mean that Dennis Mancuso intended to leave the scene of an accident knowing it resulted in personal injury to another." *Id.*

71. *Id.* at 754. In so doing, the district court of appeal found that neither the defendant's requested instruction, nor the one the trial court gave, was correct.

72. *Id.* at 756.

73. The exact question certified was as follows: "IN A PROSECUTION FOR VIOLATION OF SECTION 316.027, FLORIDA STATUTES (1991), MUST THE STATE SHOW THAT THE DEFENDANT KNEW OR SHOULD HAVE KNOWN OF THE

In a short, but instructive opinion, the Supreme Court of Florida affirmed the district court's decision.[74] The supreme court first noted that section 316.027 was modeled after the Uniform Vehicle Law.[75] The court also noted that previous Florida decisions construing the section's "willfulness" requirement have held that knowledge of the accident is an essential element under section 316.027.[76] The question presented to the court in this case was whether knowledge of the injury, in addition to knowledge of the accident, was a separate essential element of section 316.027.[77] Since there were no previous Florida decisions on this point, and the court was dealing with a statute modeled after a uniform law, the court looked to decisions in other jurisdictions construing statutes modeled after the same law. In so doing, the court found that most of these decisions had found either that "actual or constructive knowledge of injury"[78] was necessary to make a person criminally liable.

The court in *Mancuso* found two reasons for such an interpretation.[79] First, statutes criminalizing hit-and-runs from personal injury scenes generally impose more severe criminal penalties than those involving hit-and-run incidents involving only property damage.[80] Secondly, the language of section 316.027 requires the driver to take affirmative action.[81] The court found that in fairness before one can be required to act in a certain fashion, the driver must be aware of the facts which give rise to this affirmative statutory duty.[82] Thus, the Supreme Court of Florida held that "criminal liability under section 316.027 requires proof that the driver charged with leaving the scene either knew of the resulting injury or death or reasonably should have known from the nature of the accident and that the jury should be so instructed."[83]

The *Mancuso* decision will have an impact in at least two ways. First, and most importantly, whenever an accused is charged with the same offense in the future, the jury will have to be instructed that knowledge of the death and/or personal injury is required to convict. The supreme court

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INJURY OR DEATH; AND THE JURY BE SO INSTRUCTED?" *Id.*

74. *Mancuso*, 652 So. 2d at 372.
75. *Id.* at 371.
76. *Id. See* Stanfill v. State, 384 So. 2d 141 (Fla. 1980).
77. *Mancuso*, 652 So. 2d at 370-71.
78. *Id.* at 371.
79. *Id.* at 372.
80. *Id.*
81. *Id.*
82. *Mancuso*, 652 So. 2d at 372.
83. *Id.*

did not specify what the exact language of such an instruction should be. Instead, this matter was referred to the Supreme Court Committee on Standard Jury Instructions in Criminal Cases.[84] Second, there will be some reversals in other cases involving charges under section 316.027 where the juries were not instructed about this knowledge requirement.[85]

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84. *Id.* In July 1995, the Committee forwarded the following proposed instruction to the Supreme Court of Florida for its approval:

> Before you can find the defendant guilty of Leaving the scene of an Accident, the state must prove the following five elements beyond a reasonable doubt:
>
> 1. (Defendant) was the driver of a vehicle involved in an accident resulting in [injury to] [death of] any person.
>
> 2. (Defendant) knew or should have known that [he] [she] was involved in an accident.
>
> 3. (Defendant) knew or should have known of the [injury to] [death of] the person.
>
> 4. (Defendant) willfully failed to stop at the scene of the accident or as close to the accident as possible and remain there until [he] [she] had given
>
> a. to the [injured person] [driver] [occupant] or [person attending the vehicle] and
>
> b. to any police officer at the scene of the accident or investigating the accident the following information:
>
> a. [sic] [his] [her] name,
>
> b. [his] [her] address,
>
> c. registration number of vehicle [he] [she] was driving, and license plate number of vehicle [he] [she] was driving, and
>
> d. if available, and requested, the exhibition of [his] [her] license or permit to drive.
>
> 5. (Defendant) willfully failed to render reasonable assistance to the injured person if such treatment appeared to be necessary or was requested by the injured person.
>
> "Reasonable assistance" includes carrying or making arrangements to carry the injured person to a physician, surgeon or hospital for medical or surgical treatment.
>
> "Willfully" means intentionally, knowingly and purposely.

Telephone Conversation with chambers of the Hon. Fredricka Greene Smith, Circuit Court Judge, Eleventh Judicial Circuit, Dade County, Florida (Oct. 6, 1995). However, the court returned the proposed instruction to the Committee for further study. As of October 6, 1995, the Committee had not recommended another proposed instruction.

Judge Smith chaired the Supreme Court Committee on Standard Jury Instructions in Criminal Cases at the time of the supreme court's action.

85. *See, e.g.*, Cordier v. State, 652 So. 2d 505 (Fla. 4th Dist. Ct. App. 1995); Reeves v. State, 647 So. 2d 994 (Fla. 2d Dist. Ct. App. 1994). Both cases were decided during this survey period. In both cases, the district courts reversed convictions under *Florida Statutes* section 316.027, because the jury was not told that knowledge of the death or personal injury

E. *Manslaughter*

Criminal homicide is a general offense often distinguished among its various types and degrees by different gradations of intent. Thus, delineating when certain acts clearly constitute one type and degree of homicide offense from another is sometimes difficult to do. One common definition of manslaughter at common law declared that this offense existed when there was an unlawful killing of one human being by another, without malice aforethought, upon a sudden impulse or heat of passion, and without any legal justification or excuse. The term "malice aforethought" was a legal term of art used to recognize a number of different situations in which a person would be guilty of murder. Absent one of these situations, an unlawful killing would generally be considered a manslaughter.

Florida has retained this notion that manslaughter generally is a lesser included offense of murder. The Supreme Court of Florida has recognized that manslaughter "is a residual offense, defined by reference to what it is not."[86] Thus, the supreme court has consistently required that when an accused is charged with manslaughter or a greater homicide offense not more than one step removed from manslaughter, the jury must also be instructed on what constitutes a justifiable or excusable homicide under Florida law.[87] The need for such instruction on justifiable or excusable

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was an essential element of the offense. *Cordier*, 652 So. 2d at 505; *Reeves*, 647 So. 2d at 995. In each case, the defendants had not objected to the failure of giving such an instruction. However, both decisions found that this did not matter as the failure to instruct a jury concerning an element of a crime charged constitutes fundamental and reversible error. *Cordier*, 652 So. 2d at 505; *Reeves*, 647 So. 2d at 995.

86. Stockton v. State, 544 So. 2d 1006, 1007-08 (Fla. 1989). In this case, the trial court correctly instructed a jury on manslaughter as a lesser included offense of second and third-degree murder. *Id.* at 1007. This original set of jury instructions also included instructions about what would be considered justifiable or excusable homicide. However, when the court reinstructed the jury, at its request, on second and third-degree murder, the trial court on its own also decided to reinstruct on manslaughter but refused defense counsel's request to reinstruct on excusable and/or justifiable homicide. The supreme court found this refusal to be reversible, as "[a]n instruction on manslaughter which omits the definitions of justifiable and excusable homicide is . . . incomplete." *Id.* at 1008.

The court did indicate that if the trial court had limited the reinstruction to the jury's specific requests and had not included its own reinstruction on manslaughter, there would have been no error. *Id.*

87. *See* Hedges v. State, 172 So. 2d 824 (Fla. 1965). However, if defense counsel specifically requests a limited form of the standard instruction on justifiable and excusable homicide and the trial court gives the instruction requested, then the defense has waived its claim to raise on appeal the argument that the instruction as given was erroneous. Armstrong v. State, 579 So. 2d 734, 735 (Fla. 1991). Likewise, it is not fundamental error for the court

homicide is evident from the statutory definition of manslaughter.[88] Despite the supreme court's apparently clear mandate that a complete instruction on manslaughter also requires an instruction as to what constitutes justifiable and/or excusable homicide, Florida's trial courts continue to struggle with this requirement.

The Florida trial courts' continued failure to adequately instruct juries on manslaughter was recently demonstrated by the supreme court's decision in *State v. Lucas*.[89] There, David Lucas was charged with attempted second-degree murder and various other offenses. At his trial, Lucas admitted that the criminal acts had occurred but claimed that he was not the perpetrator. Defense counsel requested, and the trial court gave an instruction on attempted manslaughter as a category one lesser included offense of attempted second-degree murder. Unfortunately, the trial court failed to explain that Lucas could not be convicted of attempted manslaughter if the evidence showed that the attempted homicide was either justified or excused. The defendant did not request such a charge and did not object to the omission. After the jury found him guilty of all charges, Lucas appealed his attempted second-degree murder conviction claiming that the court's exclusion of justifiable and excusable homicide from its definition of attempted manslaughter was fundamental error requiring reversal.

On appeal, the State claimed that the failure to give jury instructions on the definition of justifiable and excusable homicide should not constitute fundamental error which would be per se reversible. The First District Court of Appeal agreed the defense at trial conceded that there was a second-degree murder and only disputed identity.[90] Thus, there really was no factually contested issue regarding attempted manslaughter, justifiable homicide, or excusable homicide. However, the district court found itself bound by earlier supreme court decisions and reversed the attempted second-

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to give a short-form instruction, instead of a long-form instruction, on excusable homicide where there is no objection from the defense. State v. Smith, 573 So. 2d 306, 310 (Fla. 1990).

88. *Florida Statutes* section 782.07 states in part that:

> The killing of a human being by the act, procurement, or culpable negligence of another, without lawful justification according to the provisions of chapter 776 and in cases in which such killings shall not be excusable homicide or murder, according to the provisions of this chapter, shall be deemed manslaughter . . . .

FLA. STAT. § 782.07.

89. 645 So. 2d 425 (Fla. 1994).

90. Lucas v. State, 630 So. 2d 597, 598 (Fla. 1st Dist. Ct. App. 1993), *aff'd*, 645 So. 2d 425 (Fla. 1994).

degree murder conviction anyway.[91] The court certified this question to the supreme court as one of great public importance.[92]

Despite the lack of evidence to support a finding of excusable and justifiable homicide, the Supreme Court of Florida found that the failure to give a complete instruction here constituted per se reversible error.[93] In so doing the court appears to hold fast to its bright-line rule regarding the necessity of complete instructions when defining the crime of manslaughter for a jury in Florida. The court held that "failure to give a complete initial instruction on manslaughter constitutes fundamental reversible error when the defendant is convicted of either manslaughter or a greater offense not more than one step removed."[94] The court found only one exception to this requirement, that being the situation where defense counsel has affirmatively agreed to, or even requested, the incomplete instruction.[95]

Lucas will hopefully bring an end to the problem of having homicide cases reversed in Florida due to a trial court's failure to give complete instructions on manslaughter. The moral of the *Lucas* decision for both prosecutors and trial judges is simple. Whenever an accused is charged with manslaughter or a homicide offense one step removed, the jury should always be given correct instructions as to what constitutes justifiable and

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91. *Id.* at 600-01.

92. *Id.* at 600. The question certified to and decided by the supreme court was as follows:

> WHEN A DEFENDANT HAS BEEN CONVICTED OF EITHER MANSLAUGHTER OR A GREATER OFFENSE NOT MORE THAN ONE STEP REMOVED, DOES FAILURE TO EXPLAIN JUSTIFIABLE AND EXCUSABLE HOMICIDE AS PART OF THE MANSLAUGHTER INSTRUCTION ALWAYS CONSTITUTE BOTH 'FUNDAMENTAL' AND PER SE REVERSIBLE ERROR, WHICH MAY BE RAISED FOR THE FIRST TIME ON APPEAL AND MAY NOT BE SUBJECTED TO A HARMLESS-ERROR ANALYSIS, REGARDLESS OF WHETHER THE EVIDENCE COULD SUPPORT A FINDING OF EITHER JUSTIFIABLE OR EXCUSABLE HOMICIDE?

Id.

93. *Lucas*, 645 So. 2d at 427.

94. *Id.*

95. *Id.* The court cited *Armstrong*, for approval of this exception. For a recent case after *Lucas* applying this exception to affirm a second-degree murder conviction, even where no instructions on excusable or justifiable homicide were given, see Abbarno v. State, 654 So. 2d 225 (Fla. 5th Dist. Ct. App. 1995).

Lucas did not indicate that the situation suggested in *Stockton*, where the jury requests reinstruction on second or third-degree murder, and the judge only instructs on these homicide offenses and not on manslaughter, would also be an exception to the general rule in *Lucas*. Thus, the continued viability of *Stockton* is in doubt.

excusable homicide in Florida, even when the evidence would not support such a finding. Prosecutors who follow this simple rule should have no difficulty living with the *Lucas* decision. If the evidence would definitely not support a finding of justifiable or excusable homicide, the instruction will just be superfluous and the jury will merely ignore it. Prosecutors and trial judges will have to be careful of defense "sandbagging" after *Lucas*. The lack of requested instructions or an objection to the lack of instructions about excusable or justifiable homicide made no difference as to the defense's ability to raise the issue on appeal. Thus, defense counsel will no longer feel an urgency to request such instruction. Prosecutors will have to remain constantly alert to make sure manslaughter instructions are appropriately complete.[96]

F. *Felony Offense Reclassification*

Substantive criminal law recognizes that offenses can be committed by a variety of means. Some means used to commit a criminal offense actually or potentially increase the harm, or threat of harm, stemming from the offense committed. Sometimes the substantive criminal law explicitly takes this into account. Thus, when a theft is committed by force or threat of force, the offense becomes a robbery. Likewise, Florida substantive criminal law has long distinguished among various degrees of batteries and assaults, depending upon the means used to perpetrate the offense.[97] However, given the wide variety of crimes existing in Florida, explicitly providing for changes in each individual offense's nature or degree whenever force or threat of force is used would be practically impossible. Instead, to partially alleviate the difficulty of providing a degree increase in each individual of-

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96. The need to remain alert to make sure correct jury instructions are given exists when the jury is reinstructed on a point as well as initially instructed about that matter. Even if counsel points out that initial instructions are erroneous and the court attempts to cure this deficiency, mistakes will sometimes occur.

For a recent case illustrating this point, see Cummings v. State, 648 So. 2d 166 (Fla. 4th Dist. Ct. App. 1994), where counsel drew the trial court's attention to a mistake made in initially instructing the jury about excusable homicide and the trial court erred again, but in a different way, when reinstructing the jurors about excusable homicide. The court noted that the lack of evidence to support excusable homicide made no difference. *Id.* at 168.

97. Thus, simple assault becomes aggravated assault when a deadly weapon is used without the intent to kill. FLA. STAT. § 784.021(1)(a). Likewise, simple battery becomes aggravated battery when a deadly weapon is used. FLA. STAT. § 784.945(1)(a)(2).

Of course the change from an assault to a battery once actual force is used, as opposed to threat of force, is another illustration of how substantive criminal law distinguishes between kinds of offenses due to the harm that actual use of force causes or may cause.

fense's sections, the legislature promulgated a general reclassification statute for most felony offenses when a firearm or weapon is used to perpetrate them.

Florida Statutes section 775.087(1) provides, in part that, when during a felony an accused "carries, displays, uses, threatens, or attempts to use any weapon or firearm, or . . . commits an aggravated battery"[98] the felony is reclassified to the next highest degree. This reclassification section does not apply to felony offenses where the use of a weapon or firearm is an essential element of the crime that the defendant committed.[99] Within the survey period, the Supreme Court of Florida decided two important cases concerning the construction of section 775.087(1).

The first case, *State v. Tripp*,[100] involved the certified question of whether an accused's conviction may be reclassified under section 775.087(1) without the jury explicitly finding that the defendant had a weapon during the commission of the felony involved.[101] Tripp had entered a convenience store and had repeatedly struck the store clerk with a claw hammer. After he was unsuccessful in opening the cash register, he again beat the clerk with the hammer, causing her serious physical injuries. Tripp was charged with aggravated battery with a deadly weapon, robbery with a deadly weapon, and attempted first-degree murder. The charging document specifically alleged that he had a premeditated design to cause the

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98. FLA. STAT. § 775.087(1).

99. For a recent Florida case finding upward reclassification of a felony impermissible under *Florida Statutes* section 775.087(1), see McNeal v. State, 653 So. 2d 1122 (Fla. 1st Dist. Ct. App. 1995). The *McNeal* court found that an accused's attempted aggravated battery conviction could not be reclassified from a third-degree to a second-degree felony when the charging document had alleged that the aggravated battery was committed by use of a deadly weapon. *Id.* at 1123. The court acknowledged that use of a deadly weapon was not "an essential element of the offense of aggravated battery in all cases." *Id.* at 1123 (quoting Brown v. State, 583 So. 2d 742 (Fla. 1st Dist Ct. App. 1991)). However, the *McNeal* court found that weapon's use became an essential element of the offense due to the charging document's language. *Id.* at 1124.

100. 642 So. 2d 728 (Fla. 1994).

101. *Id.* at 729. The certified question the supreme court considered was as follows: "MAY A TRIAL COURT RECLASSIFY A FELONY CONVICTION PURSUANT TO SECTION 775.087(1) ABSENT A SPECIFIC FINDING ON THE JURY'S VERDICT FORM THAT A DEFENDANT CARRIED, DISPLAYED, USED, ETC. ANY WEAPON OR FIREARM OR THAT HE COMMITTED AN AGGRAVATED BATTERY DURING THE COMMISSION OF THE FELONY SUBJECT TO RECLASSIFICATION?" *Id.* This certified question was a rephrased version from the one originally certified by the district court of appeal. Tripp v. State, 610 So. 2d 1311, 1313 (Fla. 1st Dist. Ct. App. 1992), *aff'd*, 642 So. 2d 728 (Fla. 1994).

victim's death while involved in a felony, namely the robbery, and did so by attempting to murder her by hitting her in the head with a weapon, the claw hammer. The jury found Tripp guilty of these three offenses. Following his conviction, the State successfully sought to have his offenses reclassified pursuant to section 775.087(1).[102]

The First District Court of Appeal reversed the reclassification of Tripp's first-degree murder and attempted armed robbery convictions.[103] The attempted armed robbery conviction reclassification was reversed, because use of a weapon is an essential element in this offense.[104] As for the attempted first-degree murder charge, the district court agreed with the State's argument that use of the weapon was not an essential element of this offense, thus the offense could be subject to reclassification.[105] The court found that the charging document and the proof at trial supported the determination that both a weapon had been used and an aggravated battery had been committed during the attempted first-degree murder offense.[106] However, the court noted that the verdict form contained no specific jury finding that Tripp had used a deadly weapon or committed an aggravated battery while committing the attempted first-degree murder.[107] Without this explicit jury finding, the district court found that reclassification of the attempted first-degree murder conviction from a first-degree felony to a life felony was improper.[108]

The Supreme Court of Florida, in a short but important opinion, affirmed the First District Court of Appeal's decision.[109] The supreme court noted that the jury had found Tripp guilty of "charges made against him in the Information"[110] and that the information had alleged Tripp used a weapon when committing the attempted first-degree murder. However, the supreme court found that "the jury did not make a sufficient finding that Tripp used a weapon because there was no special verdict form reflecting

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102. This reclassification resulted in the attempted first-degree murder being raised to a life felony, instead of a first-degree felony.

103. *Tripp*, 610 So. 2d at 1313.

104. *Id.* at 1312.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Tripp*, 610 So. 2d at 1313.

109. *Tripp*, 642 So. 2d at 730.

110. *Id.* The supreme court quotes this language in its opinion. However, it is not clear where the wording came from. As this wording does not appear in the First District Court of Appeal opinion, this author assumes that it came from the jury verdict form.

a separate finding to this effect."[111] Since the court considered this question a factual one for the jury, and not for the court to decide, without such a special verdict form, reclassification was improper. Thus, Tripp could only be sentenced for a first-degree felony, not a life felony.

Both the district court and the supreme court relied upon, and noted with approval, the supreme court's earlier decision in *State v. Overfelt*,[112] also involving the proper construction of section 775.087. There, the question was whether there had to be a jury finding that an accused possessed a firearm before the trial court could reclassify a felony pursuant to section 775.087(1).[113] As with *Tripp*, the supreme court had found that this was a factual finding for the jury and not for a trial court.[114] After *Tripp* and *Overfelt*, prosecutors who plan to ask for reclassification of a felony conviction pursuant to section 775.087(1) must make sure that the jury receives special verdict forms or else reclassification will not be possible. Given the *Tripp* and *Overfelt* decisions, all three factors which can enhance a felony reclassification must be submitted to a jury for a specific determination of their presence.[115]

Despite the broad holding in *Tripp*, that whether a defendant used a weapon during the commission of a felony is a jury question, a second recent Supreme Court of Florida case construing section 775.087(1) shows that there are some limits on this decision's scope. In *State v. Houck*,[116] the defendant was accused of banging the victim's head against the pavement, thus causing him serious head injuries which resulted in his death. The State charged the defendant with second-degree murder alleging that the pavement had been used as a weapon to injure the victim's head. The jury instead found the defendant guilty of manslaughter with a weapon. The State sought reclassification under section 775.087(1), and the trial court adjudicated Houck guilty of a first-degree felony. Unlike *Tripp* and *Overfelt*, the jury had apparently been explicitly presented with the specific question whether a weapon was used during the commission of the

111. *Id.*

112. 457 So. 2d 1385 (Fla. 1984).

113. *Id.* at 1386.

114. *Id.* at 1387.

115. Although the charge in *Tripp* only alleges the presence of one of the sentencing enhancing factors of *Florida Statutes* section 775.087(1), the certified question the supreme court answered included all three factors.

116. 652 So. 2d 359 (Fla. 1995).

felony.[117] Thus, if this were purely a jury question as a broad reading of these two cases implies, Houck's conviction and reclassification should have been affirmed. However, that was not the case.

One difficulty with section 775.087(1) is that neither it, nor any section of chapter 775, defines what should be considered a "weapon" for felony reclassification purposes. This problem is not unique to this particular statute. Other sections of the *Florida Criminal Code* using the term "weapon" also lack a specific definition for it. Given the absence of a statutory definition of "weapon" in chapter 775 the supreme court had two apparent choices: adopt the definition of weapon found in chapter 790 as had been done in other cases,[118] or give the word "weapon" its common or ordinary meaning. In this case, both the supreme court and the district court of appeal chose to resort to dictionary definitions for the meaning of "weapon."[119] Something would be considered a weapon if it is commonly used as an "instrument for combat against another person."[120] Pavements are not such instruments. The supreme court rejected the State's argument that whether something was a weapon was a matter for the jury and not for

117. Neither the district court of appeal's decision nor the supreme court's decision say that the jury was presented with this question via a special jury form. The author infers that this was the situation from the supreme court's opinion which does not mention *Tripp*. The court's failure to cite *Tripp*, decided the same day as *Houck*, indicates that the error which caused reversal there was probably not present in *Houck*. Whether this deduction is correct or not, there would still be the same result in *Houck*, given the supreme court's reasoning for the reversal there.

118. *E.g.*, Arroyo v. State, 564 So. 2d 1153, 1154 (Fla. 4th Dist. Ct. App. 1990) (finding it appropriate to use definitions in chapter 790 to determine what is a "dangerous weapon" for purposes of deciding if an armed burglary has occurred under *Florida Statutes* section 810.02(2)(b)); Gust v. State, 558 So. 2d 450, 452 (Fla. 1st Dist. Ct. App. 1990) (finding it appropriate to look to the definition in chapter 790 of "weapon" to determine when a person commits armed robbery, a first-degree felony, rather than unarmed robbery, a second-degree felony).

In *Houck*, both the district court and the supreme court used means other than looking to chapter 790 for help in deciding what should be considered a weapon under *Florida Statutes* section 775.087(1). *Houck*, 652 So. 2d at 360; Houck v. State, 634 So. 2d 180, 182 (Fla. 5th Dist. Ct. App.), *review granted*, 642 So. 2d 1363 (Fla. 1994). The district court of appeal's decision indicated that even if the definition of "weapon" in section 709.001(13) had been used, there would still have been a reversal of the felony reclassification. *Houck*, 634 So. 2d at 182.

119. The district court used the definition of weapon from Webster's New Collegiate Dictionary. *Houck*, 634 So. 2d at 182. However, the supreme court chose the definition in the American Heritage College Dictionary. *Houck*, 652 So. 2d at 360.

120. *Houck*, 652 So. 2d at 360.

the court.[121] The court found that allowing something as passive as a pavement to be considered a weapon for sentencing enhancement would allow all sorts of objects not otherwise considered inherently dangerous to enhance convictions.[122] Secondly, both the supreme court and the district court of appeal recognized that allowing such a broad definition of weapon might implicitly go against one of the purposes of the felony reclassification statute.[123] Both courts agreed that "the obvious legislative intent reflected by 775.087 is to provide harsher punishment for, and hopefully deter, those persons who use instruments commonly recognized as having the purpose to inflict death and serious bodily injury upon other persons."[124] If virtually anything could be considered a "weapon" under this section, the deterrence value of such a classification scheme would be lowered, as most felonies would automatically be subject to reclassification.[125]

Is *Houck* in conflict with *Tripp* and *Overfelt*? If *Tripp* is read broadly, conflict between the two supreme court decisions is inevitable. However, another reading of *Tripp* shows that no conflict exists. Under *Houck* whether something can be considered a weapon, as a matter of law, remains for the court to decide. However, under *Tripp* and *Overfelt*, whether something can be legally considered a weapon for purposes of section 775.087(1) when used during the commission of a felony is a factual matter for jury consideration. Read this way, there is no conflict between the two decisions.[126]

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121. *Id.*

122. *Id.*

123. *Id.*; *Houck*, 634 So. 2d at 184.

124. *Houck*, 652 So. 2d at 360 (quoting *Houck*, 634 So. 2d at 184).

125. If the State's argument had been accepted, the deterrence value of *Florida Statutes* section 775.087(1) would be lowered in another way. Deterrence assumes that persons to be deterred have some knowledge or likelihood of knowledge of what it is they are hopefully being deterred from doing. If "weapon" is given its common meaning, then an ordinary person knows what he is being deterred from using. If what is a "weapon" is left totally and completely up to a jury, an ordinary citizen can never know when harsher punishment is likely.

126. The supreme court would obviously not want to render conflicting decisions construing the same statute. When one remembers this fact, plus the fact that the decisions were rendered the same day, this strongly suggests that there is no conflict between the two opinions. Furthermore, *Houck* may not really have as broad an effect on the state's ability to enhance felony convictions as one would expect. The Fifth District Court of Appeal noted that the state had passed up another way to possibly have Houck's conviction reclassified under *Florida Statutes* section 775.087(1). *Houck*, 634 So. 2d at 184. The court noted that the state might have been able to prove Houck committed an aggravated battery during the homicide. *Id.* at 183. The Fifth District Court of Appeal implies that this would have been

G. *Attempted Felony Murder*

Perhaps no part of homicide law has generated more controversy than the felony murder doctrine. The doctrine is based upon the belief that when a defendant commits or attempts to commit a felony during or immediately after which a homicide occurs, the felon should also be held liable for the homicide as well as the underlying felony. The purpose of the felony murder doctrine is twofold: 1) to deter potential felons from committing the underlying felony in the first place; and 2) to urge felons who commit felonies to commit them in the least dangerous fashion. In Florida, a felony murder will be either first, second, or third-degree murder depending upon the underlying felony[127] and upon who the person is who actually does the killing.[128] The intent necessary for the killing is supplied through the legal fiction of the homicide occurring during the course of the underlying felony.

Twice within the last fifteen years, the Supreme Court of Florida has affirmed the notion that there is a crime of attempted felony murder. In *Fleming v. State*,[129] the court upheld the validity of the accused's guilty plea to attempted first-degree felony murder for the shooting of a police officer. The defendant had asserted that there could be no factual basis for his plea because the officer was accidentally shot during a struggle for the defendant's gun. The supreme court rejected that notion finding that the inchoate crime of attempt consists of two essential elements: "(1) a specific intent to commit the crime, and (2) a separate overt, ineffectual act done toward its commission."[130] Although the first requirement would seem to have required the specific intent for a death to result, the *Fleming* court

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a proper basis for reclassification. *Id.* The supreme court's opinion does not discuss this suggestion. One issue arising under the district court's suggestion is whether aggravated battery would be considered a lesser included offense of manslaughter, and if so, would enhancement still be possible under *Florida Statutes* section 775.087(1) or would double jeopardy prohibit this?

127. When the homicide is committed by someone perpetrating or attempting any one of thirteen statutorily enumerated felonies, then a first-degree felony murder has been committed. FLA. STAT. § 782.04(1)(a)(2) (1994). When the homicide is committed by someone perpetrating or attempting any felony other than one of the thirteen statutorily enumerated felonies, then the homicide is a third-degree felony murder. *Id.* § 782.04(4).

128. When someone other than a person engaged in perpetrating or attempting one of thirteen statutorily enumerated felonies actually commits the homicide, the felony murder is a second-degree felony. *Id.* § 782.04(3).

129. 374 So. 2d 954 (Fla. 1979).

130. *Id.* at 955 (citing Hutchinson v. State, 315 So. 2d 546 (Fla. 2d Dist. Ct. App. 1975); Robinson v. State, 263 So. 2d 595 (Fla. 3d Dist. Ct. App. 1972); Grouneau v. State, 201 So. 2d 599 (Fla. 4th Dist. Ct. App. 1967)).

noted that under the felony murder doctrine, unlike in other homicide offenses, "[s]tate of mind is immaterial for the felony is said to supply the intent."[131] The *Fleming* court held that there is such a crime as attempted felony murder in Florida based upon the finding that "where the alleged 'attempt' occurs during the commission of a felony . . . the law presumes the existence of premeditation, just as it does under the felony murder rule."[132]

Five years after *Fleming*, in *Amlotte v. State*,[133] the Supreme Court of Florida reaffirmed that there is such a crime as attempted felony murder in Florida.[134] Relying in part on its decision in *Fleming*, the *Amlotte* court described the essential elements of attempted felony murder as: 1) attempt to perpetrate an enumerated felony; and 2) an intentional overt act, or the aiding or abetting of such an act, which could, but does not cause the death of another.[135] Under the *Amlotte* two-part definition, it would be easy to discern whether there was an attempt to perpetrate or an actual perpetration of an enumerated felony. Instead, the more difficult question is whether there has been a sufficient overt act toward the commission of a felony which could, but does not, cause the death of another. Thus, under the attempted felony murder doctrine, the key issue is discerning which acts could have caused the death of another but did not.

Recently, in a short but major opinion, the Supreme Court of Florida in *State v. Gray*[136] receded from its holdings in *Amlotte* and *Fleming* and found that the crime of attempted felony murder does not exist.[137] In *Gray*, the defendant and two codefendants robbed a restaurant and fled in a car. During a chase with the police, the car's driver went through a red light and hit another car. The other car's driver was ejected and seriously injured. Gray was convicted of the underlying robbery offense and of attempted felony murder. On appeal, Gray questioned whether there was a separate overt act which could, but did not, cause the death of another. The Third District Court of Appeal found that the State had presented insufficient evidence to present a jury question of whether the alleged overt act of

131. *Id.* at 956 n.1.

132. *Id.* at 956 (citing Knight v. State, 338 So. 2d 201 (Fla. 1976); Adams v. State, 341 So. 2d 765 (Fla. 1976)).

133. 456 So. 2d 448 (Fla. 1984).

134. *Id.* at 449.

135. *Id.* at 449-50.

136. 654 So. 2d 552 (Fla. 1995).

137. *Id.* at 552-53.

running a red light could have caused the victim's death.[138] As a result, the court reversed Gray's conviction for the crime of attempted felony murder.[139] However, the District Court of Appeal certified the question of whether there was a sufficient overt act which could have caused the death of another.[140]

In a surprising decision, the supreme court did not answer the certified question but instead receded from its holding in *Amlotte* and held that there was no such crime as attempted felony murder at all.[141] Instead, the court agreed with Justice Overton's dissent in *Amlotte*, which reasoned that attempted felony murder is a logical impossibility.[142] The court recognized that under Florida substantive law, an attempt requires that there be proof of a specific intent to commit a specific crime.[143] The court reasoned that since felony murder is based upon a legal fiction that supplies the malice necessary through the commission of the underlying felony, attempting to commit such a crime is logically impossible.[144]

Gray is certainly a major case with a significant effect. Under the felony murder doctrine, as applied in Florida, some of the harshest consequences were possible. Unlike other jurisdictions which had recognized limits upon the application of the felony murder doctrine,[145]

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138. *Id.* at 553.

139. *Id.*

140. The exact question certified was as follows: "WHETHER THE 'OVERT ACT' REFERRED TO IN AMLOTTE v. STATE, 456 So. 2d 448, 449 (Fla. 1984), INCLUDES ONE, SUCH AS FLEEING, WHICH IS INTENTIONALLY COMMITTED BUT IS NOT INTENDED TO KILL OR INJURE ANOTHER?" *Id.* at 552.

141. *Gray*, 654 So.2d at 554.

142. *Id.* at 553.

143. *Id.* (citing *Amlotte*, 456 So. 2d at 450 (Overton, J., dissenting)).

144. *Id.* (citing *Amlotte*, 456 So. 2d at 450-51 (Overton, J., dissenting)).

145. *E.g.*, People v. Washington, 402 P.2d 130 (Cal. 1965), where the Supreme Court of California refused to extend the felony murder doctrine to a situation where an accomplice had been killed by an intended victim during the course of a robbery. *Id.* at 133-34. The court's opinion rests partially on two theories which were used to limit the felony murder rule. The first theory is the "protected persons" rule. Under this rule, the felony murder doctrine only exists to protect the innocent, not felons; so that if a co-felon is killed, the doctrine should not be used to prosecute the remaining felons for the death of someone who was not intended to be "protected" to begin with. The second theory is the agency theory. Under this theory, only when the act of killing is actually performed by the accused or a co-felon should the doctrine apply. Here, since the victim could not in any way be considered the agent of the remaining felon, the felon could not be prosecuted for the victim's actions resulting in the one robber's death. *Id.*

At least one state has "limited" the felony murder doctrine by abolishing it completely. People v. Aaron, 299 N.W.2d 304 (Mich. 1980).

Florida applied the felony murder doctrine not only to acts of co-felons but also to the acts of police officers and/or bystanders if these acts resulted in death. Florida appeared to follow the per se application of the felony murder doctrine. Thus, whenever a homicide occurred during a statutorily enumerated felony, all felons were most likely to be considered to be guilty of murder, no matter who caused the death or who the victim was.[146] Since the statutory definition of many crimes extend the life of the underlying felony to the flight stage,[147] use of the felony murder doctrine as a vehicle to prosecute for homicide can be extremely widespread. Use of the felony murder doctrine to prosecute felons and co-felons for attempted felony murder, when death did not occur, also had potentially great consequences. Thus, under *Gray* abrogation of the crime of attempted felony murder will greatly lessen the potential harshness of the felony murder doctrine itself.[148] Moreover, the courts will not be required to decide the question of which overt acts could result in death.[149]

H. *Voluntary Intoxication and Mental Disease*

Florida criminal law recognizes a number of defenses not explicitly noted in the *Florida Statutes*. Two of these defenses are voluntary intoxication and insanity. Under Florida criminal law, an accused charged

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146. For example, under Florida law, aiders and abettors of the underlying felony could be guilty of felony murder when the killing was done by one of their accomplices during the felony even if the accused was not present at the time. *E.g.*, Christie v. State, 652 So. 2d 932 (Fla. 4th Dist. Ct. App. 1995). Also, the killer does not have to be the accused or an accomplice. Even a killing resulting from a bystander's acts can support a felony murder conviction. *See* Currelly v. State, 644 So. 2d 139 (Fla. 2d Dist. Ct. App. 1994).

147. See, Parker v. State, 641 So. 2d 369, 378 (Fla. 1994), wherein the supreme court upheld the defendant's felony murder conviction that occurred during flight from a robbery. The court stated that "[t]here is no merit to . . . [the] claim that a killing during flight from the commission of a felony is not felony murder." *Id.* at 376.

148. For example, after *Gray*, several Florida courts had either vacated convictions for attempted felony murder or noted in their opinions that such a crime no longer exists in Florida. *E.g.*, State v. Grinage, 656 So. 2d 457 (Fla. 1995); Ward v. State, 655 So. 2d 1290 (Fla. 5th Dist. Ct. App. 1995).

149. Thus, the supreme court in *Grinage* did not have to decide the certified question about whether certain acts alleged in the charge were sufficient predicates for an attempted felony murder conviction, as the crime no longer exists in Florida. *Grinage*, 656 So. 2d at 458.

For a recent article praising the *Gray* decision but cautioning that "it is too early to ascertain whether *Gray* will result in a major shift away from the application of the felony-murder doctrine" see J. Rafael Rodriguez, *Attempted Felony Murder - An Improbable Legal Fiction Meets Its Demise*, 69 FLA. BAR J. 63, 65 (1995).

with a specific intent defense, should be found not guilty if the accused's voluntary intoxication negated the ability to form the specific intent needed for the crime. As for the insanity defense, Florida follows the McNaghten rule. Under this rule, at the time of the act or acts alleged, the accused must be suffering from such a mental disease or defect as to not know the nature and quality of the act done or to not know that what was done was wrong. Both defenses have been very strictly construed. Mere intoxication alone is not a defense unless it would negate the ability to form specific intent needed for a crime. Likewise, having a mental disease or defect alone is not enough unless it precludes the accused's ability to know what he was doing or to know that what he was doing was wrong. Florida has explicitly rejected the defense of diminished capacity although it is recognized in other jurisdictions.[150]

In *State v. Bias*[151] the supreme court was presented with the interesting question of what happens when a person who raises the defense of voluntary intoxication also has a mental disease or defect. Bias was charged and convicted of first-degree murder and robbery. At trial, Bias raised the defense of voluntary intoxication alleging that he had consumed eleven beers before the commission of his crimes. Bias sought to have psychiatric testimony from a forensic psychiatrist and a forensic psychologist that, in their opinion, Bias was too intoxicated to form the specific intent needed when the crimes occurred. Both experts would have relied on the fact that Bias was suffering from schizophrenia and had brain damage. They claimed that it was necessary to consider an individual's underlying psychiatric or psychological condition when forming an opinion about how intoxicated that person would become after consuming a given amount of alcohol. The psychiatrist contended that the alcohol would have a more dramatic effect

150. Chestnut v. State, 538 So. 2d 820 (Fla. 1989). The defense of diminished capacity allows an accused to offer evidence of any mental abnormality to show that the defendant could or did not have the specific intent needed for the crime charged. Under this defense, if the crime the accused is charged with has a lesser included offense not requiring the same mens rea level as the crime charged, the accused can still be guilty of this crime. If the specific intent crime charged did not have a lesser included offense or had one which was also a specific intent crime, the accused would theoretically be acquitted. Sometimes the diminished capacity defense is termed partial responsibility or partial insanity. For a short, but detailed discussion of this defense, see WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 4.7 (2d ed. 1986).

151. 653 So. 2d 380 (Fla. 1995).

on someone who was schizophrenic or had brain damage.[152] However, the State objected to this testimony claiming that this was nothing more than the defense of diminished capacity and that a person would have to claim insanity before any testimony about schizophrenia would be relevant. The trial court agreed with this objection and the experts then testified they could not give an opinion as to Bias's intoxication without also considering his schizophrenia. Thus, their testimony was precluded. The district court of appeal found that there was sufficient evidence to sustain Bias's convictions.[153] However, the court found that the trial court had erred in precluding the expert testimony pertaining to his voluntary intoxication defense.[154] The district court of appeal certified the question of whether exclusion of the experts' testimony in this case was appropriate to the supreme court as one of great public importance.[155]

The supreme court agreed with the lower court's reversal of Bias's conviction, and set forth specific guidelines for handling situations such as these.[156] The *Bias* court found that when a defendant who raises the defense of voluntary intoxication also has a mental disease or defect, the trial court cannot exclude expert testimony about the combined effect of the alleged mental disease and intoxication on the accused's ability to form a specific intent if an expert cannot adequately express an opinion about the defendant's intoxication without explaining that one of the factors used to form the opinion is the defendant's mental disease.[157] However, the supreme court put three limitations on its holding to ensure that voluntary intoxication defenses do not become diminished capacity defenses in disguised forms. First, the court declared that "the focus of the expert's testimony must be upon the defendant's intoxication, and the mental disease or mental defect must not be the feature of the testimony."[158] Secondly, the mental disease or defect alleged must be one "recognized by authorities generally accepted in medicine, psychiatry, or psychology."[159] Third, the

152. Bias v. State, 634 So. 2d 1120, 1121 (Fla. 2d Dist. Ct. App. 1994), *aff'd*, 653 So. 2d 380 (Fla. 1995). This psychiatrist also would have testified that he believed Bias had used alcohol as a form of self-medication, since schizophrenics commonly did this. *Id.* The expert would also have testified that this aggravates the psychotic symptoms, rather than helping them. *Id.*

153. *Id.*

154. *Id.*

155. *Bias*, 634 So. 2d at 1121.

156. *Bias*, 653 So. 2d at 382.

157. *Id.*

158. *Id.*

159. *Id.*

trial court must make a preliminary determination that the proffered expert opinion about intoxication from the combination of the intoxicants and the recognized mental disease or defect is also "based upon authorities, studies, and experience which have general acceptance in medicine, psychiatry, psychology, or toxicology."[160]

The first limitation is clearly geared to making sure that a voluntary intoxication defense does not become that of diminished capacity. The second two requirements are consistent with Florida's approach to expert testimony in other areas. Florida has long followed the *Frye*[161] test for the admissibility of expert testimony.[162] Unlike the recent decision of the Supreme Court of the United States regarding admissibility of novel scientific evidence and testimony under the *Federal Rules of Evidence*,[163] the *Frye* test requires that the expert testimony being proffered must be generally accepted in a relevant scientific field or fields.[164] Without such, the testimony is inadmissible even though it may be the personal opinion of the expert involved. The general acceptance needed to support an expert's testimony can be found in published studies, text and reports.

Although *Bias* is clearly a conservative opinion, the court's holding should be considered clearly correct. All individuals are not the same, and intoxicants will affect different people in different ways. A person who already suffers from a mental disease or defect is more likely to have his/her mind affected by intoxicants than a person who does not have such a defect. By limiting its holdings to factual situations where there is a recognized mental disease or defect, the Supreme Court of Florida has attempted to ensure that claims purporting that a less intelligent person would be more easily affected by intoxicants than a more intelligent person will not be raised. Also, the effect of the mental disease or defect on the allegedly intoxicated person must be generally recognized by some respected scientific authorities. Personal opinion of an expert alone is not enough. Thus, while the Supreme Court of Florida recognized "that an expert may need to explain why a certain quantity of intoxicants causes intoxication in the

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160. *Id.*

161. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

162. *E.g.*, Kaminiski v. State, 63 So. 2d 339 (Fla. 1952).

163. Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993). In Flanagan v. State, 625 So. 2d 827, 829 n.2 (Fla. 1993), the court rejected the more lenient approach to the admissibility of scientific evidence as established in *Daubert*, and reaffirmed its commitment to the more traditional approach as set forth in *Frye*.

164. During this survey period, the Supreme Court of Florida handed down a major evidence decision discussing a four-step approach to admission of novel scientific testimony under *Frye*. Ramirez v. State, 651 So. 2d 1164 (Fla. 1995).

defendant whereas it would not in other individuals,"[165] the limitations under *Bias* should ensure that this situation will not lead to a free for all exposing factors about the individual that would, in effect, resurrect the defense of diminished capacity.

Two important issues were not considered in *Bias*. The defense in *Bias* was voluntary intoxication and the question was the effect of the accused's mental disease or defect upon his potential level of intoxication, but what if the defense was insanity? Would evidence of a defendant's intoxication be admissible to support the claim that this person suffering from a mental disease or defect did not know, at that particular time, what he was doing, or that what he was doing was wrong? Moreover, what if both defenses were raised at trial? *Bias* holds that the jury could properly consider evidence of the mental disease or defect on the voluntary intoxication defense. Could the jury similarly consider evidence of the intoxication on the ability to form the requisite knowledge of right from wrong or knowledge that what the person was doing was wrong? And if not, then how can a jury be expected to block out evidence of intoxication when discussing the insanity defense and then consider evidence of a mental disease or defect when considering intoxication?[166] Neither of these questions were answered in the *Bias* opinion.

Looking at these questions, perhaps what the *Bias* decision shows is how difficult it is to limit the scope of expert opinion when defenses like voluntary intoxication and insanity are raised. If the Supreme Court of Florida should find, in a case where the insanity defense is raised, that the defendant's level of intoxication is relevant to that question, then the voluntary intoxication defense could be surreptitiously resurrected for certain defenses for which it is not currently available.[167] Clearly these questions

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165. *Bias*, 653 So. 2d at 383.

166. Theoretically, one way to do this would be with detailed, carefully crafted jury instructions. Yet, many lawyers would argue that juries cannot be expected to compartmentalize their thinking to such a degree when deliberating.

167. For example, since arson is considered a general rather than a specific intent crime, voluntary intoxication is not available as a defense to arson charges. *See generally* Linehan v. State, 476 So. 2d 1262 (Fla. 1985). However, insanity should still be available as a defense here.

For an article discussing the district court's opinion in Linehan v. State, 442 So. 2d 244 (Fla. 2d Dist. Ct. App. 1983), which also held that arson was a general intent crime, see James H. Peterson, III, Note, *The Voluntary Intoxication Defense in Florida: A Question of Intent*, 13 STETSON L. REV. 649 (1984). This article provides helpful background regarding the voluntary intoxication defense in Florida.

are important issues which the Supreme Court of Florida will ultimately have to address.

III. CONSTITUTIONAL CHALLENGES TO FLORIDA CRIMINAL LAWS

A. *Vagueness*

During this survey period, several Supreme Court of Florida opinions have addressed due process challenges to Florida criminal statutes based upon allegedly vague language.[168] Criminal statutes must give a reasonable person sufficient notice of what conduct is likely to be proscribed. Such notice is required for a number of reasons. First, the criminal law expects that citizens will conform their conduct so as to avoid violating the law. Without knowing exactly what conduct violates the law, reasonable people cannot possibly be expected to govern their actions or inactions accordingly. Second, vague statutes allow the police undue freedom to interpret what actions violate the law. This potentially allows the police to arrest, search and charge citizens in an inconsistent and potentially discriminatory manner. Third, if the statute is so vague that the conduct which violates it is unclear, citizens can find themselves being charged at the whim of a prosecutor. Finally, without sufficient standards as to what conduct violates a statute, jury decision-making as to when individuals are guilty of violating the criminal laws is not likely to be sufficiently consistent to merit the public's confidence. Thus, vague statutes are general risks to the rights of individual citizens and to the confidence of the general public in the criminal system. The individual Supreme Court of Florida cases addressing challenges to *Florida Statutes* based on vagueness are discussed below.

168. In addition to these supreme court cases which discuss vagueness challenges to some of Florida's criminal statutes, a number of district court of appeal decisions have also dealt with vagueness challenges. No doubt by the end of next year's survey period, the supreme court will also have rendered decisions in some of these same cases.

For further discussion on Florida caselaw concerning the issue of vagueness, see generally State v. Bley, 652 So. 2d 1159 (Fla. 2d Dist. Ct. App. 1995); State v. Mitchell, 652 So. 2d 473 (Fla. 2d Dist. Ct. App. 1995); State v. Sailer, 645 So. 2d 1114 (Fla. 3d Dist. Ct. App. 1994); Habie v. Krischer, 642 So. 2d 138 (Fla. 4th Dist. Ct. App. 1994), *review denied,* 651 So. 2d 1194 (Fla.), *and cert. denied,* 115 S. Ct. 2003 (1995); Newberger v. State, 641 So. 2d 419 (Fla. 2d Dist. Ct. App. 1994).

1. Open House Parties

In *State v. Manfredonia*,[169] the Supreme Court of Florida considered arguments that *Florida Statutes* section 856.015(2), concerning open house parties, was unconstitutionally void for vagueness. Under subsection (2) of the statute, it is a second degree misdemeanor for an adult, in control of an open house party, to allow the party to continue where the adult knows that a minor is in possession of drugs or is consuming alcohol or drugs, and the adult fails to take reasonable steps to prevent such.[170] The statute defines such terms as "drug," "open house party," and "residence;" however, the statute does not provide a definition or explanation of what would constitute "reasonable steps" in the prevention of the possession or consumption of the alcoholic beverage or drug.[171] Based on the vagueness of the statute's terms the appellants in *Manfredonia* claimed that section 856.015(2) was unconstitutionally vague and should be stricken.[172] *Manfredonia* was not the first time that a constitutional challenge had been made to section 856.015. In an early case, *State v. Alves*,[173] the Fifth District Court of Appeal had found the same section to be unconstitutionally vague.[174] Although the *Alves* court had recognized that other Florida statutes incorporating a reasonableness standard had been found constitutional, the Fifth District Court of Appeal found that such a standard would only be constitutional when more specific directives were impossible.[175] Consequently, the *Alves* court found that "[t]he actions that are available to an observing adult in control of a residence [where the forbidden action is occurring] are not numerous and can be selected by the legislature rather than imposing criminal sanctions upon one who is placed in a position of

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169. 649 So. 2d 1388 (Fla. 1995).

170. FLA. STAT. § 856.015(2) (1991). The language of *Florida Statutes* section 856.015(2) reads as follows:

> No adult having control of any residence shall allow an open house party to take place at said residence if any alcoholic beverage or drug is possessed or consumed at said residence by any minor where the adult knows that an alcoholic beverage or drug is in the possession of or being consumed by a minor at said residence and where the adult fails to take reasonable steps to prevent the possession or consumption of the alcoholic beverage or drug.

Id.

171. *Manfredonia*, 649 So. 2d at 1389 n.1 (citing FLA. STAT. § 856.015(1) (1991)).

172. *Id.* at 1389.

173. 610 So. 2d 591 (Fla. 5th Dist. Ct. App. 1992).

174. *Id.* at 594.

175. *Id.*

guessing what is reasonable."[176] The *Alves* court found the legislature so obligated and declared that its failure to provide guidelines in section 856.015(2) made the statute unconstitutionally vague.[177]

In addressing the question of whether section 856.015(2) was unconstitutional in *Manfredonia*, the Supreme Court of Florida agreed that the section "is not a paragon of legislative drafting."[178] However, looking to Supreme Court of the United States decisions discussing vagueness of criminal statutes, the supreme court found that mere lack of precision alone would not offend due process.[179] The *Manfredonia* court found that all the Supreme Court of the United States required was that a statute's language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices . . . ."[180] The court found that section 856.015(2) gave such definite warnings. Analyzing this section's elements, the Supreme Court of Florida found that to secure a conviction, four elements must be satisfied:

> 1) An adult controlling certain premises must know there is a social gathering there; 2) a minor must possess or consume alcohol or controlled substances during this gathering; 3) the adult must have actual knowledge of the minor's acts; and 4) the adult in control must both (a) allow the party to continue and (b) fail to take any reasonable steps to prevent the possession or consumption.[181]

According to the Supreme Court of Florida, these requirements put a heavy burden on the state to prove that the adult in charge took no steps whatsoever to prevent the consumption or possession of the alcohol or drugs.[182] The court suggested that an adult controlling such a party could avoid criminal charges by simply stopping the party or taking some other reasonable action to prevent the consumption or possession after learning

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176. *Id.*
177. *Id.*
178. *Manfredonia*, 649 So. 2d at 1390.
179. *Id.*
180. *Id.* (citing Roth v. United States, 354 U.S. 476, 491-92 (1957)).
181. *Id.*
182. *Id.*

thereof.[183] Unfortunately, the *Manfredonia* decision did not give any concrete examples of what would constitute reasonable action.[184]

2. Exploitation of Aged Persons or Disabled Adults

In *Cuda v. State*,[185] the Supreme Court of Florida sustained a vagueness challenge to former *Florida Statutes* section 415.111(5) which prohibited the exploitation for profit of a disabled person or adult.[186] This section made it a third-degree felony for anyone to exploit an aged or disabled adult "by the improper or illegal use or management" of such person's property.[187] The accused had been charged with one count of exploitation of an aged person for profit. At the trial court level, Cuda successfully argued that the words "improper or illegal" were unconstitutionally vague. The Fifth District Court of Appeal agreed that the word "improper" did not provide sufficient warning of the prohibited conduct and was unconstitutionally vague.[188] However, the court found that the use of the word "illegal" was specific enough to satisfy constitutional standards.[189] The Supreme Court of Florida, in a short but important decision, reversed the appellate court's decision and agreed that the term "illegal" was also vague, thus making the entire subsection unconstitutionally vague.[190]

In reaching this conclusion, the supreme court had to distinguish between two earlier cases in which it held similar language to be constitutional. In *State v. Rodriguez*,[191] the court had upheld a statute which contained a proscription against acts "not authorized by law."[192] *Florida Statutes* section 409.325(2)(a) criminalized certain acts regarding the food

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183. *Manfredonia*, 649 So. 2d at 1391.

184. *Id.* The *Manfredonia* court also declined to comment on whether the appellants' actions, which were not mentioned in either the district court or supreme court opinion, violated *Florida Statutes* section 856.015(2) (1991). *Id.*

185. 639 So. 2d 22 (Fla. 1994).

186. *Id.* at 25.

187. *Florida Statutes* section 415.111(5) reads as follows: "A person who knowingly or willfully exploits an aged person or disabled adult by the improper or illegal use or management of the funds, assets, property, power of attorney, or guardianship of such aged person or disabled adult for profit, commits a felony of the third degree . . . ." FLA. STAT. § 415.111(5) (1991).

188. State v. Cuda, 622 So. 2d 502, 504 (Fla. 5th Dist. Ct. App.), *review granted*, 626 So. 2d 204 (Fla. 1993), *and quashed by* 639 So. 2d 22 (Fla. 1994).

189. *Id.* at 504-05.

190. *Cuda*, 639 So. 2d at 23-24.

191. 365 So. 2d 157 (Fla. 1978).

192. *Id.* at 160.

stamps program when the acts done were "not authorized by law."[193] Despite such broad language, the supreme court found that because of the program's peculiar nature and because chapter 409 itself gave notice that there were federal regulations governing the program, these words actually meant "not authorized by state and federal food stamp law."[194] Thus, the court felt that constitutional notice problems were alleviated when this particular section was read in conjunction with the rest of the chapter. However, in *Locklin v. Pridgeon*,[195] the supreme court had struck down a statute containing the exact same language. Former *Florida Statutes* section 839.22 made it unlawful for any officer of the federal government to "commit any act under color of authority . . . [of their position] when such act is not authorized by law . . . ."[196] This statute was considered unconstitutionally vague, because it required every governmental employee to determine what acts where authorized by law and what acts were not authorized by law.[197] Failure to do so could result in a criminal offense. The "law" in *Locklin* was not limited to an narrow area, like the "law" in *Rodriguez*. Thus, people could mean any and all laws, civil or criminal. Even if a public officer violated a law in good faith, he could be prosecuted. Thus, one could never know how to govern their conduct in order to avoid violating the section without having all encompassing knowledge of all the laws—something which was definitely an impossible task.[198]

The Supreme Court of Florida found that the statute in *Cuda* was more like the unconstitutional one in *Locklin* than the one upheld in *Rodriguez*.[199] The *Rodriguez* case's statute had the federal laws as a back drop, thus providing the needed notice to make the statute constitutional. However, in *Locklin*, section 415.111(5) had no specific laws as a back drop. Instead, the statute criminalized any "illegal" act in using or

193. *Rodriguez* dealt with a challenge to *Florida Statutes* section 409.325(2)(a) (Supp. 1976). *Id.* at 158. Present *Florida Statutes* section 409.325(2)(a) still contains this challenged statutory language. FLA. STAT. § 409.325(2)(a) (1994).

194. *Rodriguez*, 365 So. 2d at 159.

195. 30 So. 2d 102 (1947).

196. *Id.* at 103 (citing FLA. STAT. § 839.22 (1945)).

197. *Id.*

198. The court did not specifically note this as the reason for finding the section constitutionally infirm, but its opinion implies this was so. There also appears to be another vagueness problem with the section. Did "law" mean Florida law, federal law, or any state's law? The section did not make this clear.

199. *Cuda*, 639 So. 2d at 23-24.

managing the funds of a criminal person. This statute was thus found too vague to give sufficient notice of the prohibited conduct involved.[200]

The Supreme Court of Florida did suggest methods for drafting a similar statute so that challenges to its constitutionality could be avoided. First, the court noted that there were at least seven other states with similar statutes to those in Florida.[201] However, it also noted that none of the statutes which were worded similar to Florida's statute inflicted criminal sanctions.[202] One state, Illinois, did impose criminal sanctions for financial exploitation of the elderly.[203] However, the Illinois statute was quite specific in defining the conduct prohibited. This statute made it a crime when a person "knowingly and by deception or intimidation obtains control over the elderly or disabled person's property with the intent to permanently deprive . . . [that person] of his property."[204] The statute specifically defined what constituted "intimidation" and "deception."[205] Additionally, the Illinois statute provided that someone who made a good faith effort to manage an elderly or disabled person's property could not be subject to criminal liability under this law.[206] The Supreme Court of Florida noted that in contrast to the Illinois law, Florida's law "contains no clear explanation of the proscribed conduct, no explicit definition of terms, nor any good faith defense."[207] Thus, this statute was unconstitutionally vague.[208]

Perhaps the most interesting aspect of this discussion was the supreme court's criticism of section 415.111(5) for its failure to provide a good faith defense. The court seems to be clearly suggesting that any such law, to be constitutional, must contain a specific, instead of a general, intent requirement.[209] Evidently, without such a requirement, the Supreme Court of Florida feared that such a criminal provision would be a strict liability law. Thus, a guardian who failed to manage the funds of a disabled person in a

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200. *Id.* at 24.

201. *Id.*

202. *Id.*

203. *See id.* (citing ILL. ANN. STAT. ch. 720, (Smith-Hurd 1993)).

204. *Cuda*, 639 So. 2d at 24 n.3 (citing ILL. ANN. STAT. ch. 720, para. 5/16-1.3 (Smith-Hurd 1993)).

205. *Id.* at 24.

206. *Id.* at 24-25.

207. *Id.* at 25.

208. *Id.*

209. *Cuda*, 639 So. 2d at 23. The Illinois law not only contained a statutory "good faith" exemption, but it also was clearly a specific intent law as it required "the intent to permanently deprive." *Id.* at 24 n.3.

manner required by law could find him or herself criminally liable even though there was no intent to injure the ward in any manner. Clearly, the intent of this law seems to protect elderly or disabled persons from intentional financial abuse by their guardians or other individuals in charge of them or their property. One of the statute's obvious goals is to protect elderly or disabled persons against the theft or deprivation of their property. Thus, in a way, former section 415.111(5) could be viewed as a special kind of theft statute. The Supreme Court of the United States has previously held that statutes comparable to common law theft crimes must contain a specific intent requirement in order to be constitutional.[210] Although the Supreme Court of Florida does not say this explicitly in *Cuda*, any legislative attempt to rewrite section 415.111(5) would be wise to contain such a requirement.

During the 1995 legislative session, the Florida Legislature attempted to deal with the effects of this decision. The legislature first repealed the language in section 415.111(5) which was found unconstitutional in *Cuda*.[211] The legislature then created a new chapter, chapter 825, to address the problems found in *Cuda*.[212] New *Florida Statutes* section 825.103(1)(a) makes it a crime for anyone who "[s]tands in a position of trust and confidence, or has a business relationship, with the elderly person or disabled adult and knowingly"[213] uses deception or intimidation to obtain that person's property for the temporary or permanent use of the offending person or a third person. The offense can be either a first, second or third-degree felony depending upon the value of the property involved.[214] The language of section 825.103(1)(a) is very similar to that of the Illinois statute noted with approval in *Cuda*. While the Illinois statute only dealt with permanent deprivation, Florida criminal law recognizes that even a knowing temporary deprivation of another's property for the benefit of someone other the owner is theft. Additionally, section 825.101 specifically defines "deception," "intimidation," "position of trust and

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210. *See generally* Morissette v. United States, 342 U.S. 246 (1952).

211. Ch. 95-140, §4, 1995 Fla. Sess. Law Serv. 104, 105 (West).

212. Ch. 95-158, §§ 2-8, 1995 Fla. Sess. Law Serv. 1263, 1264 (West) (to be codified at FLA. STAT. § 825.101-825.106, 39.0001).

213. *Id.* § 4, 1995 Fla. Sess. Law Serv. at 1266 (to codified at FLA. STAT. § 825.103(1)(a)).

214. *Id.* (to be codified at FLA. STAT. § 825.103(2)(a)-(c)). If the property is valued at $100,000 or more, the crime is a first-degree felony. *Id.* (to be codified at FLA. STAT. § 825.103(2)(a)). If the property is less than $100,000 but at least $20,000, the crime is a second-degree felony. *Id.* (to be codified at FLA. STAT. § 825.103(2)(b)). If the property's value is less than $20,000, the offense is a third-degree felony. Ch. 95-158, § 4, 1995 Fla. Sess. Law Serv. at 1266 (to be codified at FLA. STAT. § 825.103(2)(c)).

confidence," and "business relationship," thus following the Illinois example. Finally, *Florida Statutes* section 825.105, addresses the last problem noted in *Cuda*. Good faith efforts which do not result in effective assistance or management of property are not subject to criminal sanctions. In short, chapter 825 clearly seems to have been drafted and passed with the *Cuda* decision in mind. Indeed, given the supreme court's decision in *Cuda*, vagueness challenges to *Florida Statutes* section 825.103(1)(a) should be swiftly and correctly rejected.[215]

B. *Right to Privacy Challenges to Crimes Involving Sexual Relations with Children*

As previously noted, the Supreme Court of Florida decided two cases concerning the constitutionality of statutes involving sexual relations with children. Surprisingly, the court arrived at diametrically opposed results. The first case, *Jones v. State*,[216] involved the constitutionality of *Florida Statutes* section 800.04, concerning a lewd, lascivious or indecent assault or act upon or in the presence of a child.[217] The second case, *B.B. v. State*,[218] involved the constitutionality of section 794.05, concerning carnal intercourse with an unmarried person under eighteen years,[219] when applied to consensual sexual relations between minors. Both constitutional challenges in these cases were predicated upon the right to privacy amendment of the *Florida Constitution*.[220] Both defendants argued that the supreme court's decision in *re T.W.*,[221] which struck down statutory barriers to a minor's right to have an abortion without parental approval, mandated that both section 800.04 and section 794.05 be declared unconsti-

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215. *Florida Statutes* section 825.103(1) actually establishes two offenses against elderly or disabled adults. *Id.* (to be codified at FLA. STAT. § 825.103(1)(a), (b)). Section 825.103(1)(b) makes it a crime to obtain the property of an elderly or disabled person for someone else's benefit, when the person obtaining "[k]nows or should know" that the victim "lacks the capacity to consent." *Id.* (to be codified at FLA. STAT. § 825.103(1)(b)). "Lacks capacity to consent" is specifically defined in section 825.101(9). *Id.* § 2, 1995 Fla. Sess. Law Serv. at 1264 (to be codified at FLA. STAT. § 825.101(9)). This offense is a felony whose degree depends on the value of the property involved. Although this offense was not discussed in *Cuda*, section 825.103(1)(b) also appears to have been drafted with the *Cuda* decision in mind. Vagueness challenges to its constitutionality should also be easily rejected.

216. 640 So. 2d 1084 (Fla. 1994).

217. *Id.* at 1085 (citing FLA. STAT. § 800.04 (1991)).

218. 659 So. 2d 256 (Fla. 1995).

219. *Id.* (citing FLA. STAT. § 794.05 (1991)).

220. FLA. CONST. art. I, § 23.

221. 551 So. 2d 1186, 1196 (Fla. 1989).

tutional. In *T.W.*, the challenged statutory provision allowed the minor to consent, without parental approval, to any medical procedure except an abortion.[222] In declaring this statutory prohibition unconstitutional, the Supreme Court of Florida recognized that the Florida constitutional right to privacy is extremely broad and applies to both adults and minors.[223] Since minors enjoyed the constitutional right to privacy as well as adults, the court in *T.W.* considered whether the State had an overriding state interest that could restrict the minor's right to an abortion.[224] Finding no such compelling interest, the court found that the statute in question there unconstitutional.[225]

1. Lewd, Lascivious, or Indecent Assault Upon a Child

Florida Statutes section 800.04 criminalizes various sexual acts with children under sixteen. In *Jones v. State*, the defendant was charged under section 800.04(2) for having sexual relations with a minor under sixteen.[226] Jones argued that based upon the expansive right to privacy for minors announced in *T.W.*, that portion of section 800.04 providing that consent is not a defense to sexual relations with minors must also be considered unconstitutional.[227] Jones admitted to having sexual relations with a person under sixteen but was denied at trial the right to raise this person's consent as a defense. The district court of appeal framed the issue as "whether a minor under sixteen years of age has a right, protected by Florida's constitutional right of privacy, to engage in consensual sex."[228] If so, this right could not be denied by prosecuting a person with whom the minor had sexual relations, thus mandating that the particular language of section 800.04 be considered unconstitutional. Jones argued that in this case, the minors had not been harmed and that they had wanted to engage in personal sexual relations. Therefore, the minors did not want any of the

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222. *Id.* at 1189-90.

223. *Id.* at 1193.

224. *Id.*

225. *Id.* at 1194.

226. *See* Jones v. State, 619 So. 2d 418, 420 (Fla. 5th Dist. Ct. App.), *review granted*, 629 So. 2d 133 (Fla.), *rev'd sub nom.* Rodriguez v. State, 629 So. 2d 134 (Fla. 1993), *and aff'd*, Jones v. State, 640 So. 2d 1084 (Fla. 1994).

227. *Id.* at 419. The specific language Jones challenged was that "[n]either the victim's lack of chastity nor the victim's consent is a defense to the crime proscribed by this section." FLA. STAT. § 800.04 (1991).

228. *Jones*, 619 So. 2d at 420.

protection offered by the statute. The district court found this irrelevant and upheld the section's constitutionality.[229]

The Supreme Court of Florida found that the purpose of the law was to protect minors from "sexual exploitation, physical harm, and sometimes psychological damage, [stemming from sexual relations], regardless of the child's maturity or lack of chastity."[230] The court noted an important distinction between the statute involved in *T.W.* and the section involved here. In *T.W.*, the pregnant minor could consent to any number of surgical medical procedures except an abortion. Thus, she had been statutorily granted the right to consent with respect to certain procedures and was only denied the right to have an abortion. As the supreme court noted, "[*In re*] *T.W.* did not transform a minor into an adult for all purposes."[231] The court noted that the right of privacy granted to minors did not vitiate all legislative authority to protect minors from the conduct of others, especially when the conduct involves an adult, as opposed to a minor.[232] As a result, the court found a compelling state interest in protecting children from sexual activity and exploitation before they physically and mentally reach maturity.[233] Therefore, section 800.04 was declared constitutional.[234]

2. Carnal Intercourse with Unmarried Person Under Eighteen Years

Following the decision in *Jones*, the Supreme Court of Florida in *B.B. v. State*[235] considered a similar constitutional attack on section 794.05. This attack was once again predicated on the *In re T.W.* decision and the *Florida Constitution*'s privacy amendment. Factually, there appears to be one significant difference between the two cases. In *Jones*, the consensual sexual relations occurred between an adult and a minor under sixteen years of age. In *B.B.*, the consensual sexual relations occurred between two sixteen-year-olds. Also, unlike section 800.04 in *Jones*, section 794.05 protects only previously chaste minors under eighteen, and not all minors in general. Thus, the supreme court found that the issues in the two cases were very different. The court phrased the issue as "whether a minor who

229. *Id.* at 422.
230. Jones v. State, 640 So. 2d 1084, 1086 (Fla. 1994).
231. *Id.* at 1087.
232. *Id.*
233. *Id.*
234. *Id.*
235. *B.B.*, 659 So. 2d at 258-59.

engages in 'unlawful' carnal intercourse with an unmarried minor of previous chaste character can be adjudicated delinquent of a felony of the second degree in light of the minor's right to privacy guaranteed by the *Florida Constitution*."[236]

As in *Jones*, the court found that the defendant here had a legitimate expectation of privacy in carnal intercourse.[237] Thus, the question again was whether there could be a compelling state interest restricting this expectation. The court, as in *Jones*, recognized that a minor's right to engage in sexual intercourse is not absolute and can be restricted.[238] However, unlike the decision in *Jones*, the court found that, as applied to the facts of this case, the state had failed to carry its burden to adjudicate the minor delinquent as a second-degree felon.[239] The court found that a much different situation exists when there are minor/minor sexual relations as opposed to adult/minor sexual relations.[240] In the adult/minor situation, as in *Jones*, prevention of the adult's sexual exploitation of the minor is the compelling reason for the statute's constitutionality.[241] However, in the minor/minor situation, the State has an interest in protecting both minors from sexual activity for reasons of health and quality of life.[242] Thus, since the interest of both minors were involved in *B.B.*, prosecuting one of them was not considered the least intrusive means of furthering the State's compelling interest.[243]

The *B.B.* court also criticized the statutory language of *Florida Statutes* section 794.05. The court found that this section only applied to previously chaste minors, and not all minors.[244] Thus, the purpose of the statute could not be to protect all minors from sexual activities, since it only applied to those who had not previously engaged in sexual activities. Instead, the court found that the statute, as applied here, was being used "as a weapon to adjudicate a minor delinquent."[245] Thus, the statute was declared unconstitutional.[246]

236. *Id.* at 258.
237. *Id.*
238. *Id.* at 259.
239. *Id.*
240. *B.B.*, 659 So. 2d at 259.
241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.* at 259-60.
245. *B.B.*, 659 So. 2d at 260.
246. *Id.*

Despite some misleading newspaper headlines,[247] the decision in *B.B.* does not legitimize all consensual sexual relations between minors. As Justice Kogan pointed out in his concurring opinion, section 800.04 might serve, in certain situations, to provide a vehicle for prosecution.[248] Under that statute neither the victim's lack of chastity nor the victim's consent is a defense. Admittedly, *Jones* did not consider a minor/minor sexual relation situation. However, the court could possibly find that sexual relations between a sixteen-year-old or a seventeen-year-old minor and one under the age of sixteen are much different than the situation confronting it in *B.B.* In the former situations, the older minor clearly could be statutorily presumed as being the more mature party, thus meriting prosecution despite the consent of his/her sexual partner. At any rate, the supreme court did not rule on this particular question in *B.B.*, so it remains to be settled in future cases.

C. *Improper Delegation of Powers*

During this survey period, the Supreme Court of Florida had a rare opportunity to discuss the delegation of powers doctrine in the context of a criminal case. The delegation doctrine is based upon the principle of separation of powers. Under this principle, one branch of government cannot exercise the powers of another branch. In *B.H. v. State*,[249] the Supreme Court of Florida, in an interesting discussion of apparent first impression, addressed the issue of how extensive a role an administrative agency may take in defining the elements of a crime.

Former *Florida Statutes* section 39.061, which is part of the Florida Juvenile Justice Reform Act of 1990,[250] made it a third-degree felony to "escape from any secure detention or any residential commitment facility of restrictiveness level VI or above. . . ."[251] Former *Florida Statutes* section 39.01(61)[252] defined "restrictiveness level"[253] and required the state

247. *See* Mark Silva, *Sex Between Youths Ruled Legal*, MIAMI HERALD, June 30, 1995, at 5B.

248. *B.B.*, 659 So. 2d at 260 n.2 (Kogan, J., concurring).

249. 645 So. 2d 987 (Fla. 1994), *cert. denied*, 115 S. Ct. 2559 (1995).

250. *Id.* at 987 (citing FLA. STAT. § 39.0205 (Supp. 1990)).

251. FLA. STAT. § 39.061 (1991).

252. *Id.* at 989 (quoting FLA. STAT. § 39.01(61) (1991)). The definitions contained in *Florida Statutes* section 39.01 apply to chapter 39 as a whole.

253. "Restrictiveness level" was defined as: "[T]he identification of broad custody categories for committed children, including nonresidential, residential, and secure residential." *B.H.*, 645 So. 2d at 989 (quoting FLA. STAT. § 39.01(61) (Supp. 1990)).

Department of Health and Rehabilitative Services ("HRS") to establish various restrictiveness levels, as long as no more than eight such levels were established. Pursuant to this authority, the department had established four restrictiveness levels, numbered two, four, six, and eight. B.H. had pled nolo contendere, with leave to challenge the constitutionality of former section 39.061 on appeal, involving a charge of escaping in March, 1992 from a level six juvenile facility. The Fifth District Court of Appeal rejected the claim that this law represented an unconstitutional delegation of power.[254] The Supreme Court of Florida granted review due to the conflict between this and another district court of appeal decision.[255]

Before deciding this precise question, the supreme court reviewed what the delegation doctrine is based upon. Under the *Florida Constitution*, all political power belongs to the people,[256] and it is for them to say how these powers may be exercised. The court noted that Florida has established a three-part government based upon the separation of powers doctrine. Article II, section 3 of the *Florida Constitution* expressly divides the state government into three branches; legislative, executive, and the judicial.[257] This article and section expressly provide that "[n]o person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."[258] Thus, the *Florida Constitution* has textually adopted a strict separation of powers doctrine. If any state statute attempts to give to one branch power assigned to another branch by the *Florida Constitution*, then that statute represents an unconstitutional delegation of powers. Under the *Florida Constitution*,[259] the legislature has the power to pass laws and to declare what these laws are. Any delegation of this power violates the constitution. The supreme court found that this legislative power encompasses the ability to define criminal defenses. In the area of criminal law, the court noted that the concept of separation of powers in the non-delegation doctrine is also linked to the constitutional guarantee of due process. This due process guarantee is found in article I, section 9 of the constitution and requires that a criminal statute reasonably

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254. B.H. v. State, 622 So. 2d 615, 617 (Fla. 5th Dist. Ct. App. 1993), *rev'd*, 632 So. 2d 1025 (Fla.), *approved in part*, 645 So. 2d 987 (Fla. 1994), *and cert. denied*, 115 S. Ct. 2559 (1995).

255. D.P. v. State, 597 So. 2d 952 (Fla. 1st Dist. Ct. App. 1992).

256. FLA. CONST. art. I, § 1.

257. *Id.* art. II, § 3.

258. *Id.*

259. *Id.* art. III, § 1.

apprise citizens of the acts that it prohibits.[260] When the legislature by statute delegates to another branch of government the power to define what a criminal offense is, both the non-delegation and the due process doctrine are violated. Under these doctrines, the attempt to give an administrative agency the authority to define what is criminal would be clearly unconstitutional.

The Supreme Court of Florida in *B.H.* found that both the due process and the non-delegation doctrines were violated by former *Florida Statutes* section 39.061.[261] The statute declared that escape from a residential commitment facility of restrictiveness level six or above was a felony. However, the statute did not attempt to define what such residential commitment facilities were. Instead, the legislature gave to HRS the ability to define restrictiveness levels in terms of broad custody categories based on the needs of the children. The only limitation on this authority was that there could be no more than eight such restrictiveness levels. The court found that while this delegation may have created a minimum standard, it did not create a maximum standard beyond which HRS could not go.[262] While *B.H.* did not address the general issue of "how much of a role may administrative agencies take in defining the elements of crime,"[263] the supreme court did state that any delegations "must *expressly* articulate reasonably definite standards of implementation that do not merely grant open-ended authority, but that impose an actual limit—both minimum and maximum—on what the agency may do."[264] Here, former section 39.061 imposed a minimum limit but did not impose any maximum restriction on the ability of HRS to define restrictiveness levels. In essence, HRS was improperly delegated the ability to define an essential element of what constituted juvenile escape in Florida, thus causing that part of the statute to be unconstitutional.

Former *Florida Statutes* section 39.061 not only criminalized escape from a juvenile commitment facility, but it also made it a crime to escape from a secure detention facility. While there was no improper delegation of legislative authority as far as the definition of what constituted a secure detention facility the supreme court felt that it could not sever the unconsti-

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260. *Id.* art. I, § 9.

261. *B.H.*, 645 So. 2d at 993-94.

262. *Id.* at 994.

263. *Id.* at 990. The court did note that it believed that "[i]t clearly is impossible to adopt a single bright-line test to apply to all alleged violations of the nondelegation doctrine." *Id.* at 993.

264. *Id.* at 994.

tutional part of section 39.061 from the rest of the statute. If such a severance was performed, it would be a crime to escape from a pretrial secure detention facility, but not from a post-trial commitment facility. This situation created an absurd situation which the legislature could not have intended. Thus, the entire statute was found unconstitutional.[265]

Although the *B.H.* decision provides an instructive and interesting discussion of the delegation doctrine, as applied to the criminal law, its result is of little practical effect for two reasons.[266] First, the court's conclusion that former section 39.061 was unconstitutional did not help B.H. in any way. In addition, the supreme court in *B.H.* decided that declaring former section 39.061 unconstitutional did not automatically leave Florida without a statute governing an escape from a juvenile commitment facility. Instead, the court found that under the doctrine of statutory revival, former *Florida Statutes* section 39.112[267] was automatically revived. This section was the immediate past predecessor of the unconstitutional section 39.061 and was itself constitutional. Thus, Florida still had a juvenile escape law under which B.H. was found delinquent.[268] Second, and even more importantly, the Florida Legislature amended section 39.061 well before the supreme court decided this case.[269] Present section 39.061 makes it a crime to escape from either a secure detention facility or from any residential commitment facility defined in section 39.01(58).[270] These two definitions do not delegate to HRS or any other administrative agency the task of defining what constitutes such facilities. Instead, the two sections

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265. *B.H.*, 645 So. 2d at 994.

266. During this survey period, one district court of appeal did cite *B.H.* in its decision finding that the language in former *Florida Statutes* section 790.001(4) partially defining a "destructive device" for purposes of chapter 790 as including "any device declared a destructive device by the Bureau of Alcohol, Tobacco, and Firearms" was an improper delegation of authority to an administrative agency. State v. Mitchell, 652 So. 2d 473, 478 (Fla. 2d Dist. Ct. App. 1995) (quoting FLA. STAT. § 790.001(4) (1991)). However, the court found that this language could be severed from the rest of section 790.001(4). *Id.* When this was done, the remaining definitions in this part met constitutional standards and survived. *Id.* at 478-79.

267. FLA. STAT. § 39.112 (1989).

268. *See also* S.W.M. v. State, 647 So. 2d 313, 314 (Fla. 2d Dist. Ct. App. 1994) (upholding a conviction for escape from a halfway house in 1992). This case noted that *B.H.* had declared former *Florida Statutes* section 39.061 unconstitutional but also noted that *B.H.* had found the previous escape statute automatically by its decision. *Id.* Thus, the delinquency adjudication in *S.W.M.* was affirmed. *Id.*

269. *See* 1992 Fla. Laws ch. 92-287.

270. Ch. 95-152, § 12, 1995 Fla. Sess. Law Serv. 1229, 1243 (West) (amending FLA. STAT. § 39.061).

provide criteria for establishing which children should be placed in these facilities and examples of what kinds of programs fall within the parameters of HRS authority. Thus, the unconstitutional delegation problems found in *B.H.* do not exist under the present version of section 39.061.

IV. CONCLUSION

The Supreme Court of Florida yearly decides a number of important cases in the field of substantive criminal law. Certainly this statement was true for the period covered by this survey. The majority of the court's opinions settled more issues than they raised. Unfortunately, even after *Young*[271] and *Bias*,[272] there still remain serious issues to explore regarding both felony petit theft charges, and the voluntary intoxication and insanity defenses.

In the decisions addressing constitutional challenges to some of Florida's substantive criminal laws, the supreme court's detailed opinions in both *Cuda*,[273] regarding exploitation of the elderly and disabled, and in *B.H.*,[274] regarding escape from juvenile commitment facilities, provided extensive guidance on how to correct the constitutional deficiencies found there. Thus, the Florida Legislature was able to respond quickly and effectively to pass new laws in these areas which should withstand future constitutional challenges.

271. 641 So. 2d at 401.
272. 653 So. 2d at 380.
273. 639 So. 2d at 22.
274. 645 So. 2d at 987.