Criminal Law: 1992 Survey of Florida Law

Hugh L. Koerner

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Abstract

One decade ago, the Florida Legislature created the Sentencing Commission, and charged it with the responsibility for developing a statewide system of sentencing guidelines.

KEYWORDS: burglary, religious, stolen property
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* J.D., Vanderbilt University, 1987; B.A., Lehigh University, 1984; the author is an associate for the law firm of Johnson, Anselmo, Murdoch & George, P.A., Fort Lauderdale, Florida, and practices in the areas of criminal law and workers' compensation. The author gratefully acknowledges the research and assistance of Deborah L. Stern of the Nova Law Review, whose enthusiasm for the law, and pride in her work, were both appreciated.

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I. INTRODUCTION ....................................... 253

One decade ago, the Florida Legislature created the Sentencing Commission, and charged it with the responsibility for developing a statewide system of sentencing guidelines. The Sentencing Commission was directed to develop, implement, and revise a uniform sentencing policy in cooperation with the Supreme Court. Recently, the Florida Supreme Court referred to this supposedly uniform system as "the prescribed network of recommended and permitted ranges." This survey explores the Florida Supreme Court's continuing efforts to sculpt uniform, yet response, sentencing policies. The survey also examines recent statutory changes, and significant developments in criminal caselaw.

1. See Ch. 82-145, § 1, Laws of Fla.
4. The survey continues to focus primarily on the decisions of the Florida Supreme Court.
5. Like the 1991 survey, topics relating to the death penalty are not included. As the United States Supreme Court observed in the context of the eighth amendment, there exists a "qualitative difference between death and all other penalties." Harmelin v. Michigan, 111 S. Ct. 680, 683 (1992). Put simply, death is different, and issues pertaining to the death penalty merit independent consideration.
I. INTRODUCTION

One decade ago, the Florida Legislature created the Sentencing Commission, and charged it with the responsibility for developing a statewide system of sentencing guidelines. The Sentencing Commission was directed "to develop, implement, and revise a uniform sentencing policy in cooperation with the Supreme Court." Recently, the Florida Supreme Court referred to this supposedly uniform system as "the prescribed network of recommended and permitted ranges." This survey explores the Florida Supreme Court's continuing efforts to sculpt uniform, yet response, sentencing policies. The survey also examines recent statutory changes, and significant developments in criminal caselaw.

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II. SUBSTANTIVE CRIMINAL OFFENSES

A. Assault or Battery upon an Elderly Person

1. Legislative Enactments

Effective October 1, 1992, the Florida Legislature amended section 784.08(2), Florida Statutes, which enhances the penalty for persons convicted of assault or battery against victims age sixty-five years or older. The amended statute provides for enhancement of the degree of offense regardless of whether the offender "knows or has reason to know the age of the victim." To effectuate this change, the word "knowingly" was stricken from the language of the former statute. For offenses occurring on or after October 1, 1992, the amendment overturns State v. Nelson, in which the Fourth District Court of Appeal affirmed the dismissal of an information which failed to state that the offense was "knowingly" committed against a person age sixty-five years or older.

6. 1992 Fla. Laws ch. 92-50, § 1 (effective Oct. 1, 1992), amending section 784.08(2) of the Florida Statutes, provides:

Whenever a person is charged with committing an assault or aggravated assault or a battery or aggravated battery upon a person 65 years of age or older, regardless of whether he knows or has reason to know the age of the victim, the offense for which he is charged shall be reclassified as follows:
(a) In the case of aggravated battery, from a felony of the second degree to a felony of the first degree.
(b) In the case of aggravated assault, from a felony of the third degree to a felony of the second degree.
(c) In the case of battery, from a misdemeanor of the first degree to a felony of the third degree.
(d) In the case of assault, from a misdemeanor of the second degree to a misdemeanor of the first degree.

7. Id.

8. Section 784.08(2) of the Florida Statutes provided in pertinent part:
Whenever a person is charged with knowingly committing an assault or aggravated assault or a battery or aggravated battery upon a person 65 years of age or older, the offense for which the person is charged shall be reclassified.

FLA. STAT. § 784.08(2) (1989).

9. The amendments to section 784.08(2), Florida Statutes, are obviously substantive, and may be applied only prospectively. Weaver v. Graham, 450 U.S. 24 (1981).


11. Id. at 972.

12. Section 810.02(1) of the Florida Statutes provides: "Burglary" means entering or remaining in a structure or a conveyance with the intent to commit an offense therein . . . .

13. Corey Stephens was convicted of burglary of an automobile after he was arrested inside a stolen car following a high-speed chase. On appeal, the district court concluded that no burglary occurred, because the criminal intent relied upon by the State to prove the offense of burglary was the intent to steal the motor vehicle itself.

14. The Florida Supreme Court disagreed.

15. In State v. Stephens, the Florida Supreme Court held that the element of "intent to commit an offense therein" is satisfied "the moment the defendant enters or remains within the vehicle with the requisite intent" to commit any criminal offense, including the theft of that motor vehicle. If an offender steals the motor vehicle after entry, grand theft may also be charged.
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(a) In the case of aggravated battery, from a felony of the second degree to a felony of the first degree.

(b) In the case of aggravated assault, from a felony of the third degree to a felony of the second degree.

(c) In the case of battery, from a misdemeanor of the first degree to a felony of the third degree.

(d) In the case of assault, from a misdemeanor of the second degree to a misdemeanor of the first degree.

7. Id.

8. Section 784.08(2) of the Florida Statutes provided in pertinent part:

Whenever a person is charged with knowingly committing an assault or aggravated assault or a battery or aggravated battery upon a person 65 years of age or older, the offense for which the person is charged shall be reclassified.

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9. The amendments to section 784.08(2), Florida Statutes, are obviously substantive, and may be applied only prospectively. Weaver v. Graham, 450 U.S. 24 (1981).


11. Id. at 972.

B. Burglary

1. Burglary of a Conveyance

Section 810.02(1) of the Florida Statutes defines the offense of burglary as "entering or remaining in a structure or conveyance with the intent to commit an offense therein . . . ." Corey Stephens was convicted of burglary of an automobile after he was arrested inside a stolen car following a high speed chase. On appeal, the district court concluded that no burglary occurred, because the criminal intent relied upon by the State to prove the offense of burglary was the intent to steal the motor vehicle itself. The district court reasoned that grand theft of a motor vehicle is not "an offense committed within the vehicle." The Florida Supreme Court disagreed.

In State v. Stephens, the Florida Supreme Court held that the element of "intent to commit an offense therein" is satisfied "the moment the defendant enters or remains within the vehicle with the requisite intent" to commit any criminal offense, including the theft of that motor vehicle. If an offender steals the motor vehicle after entry, grand theft may also be charged.

12. Section 810.02(1) of the Florida Statutes provides: "Burglary" means entering or remaining in a structure or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain. FLA. STAT. § 810.02(1) (1987).


14. Id. at 1074-75.


16. Id. The Florida Supreme Court was unimpressed with the reasoning it ascribed to the district court's decision, concluding:

[T]he district court found that the statute requires an intent to commit a crime that can be completed only within the physical confines of the vehicle itself . . . . In common English usage, "therein" means "at that place."

The use of the word "therein" plainly indicates that the crime of burglary can exist if the defendant formed an intent to commit a crime "in that place." There is no requirement that the crime must be one that can be completed solely within the fixed limits of that particular place, only that the crime is intended to be committed there. This obviously can include an intent to commit car theft, because such a crime can be committed "in that place." . . . It is irrelevant that the criminal act involved events beyond the interior of the vehicle, e.g., the act of stealing the car itself and driving away.

17. The supreme court opined that:

If the defendant then takes the additional step of starting the vehicle and driving...
2. Possession of Burglary Tools

In *Green v. State*, the Florida Supreme Court found that items of personal apparel do not fall within the definition of a burglary tool, machine, or implement for purposes of section 810.06 of the Florida Statutes. The defendant, Anthony Green, was apprehended a short distance from the scene of a burglary, while wearing garden gloves. At trial, Green was convicted of burglary, as well as possession of burglary tools, based upon his possession of the garden gloves. In reversing the defendant's conviction for possession of burglary tools, the Florida Supreme Court concluded that "items of personal apparel are not objects which actually facilitate the breaking and entering of a dwelling," and therefore, do not come within the plain meaning of the term "tool." 20

C. Child Abuse

1. Aggravated Child Abuse

In *Nicholson v. State*, the Florida Supreme Court confronted the issue of whether aggravated child abuse by willful torture, pursuant to section 827.03(1)(b) of the Florida Statutes, includes acts of omission and neglect. The facts in *Nicholson* concerned the death of four-year-old Kimberly McZinc, who died from starvation. Shortly after Kimberly's birth, her mother, Darlene Jackson, became increasingly interested in religion. Because Jackson believed that Kimberly was possessed by evil spirits, Jackson sought the advice of the defendant, Mary Nicholson, who "interpreted dreams and gave prophecies." These prophecies discerned that "Kimberly was oppressed by the evil spirit of gluttony." Nicholson eventually "assumed full control of Kimberly's diet." Several months later, Kimberly died.

On appeal following her conviction for the offenses of first-degree felony murder and aggravated child abuse, Nicholson argued that only "acts of omission done with specific intent are actionable under section 827.03." The Florida Supreme Court disagreed, holding that "torture" for purposes of section 827.03(1)(b) of the Florida Statutes, "includes not only willful acts of commission, but also willful acts of omission and neglect that cause unnecessary or unjustifiable pain or suffering to a child." To the extent that a contrary result is suggested by the plain text of the statute, Nicholson's argument fails. 23

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22. Section 827.03(1)(b) of the Florida Statutes defines the term "torture" as constituting "every act, omission, or neglect whereby unnecessary or unjustifiable pain or suffering is caused." Fla. Stat. § 827.03(1) (1987). Section 827.03 of the Florida Statutes provides in pertinent part: "(1) Aggravated child abuse is defined as one or more acts committed by a person who: . . . (b) Willfully tortures a child; . . . " Id. § 827.03(1)(b).
23. 17 Fla. L. Weekly at S325.
24. Id.
25. Id.
26. Id.
27. Id. at 326.
28. The supreme court distinguished cases concerning negligent failures to promptly seek medical care for injured children, see Jakubczak v. State, 425 So. 2d 187 (Fla. 3d Dist. Ct. App. 1983); State v. Harris, 537 So. 2d 1128 (Fla. 2d Dist. Ct. App. 1989), insofar as such omissions were "committed without the requisite specific intent." Nicholson, 17 Fla. L. Weekly at S326.
30. The supreme court had little difficulty concluding that the requisite "willful intent" was present in Kimberly's death. The supreme court described Kimberly's death as "systematic," observing that Kimberly's health deteriorated over a prolonged period of time, and that "the child's deterioration was brought to Nicholson's attention." Id.
31. The supreme court was further persuaded that prosecution under section 827.04 of the Florida Statutes was not appropriate, even though that statute specifically addresses food deprivation. The supreme court agreed with the district court's determination that Kimberly's death, "involved an aggravated form of food deprivation carried out systematically [accompanied with a regimen of forced exercise and beatings] with intent to willfully torture and maliciously punish the child." Id. (quoting Nicholson v. State, 579 So. 2d 816 (Fla. 1st Dist. Ct. App. 1991)).
2. Possession of Burglary Tools

In Green v. State,18 the Florida Supreme Court found that items of personal apparel do not fall within the definition of a burglary "tool," machine, or implement for purposes of section 810.06 of the Florida Statutes.19 The defendant, Anthony Green, was apprehended a short distance from the scene of a burglary, while wearing garden gloves. At trial, Green was convicted of burglary, as well as possession of burglary tools, based upon his possession of the garden gloves. In reversing the defendant's conviction for possession of burglary tools, the Florida Supreme Court concluded that "items of personal apparel are not objects which actually facilitate the breaking and entering of a dwelling," and therefore, do not come within the plain meaning of the term "tool."20

C. Child Abuse

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away with it the separate crime of auto theft then will be complete. In sum, two separate evils involving two distinct temporal events are involved in the typical auto theft. Nothing in our law prohibits the charging of both offenses merely because both often occur within a single transaction.

Id. at 381.
19. Section 810.06 of the Florida Statutes provides:

Whoever has in his possession any tool, machine, or implement with intent to use the same, or allow the same to be used, to commit any burglary or trespass shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

FLA. STAT. § 810.06 (1989).
20. Green, 17 Fla. L. Weekly at S567. The supreme court accepted the dictionary definition of the word "tool." The dictionary defines "tool" as "something that serves as a means to an end: an instrument by which something is effected or accomplished. "Tool" is also defined as "an implement or object used in performing an operation or carrying on work of any kind." Id. (citation omitted). The Green court concluded that the defendant's garden gloves constituted items of personal apparel. However, the supreme court appeared to leave open the possibility that other types of gloves might yield a contrary result, concluding only that "items of personal apparel, such as common gloves, are not included under the terms "tool, machine, or implement" as used in Section 810.06." Id. (emphasis added).
language of section 827.03 of the Florida Statutes, which defines aggravated child abuse in terms of "one or more acts," the Nicholson court concluded that "it is clear that in the criminal context an omission or failure to act may constitute an act . . . .

2. The Religious Accommodation Provision of Section 415.503(7)(f)

Section 415.503 of the Florida Statutes requires financially able parents to provide adequate health care for their children. However, section


Section 827.04 of the Florida Statutes provides in pertinent part:

(1) Whoever, willfully, or by culpable negligence, deprives a child of, or allows a child to be deprived of, necessary food, clothing, shelter, or medical treatment, or who, knowingly or by culpable negligence, permits physical or mental injury to the child, and in so doing causes great bodily harm, permanent disability, or permanent disfigurement to such child, shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(2) Whoever, willfully, or by culpable negligence, deprives a child of, or allows a child to be deprived of, necessary food, clothing, shelter, or medical treatment, or who, knowingly or by culpable negligence, permits physical or mental injury to the child, shall be guilty of a misdemeanor of the first degree.

FLA. STAT. §§ 827.04(1), (2) (1987).

30. See supra note 24.


32. Florida Statute § 415.503 provides in part:

As used in ss. 415.502-415.514:

(1) "Abused or neglected child" means a child whose physical or mental health or welfare is harmed, or threatened with harm, by the acts or omissions of the parent or other person responsible for the child's welfare or, for purposes of reporting requirements, by any person.

(9) "Harm" to a child's health or welfare can occur when the parent or other person responsible for the child's welfare:

(f) Fails to supply the child with adequate food, clothing, shelter, or health care, although financially able to do so or although offered financial or other means to do so; however, a parent or other person responsible for the child's welfare legitimately practicing his religious beliefs, who by reason thereof does not provide specified medical treatment for a child, may not be considered abusive or neglectful for that reason alone, but such an exception does not:

1. Eliminate the requirement that such a case be reported to the

415.503(7)(f) includes a "religious accommodation provision." In essence, this "religious accommodation provision" allows a parent to withhold traditional medical treatment from a child where that decision is based upon the parent "legitimately practicing his or her religious beliefs." In Hermanson v. State, William Hermanson, a bank vice president, and his wife, Christine Hermanson, the director of a fine arts academy, were convicted of murder in the third degree based upon the death of their seven-year-old daughter, Amy Hermanson, from child abuse. The cause

department;

2. Prevent the department from investigating such a case; or

3. Preclude a court from ordering, when the health of the child requires it, the provision of medical services by a physician, as defined herein, or treatment by a duly accredited practitioner who relies solely on spiritual means for healing in accordance with the tenets and practices of a well-recognized church or religious organization . . . .


33. See id. § 415.503(7)(f).

34. Id.

35. 604 So. 2d 775 (Fla. 1992).

36. Section 782.04(4) of the Florida Statutes defines third degree murder and provides in pertinent part that:

(4) The unlawful killing of a human being, when perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than any:

(a) Trafficking offense prohibited by Section 893.135(1),

(b) Arson,

(c) Sexual battery,

(d) Robbery,

(e) Burglary,

(f) Kidnapping,

(g) Escape,

(h) Aggravated child abuse,

(i) Aircraft piracy,

(j) Unlawful throwing, placing, or discharging of a destructive device or bomb, or

(k) Unlawful distribution of opium or any synthetic or natural salt, compound derivative, or preparation of opium by a person 18 years of age or older, when such drug is proven to be the proximate cause of death of the user, who in the third degree and constitutes a felony of the second degree . . . .


37. Hermanson, 604 So. 2d at 776. Florida Statute § 827.04 provides in pertinent part:

(1) Whoever, willfully, or by culpable negligence, deprives a child of, or allows a child to be deprived of, necessary food, clothing, shelter, or medical
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In Hermanson v. State, William Hermanson, a bank vice president, and his wife, Christine Hermanson, the director of a fine arts academy, were convicted of murder in the third degree based upon the death of their seven year-old daughter, Amy Hermanson, from child abuse. The cause
practice converts into criminal conduct.\textsuperscript{44}

D. Controlled Substances

1. Delivery of Controlled Substances to a Minor

In Johnson v. State,\textsuperscript{45} Jennifer Johnson was convicted of violating the provisions of section 893.13(1)(c)1 of the Florida Statutes, which makes the delivery of a controlled substance to a person under age eighteen years-old a first degree felony.\textsuperscript{46} Johnson, who suffered from crack cocaine dependency, was twice convicted of violations of section 893.13(1)(c)1. The State's prosecution was based on the theory that cocaine actually passed between Johnson and her newborns between the time of their birth and the severance of the umbilical cord.\textsuperscript{47} Therefore, Johnson delivered a controlled substance to a person under age eighteen years-old in the brief moments after the birth of her children, but before the umbilical cord was cut.

In Johnson,\textsuperscript{48} the Florida Supreme Court held that section 893.13(1)-(c) of the Florida Statutes was not intended to sanction the "delivery" of a controlled substance, or its derivative, from a mother to her newborn child.\textsuperscript{49} The Johnson court further concluded that insufficient evidence existed to support the State's theory that a controlled substance, or its derivative, passed from Johnson to her newborn children, prior to severance of the umbilical cord, even though Johnson admitted to cocaine use the day or night before each birth.

The Johnson court also rejected the State's theory as contrary to legislative intent.\textsuperscript{50} In its decision, the Florida Supreme Court cited a failed effort to enact legislation which some legislators warned "might...
of Amy’s death was untreated juvenile diabetes. Both the Hermanns are Christian Scientists. Although conventional medical care could have prevented Amy’s death, she was instead treated within the tenets of the Christian Science Church, which practices spiritual healing.

The trial court record established that the Hermanns first became aware of the possibility that Amy was ill approximately September 22, 1986, a little over a week before Amy’s death. From September 25, 1986, through September 29, 1986, the Hermanns left town to participate in an annual conference on Christian Science healing. During that time, Amy remained at home, under the supervision of a member of the Hermanns’ church. Amy died approximately thirty-six hours after the Hermanns returned from the out-of-town conference, on September 30, 1986.

In Hermann v. State, the Florida Supreme Court held that when considered together, section 827.04(1) and 415.503(7)(f) "are ambiguous and result in a denial of due process because the[y] . . . fail to give parents notice of the point at which their reliance on spiritual treatment loses statutory approval and becomes culpably negligent." The Florida Supreme Court suggested that if the legislature desires to protect children, while still providing for a religious accommodation provision, any new legislation must clearly delineate the point at which legitimate religious treatment, or who, knowingly or by culpable negligence, permits physical or mental injury to the child, and in so doing causes great bodily harm, permanent disability, or permanent disfigurement to such child, shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(2) Whoever, willfully, or by culpable negligence, deprives a child of, or allows a child to be deprived of, necessary food, clothing, shelter, or medical treatment, or who, knowingly or by culpable negligence, permits physical or mental injury to the child, shall be guilty of a misdemeanor of the first degree.

PLA. STAT. § 827.04(1)-(2) (1985).

38. Id.
39. Id.
40. Id.
41. Id.
42. 602 So. 2d 775 (Fla. 1992).
43. Id. The Florida Supreme Court specifically agreed with one commentator, who suggested that "[b]y authorizing conduct in one statute, but declaring that same conduct criminal under another statute, the state trapped the Hermanns, who had no fair warning that the State would consider their conduct criminal." Id. at 778 (quoting Christine A. Clark, Religious Accommodation and Criminal Liability, 17 FLA. ST. U. L. REV. 559, 585 (1990) (footnotes omitted)).

D. Controlled Substances

1. Delivery of Controlled Substances to a Minor

In Johnson v. State, Jennifer Johnson was convicted of violating the provisions of section 893.13(1)(e) of the Florida Statutes, which makes the delivery of a controlled substance to a person under age eighteen years-old a first degree felony. Johnson, who suffered from crack cocaine dependency, was twice convicted of violations of section 893.13(1)(e). The State’s prosecution was based on the theory that cocaine actually passed between Johnson and her newborns between the time of their birth and the severance of the umbilical cord. Therefore, Johnson delivered a controlled substance to a person under age eighteen years-old in the brief moments after the birth of her children, but before the umbilical cord was cut.

In Johnson, the Florida Supreme Court held that section 893.13(1)(e) of the Florida Statutes was not intended to sanction the “delivery” of a controlled substance, or its derivative, from a mother to her newborn child. The Johnson court further concluded that insufficient evidence existed to support the State’s theory that a controlled substance, or its derivative, passed from Johnson to her newborn children, prior to severance of the umbilical cord, even though Johnson admitted to coining the day or night before each birth.

The Johnson court also rejected the State’s theory as contrary to legislative intent. In its decision, the Florida Supreme Court cited a failed effort to enact legislation which some legislators warned "might
authorize criminal prosecutions of mothers who give birth to drug-dependent children.\textsuperscript{51} Instead, a contrary proposal was adopted.\textsuperscript{52} As a matter of policy, the court also reasoned that any other result might discourage cocaine dependent mothers from seeking prenatal care, and encourage abortions.

2. Manufacture of Controlled Substances

The manufacture of controlled substances is prohibited by section 893.13(1)(a) of the Florida Statutes.\textsuperscript{53} Nevertheless, the Sheriff of Broward County, Florida, reconstituted seized cocaine powder into "crack" cocaine rocks, for use in reverse sting operations.\textsuperscript{54} In \textit{Kelly v. State},\textsuperscript{55} the Fourth District Court of Appeal deemed the Sheriff's practice of manufacturing "crack" cocaine for use in reverse sting operations illegal, as violative of due process.\textsuperscript{56} The district court determined that the reconstitution procedure fell within the definition of manufacturing provided in section 893.02(12)(a) of the Florida Statutes,\textsuperscript{57} and noted with concern that each batch of the

\textsuperscript{51} Id. at 1293.
\textsuperscript{52} 1987 Fla. Laws ch. 90, § 1 (originally codified in Fla. Stat. § 415.503(8)(a) (1987)). Section 415.503(8)(a) of the Florida Statutes provided in pertinent part:
(8) "Harm" to a child’s health or welfare can occur when the parent or other person responsible for the child’s welfare:
(a) Inflicts, or allows to be inflicted upon the child physical or mental injury. Such injury includes, but is not limited to:
1. Physical dependency of a newborn infant upon any drug controlled in Schedule I of s. 893.03, upon any drug controlled in Schedule II of s. 893.03 with the exception of drugs administered in conjunction with a detoxification program as defined in s. 397.021, or upon drugs administered in conjunction with a medically-approved treatment procedures; provided that no parent of such a newborn infant shall be subject to criminal investigation solely on the basis of such infant’s drug dependency.
2. Manufacture of controlled substances as defined in s. 893.011.

\textsuperscript{53} Section 893.13(1)(a) provides in pertinent part, "[e]xcept as authorized by this chapter, and Chapter 499, it is unlawful for any person to sell, purchase, manufacture, or deliver, or to possess with the intent to sell, purchase, manufacture, or deliver, a controlled substance." Fla. Stat. § 893.13(1)(a) (1989).

\textsuperscript{54} The practice of conducting reverse sting operations has been approved. See State v. Burch, 545 So. 2d 279 (Fla. 4th Dist. Ct. App. 1989), aff’d, 558 So. 2d 1 (Fla. 1990).

\textsuperscript{55} Id. at 1062 (Fla. 4th Dist. Ct. App. 1992) (citing State v. Blossom, 462 So. 2d 1082 (Fla. 1985)).

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authorize criminal prosecutions of mothers who give birth to drug-dependent children.\textsuperscript{51} Instead, a contrary proposal was adopted.\textsuperscript{52} As a matter of policy, the court also reasoned that any other result might discourage cocaine-dependent mothers from seeking prenatal care, and encourage abortions.

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  \item 51. \textit{Id.} at 1293.
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correction process resulted in the production of "1200 or more rocks," not all of which were recovered following the reverse sting operations.\textsuperscript{58} Also, in \textit{Grissett v. State},\textsuperscript{59} the Fourth District Court of Appeal found the practice disapproved in \textit{Kelly} to be fundamental error, and thus, subject to post-conviction relief, regardless of whether the issue was raised by the defendant in the trial court.\textsuperscript{60}

3. Legislative Enactments

In \textit{Campbell v. State},\textsuperscript{61} Stanley Campbell was arrested in a reverse-sting operation after negotiating the purchase of four kilos of cocaine from an undercover police officer. Just prior to the completion of the drug transaction, Campbell was permitted to inspect one of the four kilos of cocaine in the back seat of a car.\textsuperscript{62} After Campbell expressed satisfaction with the quality of the sample kilo, he exited the vehicle, and was arrested.\textsuperscript{63} The Florida Supreme Court determined that Campbell was entitled to a special jury instruction concerning the issue of dominion and control.\textsuperscript{64} In response to the Florida Supreme Court's decision in \textit{Campbell}, the Florida Legislature amended section 893.02(16) of the Florida Statutes to provide that effective October 1, 1992: "Possession' includes temporary
possession for the purpose of verification or testing, irrespective of dominion or control. Because this amendment to section 893.02(16) affects the substantive rights of the accused, it may not be applied retrospectively.

E. Dealing in Stolen Property

Section 812.019(1) of the Florida Statutes provides that persons who traffic in stolen property commit the offense of dealing in stolen property. In State v. Camp, the Florida Supreme Court construed section 812.019(1) narrowly, holding that the offense of dealing in stolen property fails to include persons who "personally . . . put . . . stolen item or items to normal use." In other words, a person who improperly obtains another's property commits the offense of theft. However, whether this same person also commits the offense of dealing in stolen property turns on whether property is put to its normal use.

The Florida Supreme Court approved several cases demonstrating this principle. For example, a person who knowingly obtains stolen food stamps and then uses the stamps to obtain food, commits the offense of theft, not the offense of dealing in stolen property. Similarly, a person who knowingly installs a stolen motor vehicle engine in his own car is guilty of theft, but not dealing in stolen property. On the other hand, attempting to sell a stolen typewriter would violate section 812.019(1).

67. Section 812.019(1) provides, "[a]ny person who traffics in, or endeavors to traffic in, property that he knows or should know was stolen shall be guilty of a felony of the second degree, punishable as provided in ss. 775.082, 775.083, and 775.084." FLA. STAT. § 812.019(1) (1989).
68. Florida Statute § 812.012(7) provides that:
   (7) Traffic means:
   (a) To sell, transfer, distribute, dispense, or otherwise dispose of property.
   (b) To buy, receive, possess, obtain control of, or use property with the intent to sell, transfer, distribute, dispense, or otherwise dispose of such property.
69. Id. § 812.012(7)(a)-(b).
70. Id. at 1057 (quoting Grimes v. State, 477 So. 2d 649 (Fla. 1st Dist. Ct. App. 1985)).

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F. Driving Under the Influence

1. "Relation-back" Testimony

Jessie Lee Miller submitted to a blood-alcohol test one hour and twenty minutes after driving a motor vehicle. The results of Miller's chemical breath test registered 0.14, and Miller was charged with driving under the influence, contrary to section 316.193 of the Florida Statutes. Prior to trial, a State toxicologist testified that "it was scientifically possible [Miller's] . . . blood-alcohol level was below the legal limit of 0.10 at the time Miller was driving." No "relation-back" testimony was presented. Instead, the State's expert conceded that he was unable to "determine with reasonable certainty Miller's blood-alcohol level at the time Miller was driving." Miller moved to exclude evidence of the results of the chemi-

73. Section 316.193 provides:
   (1) A person is guilty of the offense of driving under the influence and subject to punishment as provided in subsection (2) if such person is driving or in actual physical control of a vehicle within this state and:
      (a) The person is under the influence of alcoholic beverages, any chemical substances set forth in s. 877.111, or any substance controlled under chapter 893, when affected to the extent that his normal faculties are impaired, or
      (b) The person has a blood alcohol level of 0.10 percent or higher.
Florida Statute § 316.1934 provides in pertinent part:
(2) Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person while driving, or in actual physical control of, a vehicle while under the influence of alcoholic beverages or controlled substances, when affected to the extent that his normal faculties were impaired or to the extent that he was deprived of full possession of his normal faculties, the results of any test administered in accordance with s. 316.1932 or s. 316.1933 and this section shall be admissible into evidence when otherwise admissible . . . .
(3) A chemical analysis of a person's blood to determine alcoholic content or a chemical analysis of a person's breath, in order to be considered valid under the provisions of this section, must have been performed substantially in accordance with methods approved by the Department of Health and Rehabilitative Services and by an individual possessing a valid permit issued by the department for this purpose. Any insubstantial differences between approved techniques and actual testing procedures in any individual case shall not render the test or test results invalid.
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68. 596 So. 2d 1055 (Fla. 1992).

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   - A chemical analysis of a person's blood to determine the alcohol content or a chemical analysis of a person's breath, in order to be considered valid under the provisions of this section, must have been performed substantially in accordance with methods approved by the Department of Health and Rehabilitative Services and by an individual possessing a valid permit issued by the department for this purpose. Any impermissible differences between approved techniques and actual testing procedures in any individual case shall not render the test or test results invalid.

Id. § 316.193(2)-(3).
75. Id.
cal breath test at his trial.76

In Miller v. State,77 the Florida Supreme Court held that the lack of "relation-back" testimony went to the weight of Miller's chemical breath test result, not its admissibility, "provided the test is conducted within a reasonable time after the defendant is stopped."78 The Miller court concluded that under "the totality of the facts ... Miller's blood-alcohol test was neither conducted after an unreasonable lapse of time nor was its probative value outweighed by the potential for prejudice or confusion."79

2. The Meaning of the Test Results

In Haas v. State,80 the Florida Supreme Court resolved the question left unanswered in Miller concerning whether the admission of a defendant's unextrapolated chemical breath "was sufficient either by itself or in conjunction with other evidence to sustain a conviction in a DUBAL case."81 On March 12, 1988, Carl A. Haas, was involved in a head-on collision with another motor vehicle. Jennifer Trotter, the driver of the other car, was killed. A blood sample taken from Haas one hour and twenty minutes after the collision revealed a blood-alcohol level of 0.11 percent. The State's toxicologist was unable to testify that Haas's blood-alcohol level exceeded 0.10 percent at the time of the collision.

76. Id.
77. 597 So. 2d 767 (Fla. 1992).
78. Id. at 780. The Miller court stated:
What is "reasonable" in this context will depend upon the facts of each case.
As a general rule, we believe a test is conducted at an unreasonable time if the results of that test do not tend to prove or disprove a material fact, or if the probative value of the evidence is outweighed by its potential to cause prejudice or confusion.
Id.
79. Id. Quizzically, in Haas v. State, 597 So. 2d 770 (Fla. 1992), the Florida Supreme Court characterized their earlier opinion in Miller as holding, "[t]hat an expert witness could be unable to state what the blood-alcohol level was at the time the defendant was operating the vehicle." Id. at 772 (emphasis added). Nothing else in the Florida Supreme Court's decision in Haas suggests that the relevancy of chemical breath-test results, or the "probative value of the evidence," was enhanced in Miller by the presence of expert testimony. Miller, 597 So. 2d at 768. Similarly, nothing in Miller suggests that expert testimony of any type is required to withstand the court's "totality of the facts" test. Id.
80. 597 So. 2d 770 (1992).
81. Id. at 772. DUBAL stands for "Driving under the influence breath alcohol level." See F.S. § 316.193(1)(b) (1989).

As in Miller, the Florida Supreme Court approved the admissibility of the defendant’s blood-alcohol test results without the necessity of extrapolation to the time of the defendant’s driving. Instead, the Florida Supreme Court interpreted Florida's statutory scheme to mean that the test results shall be prima facie evidence that the accused had the same blood-alcohol level at the time of his operation of the vehicle. Properly obtained test results which reflect a blood-alcohol level of 0.10 or more, standing alone, constitute circumstantial evidence upon which the finder of fact may (but is not required to) convict the accused driver of DUI either by impairment or DUBAL.82

The Haas Court added that "[t]he accused is at liberty to seek to demonstrate through cross-examination or the introduction of other evidence that the test results do not accurately reflect his or her blood-alcohol level at the time the vehicle was being operated."83 This comment creates additional uncertainty. Although the facts in Haas occurred on March 12, 1988, the Florida Supreme Court published its decision in Haas long before the Florida Legislature amended section 316.1934 of the Florida Statutes in Chapter 91-255, section 4, of the Laws of Florida.84 The amendments to

82. Haas, 597 So. 2d at 772.
83. Id.
84. Chapter 91-255, § 4 of the Laws of Florida provides:
(5) An affidavit containing the results of any test of a person's blood or breath to determine its alcohol content, as authorized by s. 316.1932 or s. 316.1933, shall be admissible in evidence under the exception to the hearsay rule in s. 90.803(8) for public records and reports. Such affidavit shall be admissible without further authentication and shall be presumptive proof of the results of an authorized test to determine alcohol content of the blood or breath if the affidavit discloses:
(a) The type of test administered and the procedures followed;
(b) The time of the collection of the blood or breath sample analyzed;
(c) The numerical results of the test indicating the alcohol content of the blood or breath;
(d) The type and status of any permit issued by the Department of Health and Rehabilitative Services that was held by the person who performed the test; and
(e) If the test was administered by means of a breath testing instrument, the date of the performance of the most recent required maintenance on such instrument.
The Department of Health and Rehabilitative Services shall provide a form for the affidavit. Admissibility of the affidavit shall not abrogate the right of the
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The Department of Health and Rehabilitative Services shall provide a form
for the affidavit. Admissibility of the affidavit shall not abrogate the right of the
section 316.1934 provide for the admissibility of blood or breath test results solely by affidavit. Because the State may now introduce into evidence blood or breath test results without any testimony, the suggestion in Haas that "[t]he accused is at liberty to seek to demonstrate through cross-examination . . . that the test results do not accurately reflect his or her blood-alcohol level" is no longer applicable. Although the court suggested that the accused may still challenge the test results through "the introduction of other evidence," the Florida Supreme Court's language in Haas portends that the new legislative scheme may be constitutionally deficient, insofar as it denies the accused essential confrontation rights, or impermissibly shifts the burden of proof.85

3. Non-consensual Blood Alcohol Testing

In Robertson v. State,86 Karen Deatherage was killed in an automobile accident. At the direction of a law enforcement officer, blood samples were forcibly withdrawn from the defendant, Willard Carl Robertson.87 Contrary

person tested to subpoena the person who administered the test for examination as an adverse witness at a civil or criminal trial or other proceeding. 1991 Fla. Laws ch. 91-255, § 4 (effective July 1, 1991) (amended at Fla. Stat. § 316.1934 (1991)).

85. The Legislature was obviously cognizant of the potential constitutional shortcomings caused by the amendments to § 316.1934 when it specifically stated that "[a]dmissibility of the affidavit shall not abrogate the right of the person tested to subpoena the person who administered the test for examination as an adverse witness at a civil or criminal trial or other proceeding." Id.

To suggest that this language might somehow cure the statute's constitutional deficiencies would, in most contexts, seem farfetched. On the other hand, the "scourge of drunk driving," is a national tragedy of such proportion that legislatures and courts are occasionally tempted to avoid scrupulous adherence to constitutional principles. Haas, 557 So. 2d at 774.


87. Id. Section 316.1933(1) of the Florida Statutes provides:

Notwithstanding any recognized ability to refuse to submit to the tests provided in s. 316.1932 or any recognized power to revoke the implied consent to such tests, if a law enforcement officer has probable cause to believe that a motor vehicle driven by or in the actual physical control of a person under the influence of alcoholic beverages or controlled substances has caused the death or serious bodily injury of a human being, such person shall submit, upon the request of a law enforcement officer, to a test of his blood for the purpose of determining the alcoholic content thereof . . . . The law enforcement officer may use reasonable force if necessary to require such person to submit to the administration of the blood test.


88. Florida Statute § 316.1933(2)(b) provides:

A chemical analysis of the person's blood to determine the alcoholic content thereof must have been performed substantially in accordance with methods approved by the Department of Health and Rehabilitative Services and by an individual possessing a valid permit issued by the department for this purpose. The Department of Health and Rehabilitative Services may approve satisfactory techniques or methods, ascertain the qualifications and competence of individuals to conduct such analyses, and issue permits which will be subject to termination or revocation at the discretion of the department.

Id. § 316.1933(2)(b).

Section 316.1934(3) of the Florida Statutes provides:

A chemical analysis of a person's blood to determine alcoholic content or a chemical analysis of a person's breath, in order to be considered valid under the provisions of this section, must have been performed substantially in accordance with methods approved by the Department of Health and Rehabilitative Services and by an individual possessing a valid permit issued by the department for this purpose. Any insubstantial differences between approved techniques and actual testing procedures in any individual case shall not render the test or test results invalid.

Id. § 316.1934(3).

89. Robertson, 17 Fla. L. Weekly at 5455. Only authorized tests are entitled to the presumptions contained in § 316.1934(2) of the Florida Statutes, which provides:

Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person while driving, or in actual physical control of, a vehicle while under the influence of alcoholic beverages or controlled substances, when affected to the extent that his normal faculties were impaired or to the extent that he was deprived of full possession of his normal faculties, the results of any test administered in accordance with s. 316.1932 or s. 316.1933 and this section shall be admissible into evidence when otherwise admissible, and the amount of alcohol in the person's blood at the time alleged, as shown by chemical analysis of the person's blood or breath, shall give rise to the following presumptions:

(a) If there was at that time 0.05 percent or less by weight of alcohol in the persons' blood, it shall be presumed that the person was not under the influence of alcoholic beverages to the extent that his normal faculties were impaired.

(b) If there was at that time in excess of 0.05 percent but less than 0.10 percent by weight of alcohol in the person's blood, such fact shall not give rise to any presumption that the person was or was not under the influence of alcoholic beverages to the extent that his normal faculties were impaired, but
section 316.1934 provide for the admissibility of blood or breath test results solely by affidavit. Because the State may now introduce into evidence blood or breath test results without any testimony, the suggestion in Haas that "[t]he accused is at liberty to seek to demonstrate through cross-examination . . . that the test results do not accurately reflect his or her blood-alcohol level" is no longer applicable. Although the court suggested that the accused may still challenge the test results through "the introduction of other evidence," the Florida Supreme Court's language in Haas portends that the new legislative scheme may be constitutionally deficient, insofar as it denies the accused essential confrontation rights, or impermissibly shifts the burden of proof.85

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In Robertson v. State,86 Karen Deatherage was killed in an automobile accident. At the direction of a law enforcement officer, blood samples were forcibly withdrawn from the defendant, Willard Carl Robertson.87 Contrary to the requirements of subsections 316.1933(2)(b) and 316.1934(3) of the Florida Statutes, Robertson’s blood was tested by a person who failed to possess a valid permit.88 The Florida Supreme Court held that the test conducted by a person not possessing a valid permit was not an authorized test within the meaning of subsections 316.1933(2)(b) and 316.1934(3).89

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(b) If there was at that time in excess of 0.05 percent but less than 0.10 percent by weight of alcohol in the person's breath, such fact shall not give rise to any presumption that the person was or was not under the influence of alcoholic beverages to the extent that his normal faculties were impaired.
The Robertson court distinguished the permit requirement from other HRS regulations in subsections 316.1933(2)(b) and 316.1934(3) which require only "substantial compliance."

The court also found, though, that Robertson's test results were admissible under the traditional predicates of the common law, as codified in State v. Bender. However, in a footnote, the Florida Supreme Court in Robertson stressed that before determining the admissibility of the test results, the trial court "must consider (among other reasons) why the expert is not licensed."  

G. Kidnapping

In Walker v. State, the Florida Supreme Court reviewed the offense of kidnapping pursuant to subsection 787.01(1)(a)(2) of the Florida Statutes, which prohibits the confining, abducting, or imprisoning of another with the intent to commit or facilitate the commission of any felony. To consi-

such fact may be considered with other competent evidence in determining whether the person was under the influence of alcoholic beverages to the extent that his normal faculties were impaired.

(c) If there was at that time 0.10 percent or more by weight of alcohol in the person's blood, that fact shall be prima facie evidence that the person was under the influence of alcoholic beverages to the extent that his normal faculties were impaired. Moreover, such person who has a blood alcohol level of 0.10 percent or above is guilty of driving, or being in actual physical control of, a motor vehicle, with an unlawful blood alcohol level.

F.A. STAT. § 316.1934(2)(a)(c) (Fla. 1987).

90. 382 So. 2d 697 (Fla. 1980). Bender held that scientific tests for alcohol were admissible notwithstanding the requirements of Florida's implied consent law "if a proper predicate established that (1) the test was reliable, (2) the test was performed by a qualified operator with the proper equipment and (3) expert testimony was presented concerning the meaning of the test." Bender, 382 So. 2d at 699.

91. Robertson, 17 Fla. L. Weekly at S458 n.11. The Florida Supreme Court specifically reaffirmed that the implied consent law does include an exclusionary rule. Id. at S458 n.13. However, the Florida Supreme Court added that:

[T]his exclusionary rule does not prohibit the use of all evidence obtained contrary to the implied consent law, but only such evidence obtained in a manner that is contrary to the core policies of that statute: ensuring scientific reliability of the tests, and protecting the health of test subjects. To this extent, the present opinion clarifies the holding in Bender.

Id. at S458 n.5.  


93. Section 787.01 of the Florida Statutes provides, in pertinent part, that "[t]he term "kidnapping" means forcibly, secretly, or by threat, confining, abducting, or imprisoning another person against his will and without lawful authority, with intent to . . . [c]ommit or

H. Racketeer Influence and Corrupt Organizations Act (RICO)

In State v. Lucas, the Florida Supreme Court clarified the require-
The Robertson court distinguished the permit requirement from other HRS regulations in subsections 316.1933(2)(b) and 316.1934(3) which require only "substantial compliance."

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nate kidnapping under this subsection, the movement or confinement of the victim "must not be slight, inconsequential, and merely incidental to the other offense."94 Otherwise, "the kidnapping statute would convert almost every forcible felony into kidnapping."95

The facts in Walker were not complex. The defendant, Richard Earl Walker, entered a convenience store, took the money from the cash register, and robbed a customer. Walker then ordered all of the occupants of the store to move to the rear, and lie on the floor. After this brief encounter, Walker left.96

In reversing Walker's kidnapping convictions, the Florida Supreme Court approved the results in several other cases. On the other hand, the court distinguished the facts in Walker by noting that the confinement and movement of the victims inside the store was limited,97 that some of the victims were dragged about from room to room,98 or bound and blindfolded for extended periods.99 The court noted that the offense occurred "within a matter of seconds,"100 and that the victims were neither barricaded by the defendant,101 or forcibly taken from the store to a secondary location.102

H. Racketeer Influence and Corrupt Organizations Act (RICO)

In State v. Lucas,103 the Florida Supreme Court clarified the require-


94. Walker, 604 So. 2d at 477. For a kidnapping offense to result from the movement or confinement of a victim during the commission of a felony offense, the movement or confinement:

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

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

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


95. Walker, 604 So. 2d at 477.

96. Id.


98. See Faison v. State, 426 So. 2d 963, 964 (Fla. 1983).


100. Walker, 604 So. 2d at 477.


102. See Ferguson v. State, 533 So. 2d 763, 764 (Fla. 1988).

103. 600 So. 2d 1093 (Fla. 1992).
ment of "continuity" in racketeering prosecutions. A violation of Florida's Racketeer Influence and Corrupt Organizations Act (RICO) statute, pursuant to section 895.03 of the Florida Statutes, may be established by a "pattern of racketeering activity." The term "pattern" has been construed by the Florida Supreme Court to require "proof that a continuity of particular criminal activity exists." Dean Kevin Lucas was charged with a RICO violation for his alleged involvement with Wellington Precious Metals, a suspected "boiler-room" operation. However, the RICO allegation against Lucas was dismissed by the court prior to trial, and the State appealed.

In Lucas, the Florida Supreme Court approved the United States Supreme Court's analysis of the term "continuity" under the federal RICO Act in H.J. Inc. v. Northwestern Bell Telephone Co. H.J. Inc. reafirmed that "continuity" for purposes of the Federal RICO Act "is both a closed- and open-ended concept." 104

104. Florida Statute § 895.03 provides in pertinent part:

(a) (1) It is unlawful for any person employed by, or associated with, any enterprise to conduct or participate, directly or indirectly, in such enterprise through a pattern of racketeering activity or the collection of an unlawful debt

(b) It is unlawful for any person to conspire or endeavor to violate any of the provisions of this section.

FLA. STAT. § 895.03(1), (4) (1985).

Additionally, § 895.02 provides in part:

3. "Enterprise" means any individual, sole proprietorship, partnership, corporation, business trust, union chartered under the laws of this state, or other legal entity, or any unchaeerd union, association, or group of individuals associated in fact although not a legal entity; and it includes illicit as well as licit enterprises and governmental, as well as other, entities.

4. "Pattern of racketeering activity" means engaging in at least two incidents of racketeering conduct that have the same or similar intent, results, accomplices, victims, or methods of commission that otherwise are interrelated by distinguishing characteristics and are not isolated incidents, provided at least one of such incidents occurred after the effective date of this act and that the last of such incidents occurred within 5 years after a prior incident of racketeering conduct.

Id. § 895.02(3), (4).

105. State v. Lucas, 60 So. 2d 1093, 1094 (Fla. 1951) (emphasis added) (quoting Bowden v. State, 402 So. 2d 1173, 1174 (Fla. 1981)).

106. Id. at 1093.


By its very nature, open-ended "continuity" is a forward looking concept. In other words, where a racketeering enterprise is interrupted before the completion of its agenda, the "threat of continuity" which existed prior to the interruption of the enterprise may satisfy the element of "continuity" for purposes of establishing a "pattern of racketeering activity.

From this framework, the Lucas court determined that sufficient "continuity" existed to sustain the alleged RICO violation against Lucas. In making this determination, the court focused on the fact that when the defendant's alleged "boiler-room" operation was shut down by law enforcement, the enterprise "had already defrauded seventeen former . . . clients, and there was nothing to keep them from continuing to defraud other former . . . clients." Additionally, the Florida Supreme Court adopted the rationale of the United States Supreme Court in H.J. Inc. "that the threat of continued criminal activity could also be proven by showing the predicate acts to be part of an ongoing entity's regular way of doing business." Because the charges against Lucas alleged that "defrauding . . . former . . . clients was the business" of Wellington Precious Metals, the court found that sufficient "continuity" had been alleged to establish a "pattern of racketeering activity." 112

I. Robbery

1. Legislative Enactments

In Daniels v. State, the Florida Supreme Court held that "the specific intent to commit robbery is the intent to steal, i.e., to deprive an owner of property either permanently or temporarily." In Chapter 92-155, section 1, Laws of Florida, the Florida Legislature amended

109. Id. at 245.

110. Id.

111. Id.

112. Id. at 1096.

113. 387 So. 2d 460 (Fla. 1981).

114. Id. at 462 (emphasis added).

115. Chapter 92-155, § 1, Laws of Florida, provides:

1. "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear.

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FLA. STAT. § 895.03(1), (4) (1985).  

Additionally, § 895.02 provides in part:  

3. "Enterprise" means any individual, sole proprietorship, partnership, corporation, business trust, union chartered under the laws of this state, or other legal entity, or any unchartered union, association, or group of individuals associated in fact although not a legal entity; and it includes illicit as well as licit enterprises and governmental, as well as other, entities.  

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subsection 812.13(1) of the Florida Statutes to codify the Florida Supreme Court's holding in Daniels. The Florida Supreme Court's decision in Daniels concluded that their result was compelled by a 1982 legislative change to section 812.014(1) of the Florida Statutes.\textsuperscript{116}

Whether the holding in Daniels may be given retrospective effect is unclear. "[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, can be a violation of the ex post facto clause."\textsuperscript{117} The tenor of the Daniels opinion suggests that the Florida Supreme Court's judicial enlargement of subsection 812.13(1) was not reasonably foreseeable to the average person, and therefore, should not be applied to offenses occurring prior to October 10, 1991, the date the decision in Daniels was issued by the Florida Supreme Court.

J. Sex Offenses

1. Sexual Performance by a Child

Section 827.071 of the Florida Statutes prohibits "Sexual Performance by a Child."\textsuperscript{118} Subsection 827.071(5) provides that it is unlawful to possess materials, such as photographs, which include "sexual conduct" by a child.\textsuperscript{119} "Sexual conduct" is defined in subsection 827.071(1)(g), as including "actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or if such person is a female, breast."\textsuperscript{120}

In Schmitt v. State,\textsuperscript{21} the Florida Supreme Court found subsection 827.071(1)(g) unconstitutionally overbroad, insofar as the statute sanctions the possession of materials which depict physical contact with the "clothed or unclothed genitals, pubic area, [or] buttocks," of any child, or the "breast" of a female child.\textsuperscript{122} The court concluded that the subsection "impermissibly chills the exercise of free speech and expression." The Schmitt court was particularly concerned that the statute's scope included innocent family activities, such as a photograph of a parent bathing an infant.\textsuperscript{123}

2. Lewd and Lascivious Conduct

Section 800.04 of the Florida Statutes provides, in pertinent part, that "[a]ny person who . . . (3) Knowingly commits any lewd or lascivious act is the presence of any child under the age of sixteen years without committing the crime of sexual battery is guilty of a felony of the second degree . . ."\textsuperscript{124}

With little analysis, the Florida Supreme Court in State v. Hernandez,\textsuperscript{22} concluded that "[t]he size of the audience or the number of witnesses should not determine the number of allowable convictions under subsection 800.04(3)."\textsuperscript{126} In other words, subsection 800.04(3) precludes multiple convictions for a single "act."\textsuperscript{127}

Although the Florida Supreme Court noted that each lewd assault under subsection 800.04(1) constitutes a separate offense,\textsuperscript{128} the court concluded

\textsuperscript{116} See 1982 Fla. Laws ch. 82-164, § 1.
\textsuperscript{117} Berry v. State, 458 So. 2d 1155, 1156 (Fla. 1st Dist. Ct. App. 1984).
\textsuperscript{118} Fla. STAT § 827.071 (1987).
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\textsuperscript{120} Section 827.071(1)(g) of the Florida Statutes provides:
"Sexual conduct" means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse, actual lewd exhibition of the genitals; actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or if such person is a female, breast; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed.
\textsuperscript{121} Id. § 827.071(1)(g).
\textsuperscript{122} Schmitt v. State, 659 So. 2d 464 (Fla. 1995).
\textsuperscript{123} Id. at 469.
\textsuperscript{124} Id. at 413. The Florida Supreme Court considered the following portions of the statute:
"The Florida Supreme Court found the remaining portions of the statute severable by application of the so-called "Cramp test," which provides: When a part of a statute is declared unconstitutional the remainder of the act will be permitted to stand provided: (1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken."
\textsuperscript{125} Fla. STAT § 800.04(3) (1987).
\textsuperscript{126} Case v. Board of Pub. Instruction, 137 So. 2d 828, 830 (Fla. 1962).
\textsuperscript{127} Id. at 672.
\textsuperscript{128} In Hernandez, the defendant was accused of exposing himself and masturbating in front of two young girls. Because the defendant's conduct occurred during a single distinct act, the Florida Supreme Court concluded that only one lewd act could be charged, even though there were obviously two children harmed by the defendant's actions. Id. at 671-72.
\textsuperscript{129} Section 800.04 provides in pertinent part: "[a]ny person who: (1) Handles, fondles or makes an assault upon any child under the age of 16 years in a lewd, lascivious, or indecent manner . . . is guilty of a felony of the second degree . . . ." FLA. STAT. § 800.04 (1997).
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Whether the holding in Daniels may be given retrospective effect is unclear. "[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, can be a violation of the ex post facto clause."117 The tenor of the Daniels opinion suggests that the Florida Supreme Court's judicial enlargement of subsection 812.13(1) was not reasonably foreseeable to the average person, and therefore, should not be applied to offenses occurring prior to October 10, 1991, the date the decision in Daniels was issued by the Florida Supreme Court.

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2. Lewd and Lascivious Conduct

Section 800.04 of the Florida Statutes provides, in pertinent part, that "[a]ny person who . . . (3) Knowingly commits any lewd or lascivious act in the presence of any child under the age of sixteen years without committing the crime of sexual battery is guilty of a felony of the second degree . . . ."124

With little analysis, the Florida Supreme Court in State v. Hernandez,125 concluded that "[t]he size of the audience or the number of witnesses should not determine the number of allowable convictions under subsection 800.04(3)."126 In other words, subsection 800.04(3) precludes multiple convictions for a single "act."127

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123. Id. at 413. The Florida Supreme Court found the remaining portions of the statute separable by application of the so-called "Cramp test," which provides: When a part of a statute is declared unconstitutional the remainder of the act will be permitted to stand provided: (1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken.
125. 596 So. 2d 671 (Fla. 1992).
126. Id. at 672.
127. In Hernandez, the defendant was accused of exposing himself and masturbating in front of two young girls. Because the defendant's conduct occurred during a single distinct act, the Florida Supreme Court concluded that only one lewd act could be charged, even though there were obviously two children harmed by the defendant's actions. Id. at 671-72.
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that for purposes of subsection 800.04(3), "the legislature intended that a lewd act, though seen by more than one person, be one crime subject to only one conviction."

Therefore, separate convictions are available only for each "distinct" lewd act. Unfortunately, the Florida Supreme Court offered no guidance concerning what constitutes a "distinct" act.

3. Legislative Enactments

a. Sexual Performance by a Child—Penalties

In Schmitt v. State, the Fourth District Court of Appeal interpreted subsection 827.071(5) of the Florida Statutes to preclude the possibility of multiple convictions for the possession of multiple items containing sexual conduct by a child. Under the Fourth District Court of Appeal's interpretation of subsection 827.071(5), the possession of seven different photographs containing sexual conduct by a child could result in only a single third degree felony.

By amending subsection 827.071(5) in Chapter 92-83, section 1, Laws of Florida, possession of each item in violation of subsection 827.071(5) constitutes a separate third degree felony for offenses occurring on or after October 1, 1992, the effective date of the amendment.

Chapter 92-83, section 1, Laws of Florida, provides:

It is unlawful for any person to knowingly possess a photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, he knows to include any sexual conduct by a child.

129. Hernandez, 596 So. 2d at 672.
130. Id.
132. 563 So. 2d 1095 (Fla. 4th Dist. Ct. App. 1990), modified on other grounds, 590 So. 2d 404 (Fla. 1991).
133. Id. at 1101. Florida Statute § 827.071(5) provides:

It is unlawful for any person to knowingly possess any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, he knows to include any sexual conduct by a child. Whoever violates this subsection is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.


Because the amendment to section 827.071(5) affects the substantive rights of the accused, it may not be applied retrospectively.

b. Necessarily Included Lesser Offenses of Section 794.011(4)(a)

In Chapter 92-135, section 3, Laws of Florida, the Florida Legislature amended section 794.011 of the Florida Statutes, defining the offense of sexual battery. The amendment reiterated the legislature's belief that the offense of sexual battery under subsection 794.011(5) should be a necessarily included lesser offense of sexual battery under subsections 794.011(3) and (4) of the Florida Statutes.

135. Id. (emphasis added).
136. See cases cited supra note 68.
137. Chapter 92-135, § 3 provides in pertinent part:

(5) A person who commits sexual battery upon a person 12 years of age or older, without that person's consent, and in the process thereof does not use physical force and violence likely to cause serious personal injury is guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(7) The offense described in subsection (5) is included in any sexual battery offense charged under subsection (3) or subsection (4).

139. Section 794.011 provides in pertinent part:

(3) A person who commits sexual battery upon a person 12 years of age or older, without that person's consent, and in the process thereof uses or threatens to use a deadly weapon or uses actual physical force likely to cause serious personal injury is guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(4) A person who commits sexual battery upon a person 12 years of age or older, without that person's consent, under any of the following circumstances is guilty of a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084:

(a) When the victim is physically helpless to resist.
(b) When the offender coerces the victim to submit by threatening to use force or violence likely to cause serious personal injury on the victim, and the victim reasonably believes that the offender has the present ability to execute the threat.
(c) When the offender coerces the victim to submit by threatening to retaliate against the victim, or any other person, and the victim reasonably
that for purposes of subsection 800.04(3), "the legislature intended that a lewd act, though seen by more than one person, be one crime subject to only one conviction." Therefore, separate convictions are available only for each "distinct" lewd act. Unfortunately, the Florida Supreme Court offered no guidance concerning what constitutes a "distinct" act.

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It is unlawful for any person to knowingly possess a photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, he knows to include any sexual conduct by a child.

129. Hernandez, 596 So. 2d at 672.
130. Id.
131. Because subsection 800.04(3) is ambiguous concerning what constitutes a "distinct act," the statute should be strictly construed most favorably to the accused. See Fla. STAT. 775.021(1) (1991). Compare Green v. State, 484 So. 2d 97, 98 (Fla. 1st Dist. Ct. App. 1986) (sexual battery statute not ambiguous).
132. 563 So. 2d 1095 (Fla. 4th Dist. Ct. App. 1990), modified on other grounds, 590 So. 2d 404 (Fla. 1991).
133. Id. at 1101. Florida Statute § 827.071(5) provides:
   It is unlawful for any person to knowingly possess any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, he knows to include any sexual conduct by a child. Whoever violates this subsection is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
135. Id. (emphasis added).
136. See cases cited supra note 68.
137. Chapter 92-135, § 3 provides in pertinent part:
   (5) A person who commits sexual battery upon a person 12 years of age or older, without that person's consent, and in the process thereof does not use physical force and violence likely to cause serious personal injury is guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
   (7) The offense described in subsection (5) is included in any sexual battery offense charged under subsection (3) or subsection (4).
138. Section 794.011 provides in pertinent part:
   (3) A person who commits sexual battery upon a person 12 years of age or older, without that person's consent, and in the process thereof uses or threatens to use a deadly weapon or uses actual physical force likely to cause serious personal injury is guilty of a life felony, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
   (4) A person who commits sexual battery upon a person 12 years of age or older, without that person's consent, under any of the following circumstances is guilty of a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
   (a) When the victim is physically helpless to resist.
   (b) When the offender coerces the victim to submit by threatening to use force or violence likely to cause serious personal injury to the victim, and the victim reasonably believes that the offender has the present ability to execute the threat.
   (c) When the offender coerces the victim to submit by threatening to retaliate against the victim, or any other person, and the victim reasonably
Florida Supreme Court reached a contrary conclusion based upon its determination that "a section 794.011(4)(a) sexual battery can be proved without proving the actual use of any force," a necessary element of a section 794.011(5) sexual battery.140 To facilitate this change, the legislature amended subsection 794.011(5) to provide that the offense of sexual battery need not require "any force or violence beyond the force and violence that is inherent in the accomplishment of 'penetration' or 'union.'"141

Because the amendments to section 794.011 affect the substantive rights of the accused, they should not be applied to offenses occurring before April 8, 1992, the effective date provided by Chapter 92-135, section 4, Laws of Florida.142

c. Consent and Confidentiality Requirements in Genetic Testing

In Chapter 92-101, section 1, Laws of Florida, the Florida Legislature created section 760.40 of the Florida Statutes (effective October 1, 1992), regulating genetic testing.143 Subsection 760.40(2)(a) provides that,

believes that the offender has the ability to execute the threat in the future.

(d) When the offender, without the prior knowledge or consent of the victim, administers or has knowledge of someone else administering to the victim any narcotic, anesthetic, or other intoxicating substance which mentally or physically incapacitates the victim.

(e) When the victim is mentally defective and the offender has reason to believe this or has actual knowledge of this fact.

(f) When the victim is physically incapacitated.

139. 577 So. 2d 1302 (Fla. 1991).
140. Id. at 1305.
142. See cases cited supra note 68.
143. Florida Statute § 760.40 provides:

(1) As used in this section, the term "DNA analysis" means the medical and biological examination and analysis of a person to identify the presence and composition of genes in that person's body. The term includes DNA typing and genetic testing.

(2)(a) Except for purposes of criminal prosecution, except as provided in s. 943.325, and except as provided in s. 742.12(1), DNA analysis may be performed only with the informed consent of the person to be tested, and the records, results, and findings of DNA analysis covered by this paragraph, whether held by a public or private entity, are the exclusive property of the person tested, are confidential, and may not be disclosed without the consent of the person tested. Such records, results, and findings held by a public entity are

except in criminal prosecutions," DNA analysis, typing, and genetic testing may only be performed with the informed consent of the person tested. Additionally, the findings of any DNA tests may not be disclosed without the consent of the person tested. Any person who violates the consent or confidentiality requirements of subsection 760.40(2)(a) is guilty of a first degree misdemeanor.

The scope of the exception for criminal prosecutions in subsection 760.40(2)(a) is not apparent from the plain language of the statute. Because of this ambiguity, the coverage of the statute should be strictly construed in favor of the accused.144 The failure of the legislature to include the term "investigation" in subsection (2)(a), in lieu of, or in addition to, the exception provided for criminal "prosecutions" suggests that the exception should be deemed applicable only once a criminal information or grand jury indictment has issued.

The use of DNA typing in criminal cases has proven to be an effective, albeit controversial, aid to law enforcement.145 Although the exception provided for criminal prosecutions in subsection 760.40(2)(a) appears to be an attempt to accommodate the needs of law enforcement, a better solution might have been to provide for nonconsensual DNA testing only upon court order, supported by probable cause, similar to the safeguards utilized in section 934.09 of the Florida Statutes, regulating the interception of wire, oral or electronic communications.146

Sunset Review Act in accordance with s. 119.14.

(b) A person who violates paragraph (a) is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(3) A person who performs DNA analysis or receives records, results, or findings of DNA analysis must provide the person tested with notice that the analysis was performed or that the information was received. The notice must state that, upon the request of the person tested, the information will be made available to his physician. The notice must also state whether the information was used in any decision to grant or deny any insurance, employment, mortgage, loan, credit, or educational opportunity. If the information was used in any decision that resulted in a denial, the analysis must be repeated to verify the accuracy of the first analysis, and if the first analysis is found to be inaccurate, the denial must be reviewed.

145. Sam Terrill, On Trial: Suspects' Genetic Printing, MIAMI HERALD, MAY 3, 1992, at 1B.
146. See FLA. STAT. § 934.09 (1991) (requiring a showing of probable cause based upon sworn affidavit, and providing an exclusionary rule).
Florida Supreme Court reached a contrary conclusion based upon its determination that "a section 794.011(4)(a) sexual battery can be proven without proving the actual use of any force," a necessary element of a section 794.011(5) sexual battery. To facilitate this change, the legislature amended subsection 794.011(5) to provide that the offense of sexual battery need not require "any force or violence beyond the force and violence that is inherent in the accomplishment of 'penetration' or 'union.'" 

Because the amendments to section 794.011 affect the substantive rights of the accused, they should not be applied to offenses occurring before April 8, 1992, the effective date provided by Chapter 92-135, section 4, Laws of Florida.

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(3) A person who performs DNA analysis or receives records, results, or findings of DNA analysis must provide the person tested with notice that the analysis was performed or that the information was received. The notice must state that, upon the request of the person tested, the information will be made available to his or her physician. The notice must also state whether the information was used in any decision to grant or deny any insurance, employment, mortgage, loan, credit, or educational opportunity. If the information was used in any decision that resulted in a denial, the analysis must be repeated to verify the accuracy of the first analysis, and if the first analysis is found to be inaccurate, the denial must be reviewed.


145. See FLA. STAT. § 934.09 (1991) (requiring a showing of probable cause based upon sworn affidavit, and providing an exclusionary rule).
K. Stalking

1. Legislative Enactments

In Chapter 92-208, section 1, Laws of Florida, the Florida Legislature created section 784.048 of the Florida Statutes (effective July 1, 1992), prohibiting the offense of stalking. Section 784.048 is almost identical to the stalking statute recently enacted by the State of California.

147. Section 784.048 provides:

(1) As used in this section:

(a) "Harasses" means to engage in a course of conduct directed at a specific person that causes substantial emotional distress in such person and serves no legitimate purpose.

(b) "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of "course of conduct." Such constitutionally protected activity includes picketing or other organized protests.

(c) "Credible threat" means a threat made with the intent to cause the person who is the target of the threat to reasonably fear for his or her safety. The threat must be against the life of, or a threat to cause bodily injury to, a person.

(2) Any person who willfully, maliciously, and repeatedly follows or harasses another person commits the offense of stalking, a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(3) Any person who willfully, maliciously, and repeatedly follows or harasses another person, and makes a credible threat with the intent to place that person in reasonable fear of death or bodily injury, commits the offense of aggravated stalking, a felony of the third degree, punishable as provided in s. 775.082 or s. 775.083, or s. 775.084.

(4) Any person who, after an injunction for protection against repeat violence pursuant to s. 784.046, or an injunction for protection against domestic violence pursuant to s. 741.30, or after any other court imposed prohibition of conduct toward the subject person or that person's property, knowingly, willfully, maliciously, and repeatedly follows or harasses another person commits the offense of aggravated stalking, a felony of the third degree, punishable as provided in s. 775.082 or s. 775.083, or s. 775.084.

(5) Any law enforcement officer may arrest, without a warrant, any person he or she has probable cause to believe has violated the provisions of this section.


148. Section 646.9 of the California Penal Code provides:

(a) Any person who willfully, maliciously, and repeatedly follows or harasses another person and makes a credible threat with the intent to place that person in reasonable fear of death or great bodily injury is guilty of the crime of stalking, punishable by imprisonment in a county jail for not more than one year or by a fine of not more than one thousand dollars ($1,000), or by both that fine and imprisonment.

(b) Any person who violates subdivision (a) when there is a temporary restraining order or an injunction, or both, in effect prohibiting the behavior described in subdivision (a), against the same party, is punishable by imprisonment in a county jail for not more than one year or by a fine of not more than one thousand dollars ($1,000), or by both that fine and imprisonment, or by imprisonment in the state prison.

(c) A second or subsequent conviction occurring within seven years of a prior conviction under subdivision (a) against the same victim, and involving an act of violence or a "credible threat" of violence, as defined in subdivision (e), is punishable by imprisonment in a county jail for not more than one year or by a fine of not more than one thousand dollars ($1,000), or by both that fine and imprisonment, or by imprisonment in the state prison.

(d) For the purposes of this section, "harasses" means a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, or harasses the person, and which serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the person. "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of "course of conduct."

(e) For the purpose of this section, a "credible threat" means a threat made with the intent and the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety. The threat must be against the life of, or a threat to cause great bodily injury to, a person as defined in Section 12022.7.

This section shall not apply to conduct which occurs during labor picketing.

CAL. PENAL CODE § 646.9 (West 1991).

149. FLA. STAT. § 784.048(2) (Supp. 1992).

150. Id. § 784.048(3).

151. Section 748.048(1)(c) of the Florida Statutes provides, "Credible threat means a threat made with the intent to cause the person who is the target of the threat to reasonably fear for the life of, or a threat to cause great bodily injury to, a person as defined in Section 12022.7."
K. Stalking

1. Legislative Enactments

In Chapter 92-208, section 1, Laws of Florida, the Florida Legislature created section 784.048 of the Florida Statutes (effective July 1, 1992), prohibiting the offense of stalking. Section 784.048 is almost identical to the stalking statute recently enacted by the State of California.

Section 784.048 of the Florida Statutes defines stalking as "[a]ny person who willfully, maliciously, and repeatedly follows or harasses another person, constitutes the third degree felony of aggravated stalking, if the threat was made "with the intent to place ... [the victim] in reasonable fear of death or bodily injury." The Florida and California stalking statutes are variations of the same statutory scheme, although Florida's statute is more restrictive. Most significantly, subsection 784.048(2) of the Florida Statutes (effective July 1, 1992) does not require a "credible threat." The only act required is of stalking, punishable by imprisonment in a county jail for not more than one year or by a fine of not more than one thousand dollars ($1,000), or by both that fine and imprisonment.

(a) Any person who violates subdivision (a) when there is a temporary restraining order or an injunction, or both, in effect prohibiting the behavior described in subdivision (a) against the same party, is punishable by imprisonment in a county jail for not more than one year or by a fine of not more than one thousand dollars ($1,000), or by both that fine and imprisonment, or by imprisonment in the state prison.

(b) A second or subsequent conviction occurring within seven years of a prior conviction under subdivision (a) against the same victim, and involving an act of violence or a "credible threat" of violence, as defined in subdivision (6), is punishable by imprisonment in a county jail for not more than one year or by a fine of not more than one thousand dollars ($1,000), or by both that fine and imprisonment, or by imprisonment in the state prison.

(c) Any person who, after an injunction for protection against domestic violence pursuant to s. 784.065, or an injunction for protection against repeat violence pursuant to s. 784.065, or an injunction for protection against repeat violence pursuant to s. 784.065, or an injunction for protection against domestic violence pursuant to s. 784.065, commits the offense of aggravated stalking, a felony of the third degree, punishable as provided in s. 784.048 or s. 784.053, or s. 784.064.

(d) For the purposes of this section, "harasses" means a knowing and willful course of conduct directed at a specific person who seriously alarms or distresses the person, and which serves no legitimate purpose.

(e) For the purposes of this section, a "credible threat" means a threat made with the intent to cause the person who is the target of the threat to reasonably fear for his or her safety. The threat must be against the life of, or a threat to cause great bodily injury to, a person as defined in Section 12022.7.

This section shall not apply to conduct which occurs during labor picketing.


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(b) Any person who violates subdivision (a) when there is a temporary restraining order or an injunction, or both, in effect prohibiting the behavior described in subdivision (a) against the same party, is punishable by imprisonment in a county jail for not more than one year or by a fine of not more than one thousand dollars ($1,000), or by both that fine and imprisonment, or by imprisonment in the state prison.

(c) A second or subsequent conviction occurring within seven years of a prior conviction under subdivision (a) against the same victim, and involving an act of violence or a "credible threat" of violence, as defined in subdivision (6), is punishable by imprisonment in a county jail for not more than one year or by a fine of not more than one thousand dollars ($1,000), or by both that fine and imprisonment, or by imprisonment in the state prison.

(d) For the purposes of this section, "harasses" means a knowing and willful course of conduct directed at a specific person who seriously alarms or distresses the person, and which serves no legitimate purpose.

(e) For the purposes of this section, a "credible threat" means a threat made with the intent to cause the person who is the target of the threat to reasonably fear for his or her safety. The threat must be against the life of, or a threat to cause great bodily injury to, a person as defined in Section 12022.7.

This section shall not apply to conduct which occurs during labor picketing.
is "following" or "harassing." Also, a law enforcement officer may arrest any person for misdemeanor stalking based upon probable cause. In most instances, law enforcement officers may make a warrantless misdemeanor arrest only where the offense occurs in the presence of an officer. 152

Because of the difficulty of distinguishing between the terms "follow" and "harass" (the requisite actus reus), and constitutionally protected activity, subsection 784.048(2) is almost certain to face constitutional scrutiny. Section 784.048 is much needed, and well-intended. However, as enacted, it is also probably unconstitutionally vague and/or overbroad. 153

In western culture, the difference between harassment and courtship too often turns on subjective interpretations of otherwise constitutional conduct. In other words, the same conduct which causes "substantial emotional distress" on one occasion might serve a "legitimate purpose" on another. Telephone calls are the best example. The distinction between "harassment" and an attempt at "reconciliation" is entirely subjective. Because of this ambiguity, it is difficult to conclude that section 784.048 gives "persons of common intelligence and understanding adequate warning of the proscribed conduct" 154 when the demarcation between the conduct condemned by section 784.048 and conduct protected by its safe-harbor provision are essentially indistinguishable in many instances. 155

L. Theft

1. Grand Theft of a Firearm

Section 812.014 of the Florida Statutes defines the offense of theft. 156

Fear for his or her safety. The threat must be against the life of, or a threat to cause bodily injury to, a person." Id. § 784.048(1)(c).


154. Trushis v. State, 425 So. 2d 1126, 1130 (Fla. 1982).

155. The definition of "harasses" for purposes of subsection 784.048(1)(a) occurs in great measure upon the meaning of "course of conduct." "Course of conduct" is evidenced by a "continuity of purpose." "Continuity" was left undefined by the legislature in section 784.048, even though that same term has caused difficulty elsewhere. See supra text accompanying notes 106-15.

156. Section 812.014 provides:

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In Johnson v. State, 157 the defendant, Raymond Johnson, was convicted and sentenced for two separate counts of grand theft, stemming from Johnson's taking a purse containing money and a firearm. Subsection 812.014(2)(c)1 provides that theft of property valued at over $300 is grand theft. The theft of a firearm is also grand theft, pursuant to subsection 812.014(2)(c). 158

Johnson argued that his separate grand theft convictions for violations of subsections 812.014(2)(c)1 and 812.014(2)(c)3, based upon the same distinct act, offended double jeopardy. The Florida Supreme Court agreed, but only because the purse and enclosed firearm were picked up in one swift action. 159

The Johnson court reasoned that Johnson's theft of the purse from the seat of an unattended car resulted from "one intent and one act of taking." 160 On the other hand, the court approved dual convictions in instances where separate and "distinct acts" of taking occur, such as when a firearm and other property are taken during the course of a household burglary. 161

2. Legislative Enactments

a. Felony Petit Theft

In Chapter 92-79, section 1, Laws of Florida, the Florida legislature amended subsection 812.014(2)(d) of the Florida Statutes to provide that, effective October 1, 1992, "[a] person who commits petit theft and who has permanently:

(a) Deprive the other person of a right to the property or a benefit therefrom;

(b) Appropriate the property to his own use or to the use of any person not entitled thereto.

... (2)(c) It is grand theft of the third degree and a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if the property stolen is:

1. Valued at $300 or more, but less than $20,000.

3. A firearm.

Fla. Stat. § 812.014(1)(a)-(b), (2)(c)1, (2)(c)3 (1989).

157. 597 So. 2d 789 (Fla. 1992).


159. Johnson, 597 So. 2d at 799.

160. Id.

1. Grand Theft of a Firearm

Section 812.014 of the Florida Statutes defines the offense of theft. 156

fear for his or her safety. The threat must be against the life of, or a threat to cause bodily injury to, a person. 152 See generally Fla. Stat. § 901.15 (1991).


154 Trustar v. State, 425 So. 2d 1126, 1130 (Fla. 1982).

155 The definition of "harass" for purposes of subsection 784.048(1)(a) turns in great measure upon the meaning of "course of conduct." "Course of conduct" is evidenced by a "continuity of purpose." "Continuity" was left undefined by the legislature in section 784.048, even though that same term has caused difficulty elsewhere. See supra text accompanying notes 106-15.

156 Section 812.014 provides:

(1) A person commits theft if he knowingly obtains or uses, or endeavors to obtain or 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 his own use or to the use of any person not entitled thereto.

(2)(c) It is grand theft of the third degree and a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if the property stolen is:

1. Valued at $300 or more, but less than $2,000.

2. A firearm.

157 Fla. Stat. § 812.014(1)(a)-(b), (2)(c)1, (2)(c)3 (1989).


159 Johnson, 597 So. 2d at 799.

160 Id.

161 See State v. Getz, 435 So. 2d 789, 790 (Fla. 1983).
previously been convicted two or more times of any theft" is guilty of a third degree felony. In *State v. Jackson*, the Florida Supreme Court had affirmed a district court of appeal decision holding that a petty theft conviction may not be reclassified as a third degree felony, based upon two prior grand theft convictions.

The amendment to subsection 812.014(2)(d) in Chapter 92-79, section 1, Laws of Florida, specifically provides that any two prior "theft" convictions may be used for reclassification. However, subsection 812.014(2)(d) fails to define "theft." Because of this ambiguity, the meaning of the term "theft" should be strictly construed to permit reclassification only where the two predicate thefts convictions are for violations of section 812.014, as opposed to other types of theft related offenses. Additionally, because the revised language in Chapter 92-79, section 1, Laws of Florida, affects the substantive rights of the accused, the amendment to subsection 812.014(2)(d) should not be applied retrospectively to offenses committed prior to October 1, 1992, the effective date provided by Chapter 92-79, section 7, Laws of Florida.

b. Resisting a Merchant

Subsection 812.015(6) of the Florida Statutes provides that any person who resists the efforts of a merchant to recover property the merchant believes has been "concealed or removed from its place of display or elsewhere and who is subsequently found to be guilty of theft of the subject property is guilty of a misdemeanor of the first degree."166

163. 526 So. 2d 58 (Fla. 1988).
165. See cases cited supra note 68.
166. Florida Statute § 812.051(2) provides in pertinent part:

An individual who resists the reasonable effort of a law enforcement officer, merchant, merchant's employee, or farmer to recover property which the law enforcement officer, merchant, merchant's employee, or farmer had probable cause to believe the individual had concealed or removed from its place of display or elsewhere and who is subsequently found to be guilty of theft of the subject property is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083, unless the individual did not know, or did not have reason to know, that the person seeking to recover the property was a law enforcement officer, merchant, merchant's employee, or farmer. For purposes of this section the charge of theft and the charge of resisting may be tried concurrently.


In *K.C. v. State*, the Florida Supreme Court reviewed an earlier but substantially similar version of subsection 812.015(6) and determined that the criminal charges of resisting a merchant may not be filed until the defendant has first been convicted of the subject theft.

In Chapter 92-79, section 2, Laws of Florida, the legislature amended subsection (6) of section 812.015 to obviate the requirement that the defendant first be found guilty of the subject theft as a condition precedent to charging the offense of resisting a merchant. Because the amendment eliminates an essential element of resisting a merchant—the prior conviction for theft—the amendment to subsection (6) of section 812.015 should be applied only to offenses occurring on or after October 1, 1992, the effective date of provided by Chapter 92-79, section 7, Laws of Florida.

III. DEFENSES

A. Double Jeopardy

1. Conspiracy Offenses

In *Grady v. Corbin*, the United States Supreme Court clarified the coverage provided by the double jeopardy clause of the United States Constitution, holding that double jeopardy prohibits a second prosecu-
previously been convicted two or more times of any theft" is guilty of a third degree felony.\footnote{162} In \textit{State v. Jackson},\footnote{163} the Florida Supreme Court had affirmed a district court of appeal decision holding that a petit theft conviction may not be reclassified as a third degree felony, based upon two prior grand theft convictions.

The amendment to subsection 812.014(2)(d) in Chapter 92-79, section 1, Laws of Florida, specifically provides that any two prior "theft" convictions may be used for reclassification. However, subsection 812.014(2)(d) fails to define "theft." Because of this ambiguity, the meaning of the term "theft" should be strictly construed to permit reclassification only where the two predicate thefts convictions are for violations of section 812.014, as opposed to other types of theft related offenses.\footnote{164} Additionally, because the revised language in Chapter 92-79, section 1, Laws of Florida, affects the substantive rights of the accused, the amendments to subsection 812.014(2)(d) should not be applied retrospectively to offenses committed prior to October 1, 1992, the effective date provided by Chapter 92-79, section 7, Laws of Florida.\footnote{165}

\subsection*{b. Resisting a Merchant}

Subsection 812.015(6) of the Florida Statutes provides that any person who resists the efforts of a merchant to recover property the merchant believes has been "concealed or removed from its place of display or elsewhere and who is subsequently found to be guilty of theft of the subject property is guilty of a misdemeanor of the first degree."\footnote{166}
tion if, "to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." In *United States v. Felix*, the United States Supreme Court held that "a substantive crime, and a conspiracy to commit that crime, are not the 'same offense' for double jeopardy purposes." In other words, the government is free to separately prosecute a substantive crime, and the conspiracy to commit that same offense, without fear of offending the double jeopardy principles codified in *Grady v. Corbin*.

2. Other Crimes, Wrongs, or Acts

Also in *Felix*, the United States Supreme Court considered the relationship between the holding in *Grady v. Corbin* and Federal Rule of Evidence 404(b). Frank Dennis Felix was arrested for allegedly manufacturing methamphetamine during July, 1987, in Oklahoma, and for attempting to manufacture methamphetamine in Missouri, between August 26 and August 31, 1987. The charge of attempting to manufacture methamphetamine in Missouri was brought to trial first. During that trial, evidence concerning Felix's conduct in Oklahoma was introduced pursuant to Federal Rule of Evidence 404(b). Felix was subsequently indicted in Oklahoma, and during the Oklahoma trial, "the Government introduced much the same evidence . . . . that had been introduced in the Missouri trial." Felix raised double jeopardy as a defense.

In rejecting Felix's arguments, the United States Supreme Court emphasized "that the introduction of relevant evidence of particular misconduct in a case is not the same thing as prosecution for that conduct." *Grady v. Corbin* prohibits the government from proving "con-...
tion if, "to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." In United States v. Felix,\(^{174}\) the United States Supreme Court held that "a substantive crime, and a conspiracy to commit that crime, are not the 'same offense' for double jeopardy purposes."\(^{175}\) In other words, the government is free to separate-ly prosecute a substantive crime, and the conspiracy to commit that same offense, without fear of offending the double jeopardy principles codified in Grady v. Corbin.

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In rejecting Felix's arguments, the United States Supreme Court emphasized "that the introduction of relevant evidence of particular misconduct in a case is not the same thing as prosecution for that conduct."\(^{179}\) Grady v. Corbin prohibits the government from proving "con-
subsection 777.201(2) of the Florida Statutes unconstitutionally shifts the burden of proof to the defendant to prove entrapment.

In response to Herrera's assertion that subsection 777.201(2) violated his due process rights, the State countered that subsection 777.021(2) "shift[s] only the burden of persuasion of an affirmative defense, not the burden of proving the elements of the crime charged and the defendant's guilt." 186 The Florida Supreme Court agreed.

In Herrera, the Florida Supreme Court distinguished Herrera's suggestion that subsection 777.021(2) unconstitutionally shifts the burden of proof by reasoning that the subsection only requires the defendant to prove his own character and criminal inclinations as to the affirmative defense of entrapment. Therefore, no violation of due process occurs, because unlike mens rea, character and criminal inclination are not essential elements of the crimes of trafficking in cocaine or conspiracy to traffic in cocaine. 187 On the other hand, subsection 777.201(2) does nothing to relieve the State from its constitutional obligation of proving each of the elements of the defendant's offenses, including the defendant's criminal intent.

IV. SENTENCING

A. Offense Category

1. Inchoate Offenses

The district courts of appeal divided over whether conspiracy, solicitation, and attempted first degree murder should be scored on a category 1 or 9 scoresheet. The heading for the category 1 scoresheet, found in rule 3.988(a),188 provides: "Category 1: Murder, Manslaughter." However, a notation on the category 1 scoresheet states: "Chapter 782—Homicide (except subsection 782.04(1)(a)—capital murder)." 189

The committee note to rule 3.701, Florida Rules of Criminal Procedure, provides in pertinent part:

186. Id. at 584.
187. Id.
188. FLA. R. CRIM. P. 3.988.
189. Subsection 782.04(1)(a) defines murder in the first degree as a capital felony. The guidelines are inapplicable to capital felonies. Section 775.082(1) of the Florida Statutes, provides, in pertinent part, "[a] person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than 25 years before becoming eligible for parole . . . ." FLA. STAT. § 775.082(1) (1991).

(c) Only one category is proper in any particular case. Category 9, "All Other Felony Offenses," should be used only when the primary offense at conviction is not included in another, more specific category. The guidelines do not apply to capital felonies. Inchoate offenses are included within the category of the offense attempted, solicited, or conspired . . . . 190

By reading the first portion of the committee note to rule 3.701(c) literally, the Fourth District Court of Appeal concluded that conspiracy, solicitation, and attempted first degree murder offenses fall within category 9, "All Other Felony Offenses." 191 The First, Third, and Fifth District Courts of Appeal 192 reached a contrary result.

In Hayles v. State, 193 the Florida Supreme Court agreed with the First, Third, and Fifth District Courts of Appeal. Lee Robertson Hayles was convicted and sentenced under a category one scoresheet for the offense of solicitation to commit first-degree murder. In affirming Hayles' sentence, the supreme court reasoned that the actual offense committed was a violation of subsection (2) of Florida's inchoate offense statute, section 777.04 of Florida Statutes, and not section 782.04. 194 Therefore, the fact that first-degree capital murder is excluded from category 1 is of no moment. As indicated in the committee note to rule 3.701(c), all inchoate offenses must be scored "within the category of the offense attempted, solicited, or conspired." 195 Therefore, solicitation to commit first-degree murder must be scored on a category 1 scoresheet.

190. FLA. R. CRIM. P. 3.701, committee note (c) (emphasis added).
194. Subsection 777.04(2) of the Florida Statutes provides in pertinent part: "Whoever solicits another to commit an offense prohibited by law and in the course of such solicitation commands, encourages, hires, or requests another person to engage in specific conduct which would constitute such offense or an attempt to commit such offense commits the offense of criminal solicitation.
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B. Scoring of Offenses

1. Enhancement Under Section 775.087(1) for Use of Firearm

Section 775.087 of the Florida Statutes provides that an offense category may be increased for some felony offenses where during the commission of the offense, "the defendant carries, displays, uses, threatens, or attempts to use any weapon or firearm." In Rodriguez v. State,\textsuperscript{196} Anibal Rodriguez was convicted of attempted first degree murder, and his sentence was reclassified pursuant to section 775.087(1)(c), based upon a codefendant's use of a firearm. Although Rodriguez never personally used a firearm during the attempted homicide, the State contended that Rodriguez's sentence could be reclassified "on the theory of constructive or vicarious possession based on the conduct of the codefendant."\textsuperscript{196} The Florida Supreme Court agreed with Rodriguez that enhancement under section 775.087(1) for "use" of a weapon or firearm is not appropriate "without evidence establishing that the defendant had personal possession of the weapon during the commission of the felony."\textsuperscript{199}

C. Prior Record

1. Uncounseled Prior Convictions

In State v. Beach,\textsuperscript{200} the defendant, Joseph Beach, challenged several convictions in his guidelines scoresheet as uncounseled. In support of his

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(a) In the case of a felony of the first degree, to a life felony.
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198. Id. at 1272.
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C. Prior Record

1. Uncounseled Prior Convictions

In State v. Beach, 200 the defendant, Joseph Beach, challenged several convictions in his guidelines scoresheet as uncounseled. In support of his claim, Beach submitted a sworn affidavit to the effect that he was neither offered or provided counsel in his earlier cases. However, Beach failed to provide any evidence or testimony that he was indigent at these earlier proceedings, or otherwise entitled to counsel. 201 Following the reasoning of their decision in Hlad v. State, 202 the Florida Supreme Court held in Beach that the defendant bears the initial burden of establishing under oath:

(1) that the offense involved was punishable by more than six months of imprisonment or that the defendant was actually subjected to a term of imprisonment;
(2) that the defendant was indigent and, thus, entitled to court-appointed counsel;
(3) counsel was not appointed; and (4) the right to counsel was not waived. 203

If the defendant establishes these initial requirements, "the burden shifts to the state to show either that counsel was provided or that the right to counsel was validly waived." 204 Because Beach failed to provide any proof in his affidavit that he was indigent, incarcerated, or that the questioned offenses were punishable by more than six months of imprisonment, his claim failed to meet the threshold requirements of the Florida Supreme Court's test. 205

D. Victim Injury

1. Category 2 Offenses—Penetration Not Causing Ascertainable Physical Injury

In Karchesky v. State, 206 the Florida Supreme Court held that victim injury points may not be scored for penetration during a sexual offense unless there is "ascertainable physical injury." 207 Marcus E. Karchesky was convicted of three counts of unlawful carnal intercourse. For each of the three counts, the trial court assessed victim injury points for "penetration," although there was "no physical injury or trauma from the penetra-

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197. 602 So. 2d 1270 (Fla. 1992).
198. Id. at 1272.
199. Id.
200. 592 So. 2d 237 (Fla. 1992).
201. Id. at 238.
203. Beach, 592 So. 2d at 239.
204. Id.
205. Id. The cause was remanded to provide Beach with an opportunity to file amended findings. Id. at 240.
206. 591 So. 2d 930 (Fla. 1992).
207. Id. at 932-33.
tion.\(^{208}\) The Florida Supreme Court reversed, citing the 1987 amendment to rule 3.701(d)(7), of the Florida Rules of Criminal Procedure. Effective July 1, 1987, rule 3.701(d)(7) was amended to provide that "victim injury shall be scored for each victim physically injured during a criminal episode or transaction."\(^{209}\) The Florida Supreme Court observed that the committee note to rule 3.701(d)(7) was also amended at that time to provide that victim injury "is limited to physical trauma."\(^{210}\)

2. Legislative Enactments

The Florida Legislature responded almost immediately to the Florida Supreme Court's decision in *Karchesky* by amending section 921.001 of the Florida Statutes in Chapter 92-135, section 1, Laws of Florida, to provide that "sexual penetration must receive the score indicated for penetration or slight injury, regardless of whether there is evidence of any physical injury."\(^{211}\) The amended section 921.001 also allows victim injury points, in addition to points for sexual penetration or contact, in instances where a victim suffers any physical injury. Since the amendment to section 921.001 affects the substantive rights of the accused, it should not be applied to offenses occurring prior to April 8, 1992, the effective date provided by the amendment.\(^{212}\)

E. Departure Sentences

1. Escalating Patterns of Criminal Activity

Probably the most tortured area of the sentencing guidelines has been departure sentences based upon escalating patterns of criminal conduct. Because of the confused jurisprudence in this area, determining which factors were necessary or sufficient to permit this type of departure was virtually impossible. When construed together, the Florida Supreme Court's decisions in *Jones v. State*,\(^{213}\) *State v. Simpson*,\(^{214}\) and *Smith v. State*,\(^{215}\) offered little consistency. On the one hand, *Jones* suggested that where a definite pattern exists, a defendant's continuing and persistent pattern of criminal activity need not necessarily escalate in severity to support a departure sentence.\(^{216}\) On the other hand, *Simpson* suggested that an escalation in severity, combined with the temporal proximity of the defendant's offenses, may give rise to a departure, regardless of whether the defendant exhibited a persistent pattern of criminal conduct.\(^{217}\) Finally, the Florida Supreme Court's decision in *Smith* appeared to suggest that either possibility was correct.\(^{218}\)

Apparent recognizing the hopelessness of the situation, the Florida Supreme Court afforded itself a fresh start. In *Barfield v. State*,\(^{219}\) the Florida Supreme Court established a new test for determining whether a defendant's offenses establish an "escalating pattern" of criminal conduct, as recognized by section 921.001(8) of the Florida Statutes.\(^{220}\) More

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208. *Id.* at 931.
209. *Id.* at 932. (quoting Fl. R. Crim. P. 3.701(d)(7)).
210. *Id.* (quoting committee note to Fl. R. Crim. P. 3.701(d)(7)). The Florida Supreme Court in *Karchesky* emphasized that "any specifically identified physical injury or trauma" may be scored as victim injury. *Id.* at 933. Additionally, in dicta, the *Karchesky* court approved "mental or psychic trauma to the victim" as grounds for departure from the sentencing guidelines in sexual battery cases, approving Thompson v. State, 483 So. 2d 1 (Fla. 2d Dist. Ct. App. 1985). *Karchesky*, 591 So. 2d at 933.
211. Chapter 92-136, § 1 of the Laws of Florida, provides:
   (8) For purposes of the statewide sentencing guidelines, if the conviction is for an offense described in chapter 794, chapter 800, or s. 826.04 and such offense includes sexual penetration, the sexual penetration must receive the score indicated for penetration or slight injury, regardless of whether there is evidence of any physical injury. If the conviction is for an offense described in chapter 794, chapter 800, or s. 826.04 and such offense does not include sexual penetration, the sexual contact must receive the score indicated for contact but no penetration, regardless of whether there is evidence of any physical injury. If the victim of an offense described in chapter 794, chapter 800, or s. 826.04 suffers any physical injury as a direct result of the primary offense or any other offense committed by the offender resulting in conviction, such physical injury must be scored separately and in addition to the points scored for the sexual contact or the sexual penetration.

1992 Fla. Laws ch. 92-135, § 1
https://nsuworks.nova.edu/nlr/vol17/iss1/8

212. *Id.* § 4; see supra note 68.
213. 530 So. 2d 53 (Fla. 1988).
214. 554 So. 2d 506 (Fla. 1989).
215. 579 So. 2d 75 (Fla. 1991).
216. Jones, 530 So. 2d at 56.
217. Simpson, 554 So. 2d at 510.
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\(^{212}\) Id. § 4; see supra note 68.

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\(^{214}\) 554 So. 2d 506 (Fla. 1989).

\(^{215}\) 579 So. 2d 75 (Fla. 1991).

\(^{216}\) Jones, 530 So. 2d at 56.

\(^{217}\) Simpson, 554 So. 2d at 510.

\(^{218}\) Smith, 579 So. 2d at 76.

\(^{219}\) 594 So. 2d 259 (Fla. 1992).

\(^{220}\) Section 921.001(8) provides:

8. A trial court may impose a sentence outside the guidelines when credible facts proven by a preponderance of the evidence demonstrate that the defendant’s prior record, including offenses for which adjudication was withheld, and the current criminal offense for which the defendant is being sentenced indicate an escalating pattern of criminal conduct. The escalating pattern of criminal conduct may be evidenced by a progression from nonviolent crimes to
importantly, for purposes of clarity, the Florida Supreme Court specifically receded from their 1988 and 1989 decisions in Jones and Simpson to the extent that those decisions directed that "temporal proximity alone" could provide a sufficient basis for departure from the sentencing guidelines. Instead, the Florida Supreme Court reasserted the suggestion made in Smith that "a persistent but nonescalating pattern of criminal activity is not a sufficient reason to depart from the guidelines." The Barfield court stated:

[The "escalating pattern" recognized by section 921.001(8) as a valid basis for departure can be demonstrated in three ways: 1) a progression from nonviolent to violent crimes; 2) a progression of increasingly violent crimes; or 3) a pattern of increasingly serious criminal activity. Under this third category, "increasingly serious criminal activity" is indicated when the current charge involves an increase in either the degree of crime or the sentence which may be imposed, when compared with the defendant's previous offenses.]

Tobias Barfield was convicted of attempted trafficking in cocaine and conspiracy to traffic in cocaine in excess of 400 grams or more. Barfield committed these offenses just three months after his release from prison for the offense of trafficking in cocaine, in an amount greater than twenty-eight grams, but less than 200 grams. The trial court sentenced Barfield to twenty years incarceration, a departure sentence. Applying their new test, the Florida Supreme Court approved Barfield's departure sentence under the final authorized category—a pattern of increasingly serious criminal activity. Although each of Barfield's offenses were first-degree felonies, the Florida Supreme Court affirmed Barfield's departure sentence based upon the fact that his most recent offense was punishable by a fifteen year minimum mandatory sentence, and a $250,000 fine, while his previous conviction carried only a three year minimum mandatory sentence, and a $50,000 fine. Therefore, Barfield's convictions demonstrated a pattern of offenses subject to increasingly severe sentences.

The Florida Supreme Court's opinion in Barfield was issued contemporaneously with two other cases, both of which illustrate Barfield's limitations. In Gordon v. State, the Florida Supreme Court disapproved a departure sentence based upon a defendant's conviction for grand theft just five months after discharge from a supervised-release program, where the offender, Willie Gordon, had been transferred after his release from prison for three grand theft convictions. Similarly, in State v. Dodd, a majority of the Florida Supreme Court agreed that a defendant's conviction for the offense of second degree murder, within three months after being released from prison for the exact same offense, was not subject to departure under the analysis approved in Barfield. Like Gordon, the Florida Supreme Court's decision in Dodd demonstrates that no matter how reprehensible an offender's conduct, departure sentences based solely on the temporal proximity of crimes will not satisfy the requirements of the Barfield test.

However, in a later opinion, the Florida Supreme Court suggested in Taylor v. State that where an offender's criminal history demonstrates a temporal proximity of offenses, this factor need not be completely ignored. Although Taylor was issued several months after the Barfield, Dodd, and Gordon trilogy, the Florida Supreme Court concluded that "prior offenses committed within a close temporal proximity may be a basis for departure when found in conjunction with any one of the three factors outlined in Barfield." Although offering no guidance concerning exactly what this language suggests, the Florida Supreme Court approved Taylor's departure sentence, stating only that "Taylor's first conviction in 1987 involved third-degree felonies, while his subsequent offenses in 1988 and 1989 contain two second-degree felony convictions within a short
importantly, for purposes of clarity, the Florida Supreme Court specifically receded from their 1988 and 1989 decisions in Jones and Simpson to the extent that those decisions directed that "temporal proximity alone" could provide a sufficient basis for departure from the sentencing guidelines.\textsuperscript{25} Instead, the Florida Supreme Court reassessed the suggestion made in Smith that "a persistent but nonescalating pattern of criminal activity is not a sufficient reason to depart from the guidelines."\textsuperscript{222} The Barfield court stated:

\textit{[T]he "escalating pattern" recognized by section 921.001(8) as a valid basis for departure can be demonstrated in three ways: 1) a progression from nonviolent to violent crimes; 2) a progression of increasingly violent crimes; or 3) a pattern of increasingly serious criminal activity. Under this third category, "increasingly serious criminal activity" is indicated when the current charge involves an increase in either the degree of crime or the sentence which may be imposed, when compared with the defendant's previous offenses.}\textsuperscript{223}

Tobias Barfield was convicted of attempted trafficking in cocaine and conspiracy to traffic in cocaine in excess of 400 grams or more. Barfield committed these offenses just three months after his release from prison for the offense of trafficking in cocaine, in an amount greater than twenty-eight grams, but less than 200 grams. The trial court sentenced Barfield to twenty years incarceration, a departure sentence. Applying their new test, the Florida Supreme Court approved Barfield's departure sentence under the final authorized category—a pattern of increasingly serious criminal activity.\textsuperscript{224} Although each of Barfield's offenses were first-degree felonies, the Florida Supreme Court affirmed Barfield's departure sentence based upon the fact that his most recent offense was punishable by a fifteen year minimum mandatory sentence, and a $250,000 fine, while his previous conviction carried only a three year minimum mandatory sentence, and a $50,000 fine. Therefore, Barfield's convictions demonstrated a pattern of offenses subject to increasingly severe sentences.

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\textsuperscript{225} \textit{FLA. STAT. § 921.001(8) (1987).} In Chapter 92-135, § 1, Laws of Florida, this subsection was renumbered as § 921.001(9) (Supp. 1992) (effective Apr. 8, 1992).

\textsuperscript{222} \textit{Barfield, 594 So. 2d at 261.}

\textsuperscript{223} \textit{Id. (emphasis added) (citing Smith v. State, 579 So. 2d 75 (Fla. 1991)).}

\textsuperscript{224} \textit{Id.}

The Florida Supreme Court's opinion in \textit{Barfield} was issued contemporaneously with two other cases, both of which illustrate \textit{Barfield}'s limitations. In \textit{Gordon v. State},\textsuperscript{225} the Florida Supreme Court disapproved a departure sentence based upon a defendant's conviction for grand theft just five months after discharge from a supervised-release program, where the offender, Willie Gordon, had been transferred after his release from prison for three grand theft convictions.

Similarly, in \textit{State v. Dodd},\textsuperscript{226} a majority of the Florida Supreme Court agreed that a defendant's conviction for the offense of second degree murder, within three months after being released from prison for the exact same offense, was not subject to departure under the analysis approved in \textit{Barfield}. Like Gordon, the Florida Supreme Court's decision in \textit{Dodd} demonstrates that no matter how reprehensible an offender's conduct, departure sentences based solely on the temporal proximity of crimes will not satisfy the requirements of the \textit{Barfield} test.\textsuperscript{227}

However, in a later opinion, the Florida Supreme Court suggested in \textit{Taylor v. State}\textsuperscript{228} that where an offender's criminal history demonstrates a temporal proximity of offenses, this factor need not be completely ignored.\textsuperscript{229} Although Taylor was issued several months after the \textit{Barfield}, \textit{Dodd}, and \textit{Gordon} trilogy, the Florida Supreme Court concluded that "prior offenses committed within a close temporal proximity may be a basis for departure when found in conjunction with any one of the three factors outlined in \textit{Barfield}."\textsuperscript{230} Although offering no guidance concerning exactly what this language suggests, the Florida Supreme Court approved Taylor's departure sentence, stating only that "Taylor's first conviction in 1987 involved third-degree felonies, while his subsequent offenses in 1988 and 1989 contain two second-degree felony convictions within a short

\textsuperscript{225} \textit{594 So. 2d 262 (Fla. 1992).}

\textsuperscript{226} \textit{594 So. 2d 263 (Fla. 1992).}

\textsuperscript{227} \textit{The Florida Supreme Court, in \textit{Barfield}, suggested that "Florida's habitual offender statute provides a statutory means of dealing with persistent criminal conduct." 594 So. 2d at 261. On the other hand, the Florida Supreme Court also suggested in \textit{State v. Barnes} that if, as Florida's habitual offender statute lacks a sequential conviction requirement, the statute fails to fulfill "its intent and purpose." 595 So. 2d 22, 24 (Fla. 1993); see infra text accompanying notes 262-67. The Florida Supreme Court also noted that the Florida Sentencing Guidelines Commission has recommended that Florida's habitual offender statute be repealed. \textit{Barnes}, 595 So. 2d at 24 n.2.}

\textsuperscript{228} \textit{601 So. 2d 540 (Fla. 1992).}

\textsuperscript{229} \textit{Id. at 542.}

\textsuperscript{230} \textit{Id.}
period of time.”"231 In the final analysis, then, the Florida Supreme Court’s decision in Taylor foretells only that departure sentences based in part upon the temporal proximity of an offender’s crimes will continue to serve as a playground for confused and uncertain jurisprudence.

2. Premeditation or Calculation

In State v. Obojes,232 the Florida Supreme Court clarified the scope of its recent decision in Hernandez v. State,233 which rejected departure sentences based upon “professionalism,” and noted that there was “little distinction between planning and premeditation and the professional manner in which a crime is committed.”234 Andreas Obojes was convicted of sexual battery on a woman he had “stalked” for several weeks. The trial court imposed a departure sentence based upon Obojes’ “advance planning and premeditation.”235

In affirming the defendant’s departure sentence, the Florida Supreme Court emphasized that unlike Obojes, their decision in Hernandez concerned a drug charge, an offense the supreme court called “vastly different from sexual battery.”236 The supreme court further concluded that “it is settled that advance planning and premeditation are permissible reasons for a departure in the context of sexual battery,”237 but conceded that their earlier decisions required clarification.238 The Obojes court stated: “[W]e hold that premeditation or calculation is a sufficient reason for departure in a sexual battery case only if it is of a heightened variety. To this end, heightened premeditation or calculation consists of a careful plan or preconceived design formulated with cold forethought.”239 The Florida Supreme Court had no difficulty concluding that the defendant’s “stalking” satisfied the test for heightened premeditation or calculation.

3. Successive Violations of Probation

In Williams v. State,240 the Florida Supreme Court interpreted rule 3.701(d)(14) of the Florida Rules of Criminal Procedure to allow a sentence to be “bumped one cell or guideline range” for “multiple probation violations,” for example, each prior reinstatement or modification of probation or community control.241 The Florida Supreme Court referred to the term “multiple probation violations” as meaning “successive violations which follow the reinstatement or modification of probation rather than the violation of several conditions of a single probation order.”242 Although the supreme court concluded that its decisions in Lambert and Ree precluded probation violations from being used as a basis for departure

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231. Id. at 542-43 (emphasis added). The Supreme Court described Taylor’s criminal history as follows:

Taylor’s numerous convictions show the following escalating pattern of criminal conduct. In November 1987, the trial court convicted Taylor of third-degree felony possession of cocaine. While out on bond for the 1987 offense, Taylor sold cocaine twice to a confidential informant. Taylor pled guilty to these sales of cocaine, two second-degree felonies. The trial court sentenced Taylor to a year and a day and four years’ probation for these charges, which he served concurrently. Taylor was released on December 14, 1988, and began his probation. Seven and one-half months later Taylor was again arrested for possession of cocaine, a third-degree felony; possession of more than twenty grams of cannabis, a third-degree felony; possession of a short barreled shotgun, a second-degree felony; and maintenance of a drug house, a third-degree misdemeanor. While these charges were pending against Taylor, the police arrested him on an outstanding warrant on November 18, 1989. During the arrest, the police conducted a protective, sweep search which revealed possession of cocaine, a third-degree felony; possession, more than twenty grams of cannabis, a third-degree felony; and possession of a firearm by a convicted felon, a second-degree felony. Taylor pled guilty to the 1989 charges.

Id. at 542 n.2.


233. 575 So. 2d 640 (Fla. 1991).

234. Id. at 642.

235. Obojes, 17 Fla. L. Weekly at SS68.
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Id. at 542 n.2.


233. 575 So. 2d 640 (Fla. 1991).

234. Id. at 642.

235. Obojes, 17 Fla. L. Weekly at S568.

236. Id.

237. Id. (citing Casteel v. State, 498 So. 2d 1249 (Fla. 1986); Lerma v. State, 497 So. 2d 736, 739 (Fla. 1986), receded from on other grounds, State v. Rousseau, 509 So. 2d 281 (Fla. 1987)).

238. Id. at S569.

239. Id. Although the supreme court limited their holding "exclusively to sexual [battery] offenses," they added somewhat curiously that "heightened premeditation never can be a reason for departure in cases that inherently involve cold forethought, such as conspiracy or drug trafficking cases." Obojes, 17 Fla. L. Weekly at S569. This language seems to suggest that heightened premeditation may constitute valid grounds for departure for offenses which do not "inherently involve cold forethought."

240. 594 So. 2d 273 (Fla. 1992).

241. Id. at 275. Rule 3.701(d)(14) provides:

Sentences imposed after revocation of probation or community control must be in accordance with the guidelines. The sentence imposed after revocation of probation or community control may be included within the original cell (guidelines range) or may be increased to the next higher cell (guidelines range) without requiring a reason for departure.


242. Williams, 594 So. 2d at 274 n.3.
from the sentencing guidelines, the Williams court was concerned that in many instances, trial courts are powerless to meaningfully punish probation violations. The Florida Supreme Court compromised by construing rule 3.701(d)(14) of the Florida Rules of Criminal Procedure to permit a one cell bump for each probation violation.

Beyond any doubt, the Florida Supreme Court’s decision in Williams is well-intended. Some probation violations are more egregious than others, especially where a violation follows a prior revocation, or multiple revocations. However, little in rule 3.701(d)(14) supports the Florida Supreme Court’s conclusion that more than one cell bump is permissible for any probation violation. In fact, rule 3.701(d)(14) specifically permits only a bump to the “next higher cell.” In the final analysis, then, the Florida Supreme Court’s conclusion that their reading of rule 3.701(d)(14) “is entirely consistent” with the language of the rule is at best, a reach. At worst, the supreme court’s holding constitutes a substantial departure from well established principles of statutory construction. Even the supreme court’s own language—that their holding “is entirely consistent” with rule 3.701(d)(14), suggests that the rule is ambiguous, and therefore, should be strictly construed in favor of the accused. Finally, the language used by the Florida Supreme Court in Williams might also lead to unfair results, insofar as the supreme court defined the term “multiple probation violations” to include “successive violations which follow the reinstatement or modification of probation . . . .” This analysis overlooks the fact that a modification of probation may result from appropriate conduct or almost any other reason.

4. Unscored Capital Offenses

In *Bunney v. State*, the Florida Supreme Court revisited the issue of whether a contemporaneous unscored capital felony conviction was sufficient grounds for departure from the sentencing guidelines. In *Bunney*, the defendant, Gerald Wayne Bunney, was sentenced to life in prison without the possibility of parole for twenty-five years, based upon his first degree murder conviction in the death of a five year-old girl, Tonya McGrew. Bunney was also convicted of kidnapping McGrew, and the trial court imposed a departure sentence of life in prison, consecutive with Bunney’s life sentence for the homicide offense. On appeal, Bunney argued that victim injury points were already included in his kidnapping scoresheet, due to McGrew’s death. Bunney therefore concluded that the departure sentence violated the rule that factors already considered in the guidelines may not be used as a basis for departure. Nevertheless, the Florida Supreme Court approved Bunney’s departure sentence, based upon precedent that even the supreme court appeared to consider somewhat suspect.

5. Contemporaneous Writing Requirement

a. Retrospective Application of *Ree and Pope*

In *Ree v. State*, the Florida Supreme Court held that any sentence outside the permissive guideline range must be accompanied by a contemporaneous, written order, delineating the reasons for the departure.

243. Id. at 274 (quoting Niebrak v. State, 561 So. 2d 1218, 1219 (Fla. 5th Dist. Ct. App. 1990) (Sharp, J., dissenting)).
244. See Fla. R. CRIM. P. 3.701(d)(14).
244. See Fla. Stat. § 775.021(1) (1991). Section 775.021(1) states that “[t]he provisions of this code . . . shall be strictly construed; when language is susceptible of differing constructions, it shall be construed most favorably to the accused.” Id.
245. See Lambert v. State, 545 So. 2d 838, 841 (Fla. 1989) (applying the rules of construction contained in § 775.021(1) of the Florida Statutes (1987) to the rules of criminal procedure and committee notes interpreting the sentencing guidelines).
246. Williams, 594 So. 2d at 274 n.3 (emphasis added).
247. The same logic applies equally to reinstatements of probation. If the Florida definition of “probation violation,” any modification should first be subjected to a fact intensive inquiry to determine whether the modification was the result of questionable conduct by the probationer, or was simply ministerial in nature.
from the sentencing guidelines, the Williams court was concerned that in many instances, trial courts are powerless to meaningfully punish probation violations.\footnote{243} The Florida Supreme Court compromised by construing rule 3.701(d)(14) of the Florida Rules of Criminal Procedure to permit a one cell bump for each probation violation.

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\footnote{249} 17 Fla. L. Weekly 5383 (1992).
\footnote{250} Bunney argued that effective July 1, 1987, rule 3.701(d)(7) was amended to provide that “[v]ictim injury shall be scored for each victim physically injured during a criminal episode or transaction.” FLA. R. CRIM. P. 3.701(d)(7). Bunney reasoned that because his sentence for the kidnapping conviction already included victim injury points for McGrew’s death, any departure sentence would violate the rule announced in \\textit{Hendrix v. State}, where the Florida Supreme Court held that “factors already taken into account in calculating the sentencing guidelines cannot support a departure.” Bunney, 17 Fla. L. Weekly at S383 (citing Hendrix v. State, 475 So. 2d 1218, 1220 (Fla. 1985)).
\footnote{251} See Livingston v. State, 565 So. 2d 1286 (Fla. 1988); Hambrough v. State, 509 So. 2d 108 (Fla. 1987). On appeal, Bunney urged that \\textit{Hambrough and Livingston} should be distinguished on the grounds that they were decided on the basis of the language contained in rule 3.701(d)(7), prior to the its amendment in 1987. The supreme court responded only by suggesting that the Florida Sentencing Commission “visit this issue and clarify the sentencing guidelines.” Bunney, 17 Fla. L. Weekly at S383.
\footnote{252} 565 So. 2d 1329 (Fla. 1990), modified by State v. Lyles, 576 So. 2d 706 (Fla. 1991).}
Pope v. State,254 the Florida Supreme Court held that where the trial court is reversed for failing to provide written reasons for a departure sentence, the defendant must be resentenced within the guidelines. However, the more troublesome question remaining after Ree and Pope has been whether the Florida Supreme Court's decisions in these cases should be given retroactive effect.255 In an important decision of broad implication, the Florida Supreme Court held in Smith v. State256 that any decision of this Court announcing a new rule of law, or merely applying an established rule of law to a new or different factual situation, must be given retroactive application . . . in every case pending on direct review or not yet final.257

The Florida Supreme Court's decision in Smith was issued in conjunction with two other decisions, Owens v. State258 and Blair v. State.259 In Owens, the defendant received a departure sentence, and appealed. The First District Court of Appeal reversed Owens' sentence, but failed to direct

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Id. at 1064.
256. 598 So. 2d 1063 (Fla. 1992). In Smith, the State failed to tender a scoresheet at the sentencing hearing, as required by rule 3.701(d)(1), which states that "[t]he state attorney's office will prepare the scoresheets and present them to the defense counsel for review as to accuracy in all cases unless the judge directs otherwise." F.L.A. R. C.R.M. P. 3.701(d)(1). However, the State agreed to prepare a scoresheet with the court's reason for imposing a departure sentence. Although a scoresheet was ultimately prepared by the State, no written reason for departure was included. The State then appealed the trial court's departure sentence. Given these circumstances, the Florida Supreme Court refused to penalize Smith for the State's error. Instead, the supreme court described the State's failure to properly comply with the trial court's directive as a "ministerial act," and refused to apply the rigid requirements of Ree and Pope. Smith, 598 So. 2d at 1067.
257. Id. at 1066. The Florida Supreme Court further held that Ree should apply to any case pending at the trial court or appellate level on or after the date that mandate issued after rehearing in Ree. The Florida Supreme Court stated: Our decision today requires us to recede in part from Ree to the extent that we now hold that Ree shall apply to all cases not yet final when mandate issued after rehearing in Ree. We recede from Lyles and Williams to the extent that they declined to apply Ree retroactively to nonfinal cases.
Id. Ree was decided by the Florida Supreme Court on July 19, 1990. Mandate issued after rehearing in Ree on August 16, 1990 (No. 71,424). Telephone interview with Kathy Bilton, Deputy Clerk of Court, Florida Supreme Court (Sept. 21, 1992).
259. 598 So. 2d 1068 (Fla. 1992).
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Id. Reec was decided by the Florida Supreme Court on July 19, 1990. Mandate issued after rehearing in Reec on August 16, 1990 (No. 71,424). Telephone interview with Kathy Belton, Deputy Clerk of Court, Florida Supreme Court (Sept. 21, 1992). 258. 598 So. 2d 64 (Fla. 1992).
259. 598 So. 2d 1068 (Fla. 1992).

that Owens be resentenced within the guidelines, in accordance with Pope. Citing Smith, the Florida Supreme Court reversed, concluding:

On rehearing in Reec, this Court stated that Reec would apply prospectively only. Such a prospective application would preclude relief for Owens as he was sentenced before Reec became final. However, Owens was a passenger on a railroad train which was derailed in Smith v. State when we receded from this position and held that both Reec and Pope are applicable to all cases not yet final at the time mandate issued after rehearing in Reec or at the time Pope was decided. Thus, both Reec and Pope are applicable to Owens' case.

The Florida Supreme Court therefore directed that Owens be resentenced within the guidelines.

Similarly, in Blair, the Florida Supreme Court again applied Smith, and citing Reec and Pope, reversed and remanded the trial court's upward departure sentence, with directions that the defendant be resentenced within the guidelines. In dissent, Justice Grimes argued that at the time of Blair's sentencing, '[t]he trial judge had no reason to know that he was committing error by not filing the written reasons for departure.' Justice Grimes quipped: "This is no way to run a railroad.

b. Application of Reec to Motions for Reduction of Sentence, Pursuant to Rule 3.800(b)

In instances in which Reec and Pope bar a trial court from departing from the sentencing guidelines after remand on appeal, defendants have sought relief by filing motions for reduction or modification of sentence, pursuant to rule 3.800(b), Florida Rules of Criminal Procedure. This "end-run" was specifically disapproved by the Florida Supreme Court in

260. Owens, 598 So. 2d at 64-65.
261. Id. at 64. Pope was decided by the Florida Supreme Court on April 26, 1990.
262. Id. at 65.
263. Blair, 598 So. 2d at 1069.
264. Id. (Grimes, J., dissenting).
265. Id.
266. See supra text accompanying notes 255-57.
267. Rule 3.800(b) of the Florida Rules of Criminal Procedure provides in pertinent part: '[a] court may reduce or modify a legal sentence imposed by it within sixty days of such imposition, or within sixty days after receipt by the court of a mandate issued by the appellate court upon affirmance of the judgment and/or sentence upon an original appeal.' Fla. R. Crim. P. 3.800(b).
Buchanan v. State, in which the supreme court adopted the opinion of the Fifth District Court of Appeal as its own. In Buchanan, the Fifth District Court of Appeal held that "[c]ontemporaneous written reasons must be given, whether the departure is effected by the original sentence or by a motion for reduction pursuant to rule 3.800(b)."

F. Habitual Offender Sentences

1. First Degree Felonies Punishable by Life

Section 775.084 of the Florida Statutes regulates the treatment of persons sentenced as habitual offenders. Subsection 775.084(4)(a) provides that "[t]he court, in conformity with the procedure established in subsection (3), shall sentence the habitual felony offender as follows:

1. In the case of a felony of the first degree, for life."

In Burdick v. State, the defendant, Billy Burdick, was convicted of armed burglary of a dwelling, a first-degree felony punishable by life imprisonment. The trial court sentenced Burdick to life imprisonment, pursuant to section 775.084 of the Florida Statutes. Burdick appealed on two grounds.

First, Burdick asserted that only first degree felonies are subject to habitual offender treatment. In other words, because burglary of a dwelling is a first degree felony punishable by life, as opposed to only a first degree felony, Burdick argued that section 775.084 may not be used for enhancement. The Florida Supreme Court disagreed, responding that the construction urged by Burdick would result in an anomalous situation whereby 'defendants convicted of first-degree felonies who were sentenced under the habitual offender statute would potentially receive harsher sentences than defendants convicted of first-degree felonies punishable by life who received guidelines sentences.'

2. Mandatory Versus Permissive Sentencing

Burdick also took exception with the language found in subsection 775.084(4)(a), which provides that persons convicted of a first degree

2. In the case of a felony of the second degree, for a term of years not exceeding 30.
3. In the case of a felony of the third degree, for a term of years not exceeding 10.

(b) The court, in conformity with the procedure established in subsection (3), may sentence the habitual violent felony offender as follows:

1. In the case of a felony of the first degree, for life, and such offender shall not be eligible for release for 15 years.
2. In the case of a felony of the second degree, for a term of years not exceeding 30, and such offender shall not be eligible for release for 10 years.
3. In the case of a felony of the third degree, for a term of years not exceeding 10, and such offender shall not be eligible for release for 5 years.

(e) A sentence imposed under this section shall not be subject to the provisions of [the sentencing guidelines].
Buchanan v. State, in which the supreme court adopted the opinion of the Fifth District Court of Appeal as its own. In Buchanan, the Fifth District Court of Appeal held that "[c]ontemporaneous written reasons must be given, whether the departure is effected by the original sentence or by a motion for reduction pursuant to rule 3.800(b)."

F. Habitual Offender Sentences

1. First Degree Felonies Punishable by Life

Section 775.084 of the Florida Statutes regulates the treatment of persons sentenced as habitual offenders. Subsection 775.084(4)(a)

268. 592 So. 2d 676 (Fla. 1992).
270. Buchanan, 580 So. 2d at 203. The Fifth District Court of Appeal in Buchanan agreed with the Fourth District Court of Appeal, "[t]hat rule 3.800(b) should not be construed as allowing a procedure 'end-run' around the written reason requirements" of Rei, Pope, and rule 3.701(d)(11), Florida Rules of Criminal Procedure. Id. at 202-03 (citing State v. Allen, 553 So. 2d 176 (Fla. 4th Dist. Cl. App. 1989)). See Owens v. State, 598 So. 2d 64 (Fla. 1992). Therefore, written reasons for departure are required for any reductions of sentence pursuant to rule 3.800(b), which would otherwise constitute a departure from the permitted range provided by the defendant's guideline scoresheet.
271. Section 775.084 provides in pertinent part:

(1)(b) "Habitual violent felony offender" means a defendant for whom the court may impose an extended term of imprisonment, as provided in this section, if it finds that:

1. The defendant has previously been convicted of a felony or an attempt or conspiracy to commit a felony and one or more of such convictions was for:
   a. Arson,
   b. Sexual battery,
   c. Robbery,
   d. Kidnapping,
   e. Aggravated child abuse,
   f. Aggravated assault,
   g. Murder,
   h. Manslaughter,
   i. Unlawful throwing, placing, or discharging of a destructive device or bomb,
   j. Armed burglary, or
   k. Aggravated battery.

(4)(a) The court, in conformity with the procedure established in subsection (3), shall sentence the habitual felony offender as follows:

1. In the case of a felony of the first degree, for life.

2. In the case of a felony of the second degree, for a term of years not exceeding 30.
3. In the case of a felony of the third degree, for a term of years not exceeding 10.

(b) The court, in conformity with the procedure established in subsection (3), may sentence the habitual violent felony offender as follows:

1. In the case of a felony of the first degree, for life, and such offender shall not be eligible for release for 15 years.
2. In the case of a felony of the second degree, for a term of years not exceeding 30, and such offender shall not be eligible for release for 10 years.
3. In the case of a felony of the third degree, for a term of years not exceeding 10, and such offender shall not be eligible for release for 5 years.

(e) A sentence imposed under this section shall not be subject to the provisions of the sentencing guidelines. 

272. Id. at 267.  
273. Id. at 268. 
274. Id. at 269.
felony "shall" be sentenced to life in prison. This language, Burdick asserted, improperly caused the trial court to believe that sentencing under subsection 775.084(4)(a)1 is mandatory, rather than permissive. Again, the Florida Supreme Court rejected Burdick's interpretation of subsection 775.084(4)(a)1. The Florida Supreme Court concluded instead that "[t]here is no reason why the legislature would have mandated life sentences for habitual first-degree felony offenders but left permissive the sentencing for habitual first-degree violent felony offenders" under subsection 775.084-(4)(b). The Florida Supreme Court drew additional support for its position from its decision in State v. Brown, where the Florida Supreme Court construed the term "shall" in subsection 775.084(4)(a)1 of the Florida Statutes to be permissive, not mandatory.

3. Sequential Convictions

In State v. Barnes, the Florida Supreme Court addressed the issue of whether section 775.084(1)(a)1 of the Florida Statutes, contains a sequential conviction requirement. Anthony T. Barnes had previously been convicted of two separate felony offenses. Although each of Barnes' felony offenses occurred on separate dates, Barnes was convicted and sentenced for each of his two prior felony offenses simultaneously, on the same date, at the same hearing. When Barnes was subsequently convicted of the offense of grand theft, the trial court sentenced Barnes as a habitual offender. Barnes appealed, arguing that Florida's habitual offender statute has traditionally required that each predicate conviction be sequential in time, thereby affording every offender the maximum opportunity to reform.

Although the Florida Supreme Court concurred "that the underlying philosophy of a habitual offender statute may be better served by a sequential conviction requirement," the supreme court found no such requirement in the 1988 edition of section 775.084. Instead, the Florida Supreme Court found the language of section 775.084(1)(a)1, Florida Statutes, "clear and unambiguous," and pursuant to the language of subsection 775.084(1)(a)1, requiring only that "[t]he defendant has been
felony "shall be sentenced to life in prison." This language, Burdick asserted, improperly caused the trial court to believe that sentencing under subsection 775.084(4)(a)1 is mandatory, rather than permissive. Again, the Florida Supreme Court rejected Burdick's interpretation of subsection 775.084(4)(a)1. The Florida Supreme Court concluded instead that "[t]he Florida Statute is to be construed as a whole to effectuate the intent of the legislature," and that the "shall" in subsection 775.084(4)(a)1 is permissive, not mandatory.

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convicted of two or more felonies in this state." 285

4. "Stacking" Minimum Mandatory Sentences

The Florida Supreme Court held in Daniels v. State that habitual felony offenders may not be sentenced to consecutive minimum mandatory sentences for crimes arising from the same criminal episode. 286 Belis Daniels, Jr., was convicted of armed burglary, sexual battery with a deadly weapon, and armed robbery. Each offense occurred during the same criminal episode. 287 Pursuant to section 775.084 of the Florida Statutes, the trial court sentenced Daniels to consecutive sentences of life in prison, with consecutive fifteen-year minimum mandatory sentences for each conviction. 288 The Florida Supreme Court reversed, agreeing with Daniels that section 775.082, Florida Statutes, provided no basis for the imposition of consecutive mandatory punishments. 289 The Florida Supreme Court distinguished instances where penalty-oriented statutes require mandatory minimum sentences. For example, in State v. Enmund, 290 the Florida Supreme Court determined that the mandatory portion of the penalty imposed for the offense of first degree murder was statutorily required, 291 because the applicable penalty provision contained language to the effect that any person convicted of first degree murder must serve twenty-five years before becoming eligible for parole. In other words, the statute requires the imposition of a mandatory sentence. Therefore, the trial court could impose consecutive mandatory sentences. 292 The Florida Supreme Court juxtaposed their decision in Enmund with Palmer v. State, 293 concerning the offense of armed robbery with a firearm. There, the Florida Supreme Court concluded that nowhere in the language of the applicable penalty provision was there express authority by which the trial court could deny a defendant eligibility for a parole period greater than three calendar years. 294 The Daniels court described the mandatory penalty in Palmer as "an enhancement" only, and although they conceded that the question was "a close call," the Daniels court concluded that section 775.084 of the Florida Statutes was more like the sentencing statute applicable in Palmer than Enmund. 295 Therefore, consecutive mandatory penalties could not be imposed.

5. The Imposition of Habitual Violent Felony Offender Sanctions for Nonviolent Felony Offenses

In Ross v. State, 296 the Florida Supreme Court held that section 775.084 of the Florida Statutes was not unconstitutional, 297 insofar as the
determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, and in the latter event, such person shall be punished by death. 298

285. Id. at 23 (emphasis omitted) (quoting Fla. Stat. § 775.084(1)(e)1 (Supp. 1988)).


287. Id. at 954.

288. Id. at 953. Florida Statute § 775.084(4)(b) provides in pertinent part, "[t]he court, in conformity with the procedure established in subsection (3), may sentence the habitual violent felony offender as follows: 1. In the case of a felony of the first degree, for life, and such offender shall not be eligible for release for 15 years." Florida Statute § 775.084(4)(b) (Supp. 1988).

289. Daniels, 595 So. 2d at 954. Section 775.082 provides in pertinent part, "[a] person who has been convicted of any other designated felony may be punished as follows: (b) for a felony of the first degree, by a term of imprisonment not exceeding 30 years or, when specifically provided by statute, by imprisonment for a term of years not exceeding life imprisonment." Florida Statute § 775.082(3)(b) (1987).

290. 476 So. 2d 165 (Fla. 1985).

291. Section 921.141 provides in pertinent part, 
(a) "Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082." Florida Statute § 921.141(1) (1983).

292. Florida Supreme Court applied this same logic in State v. Routledge, approving consecutive mandatory minimum sentences for multiple offenses of capital sexual battery. 559 So. 2d 210 (Fla. 1990).

293. 438 So. 2d 1 (Fla. 1983).


295. Palmer, 438 So. 2d at 3.

296. Daniels, 595 So. 2d at 953.

297. Id. at 954.

298. 601 So. 2d 1190 (Fla. 1992).

299. Section 775.084 provides in pertinent part:

1. A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than 25 years before becoming eligible for parole unless the proceeding held to
convicted of two or more felonies in this state.\textsuperscript{285}

4. "Stacking" Minimum Mandatory Sentences

The Florida Supreme Court held in Daniels v. State that habitual felony offenders may not be sentenced to consecutive minimum mandatory sentences for crimes arising from the same criminal episode.\textsuperscript{286} Britie Daniels, Jr., was convicted of armed burglary, sexual battery with a deadly weapon, and armed robbery. Each offense occurred during the same criminal episode.\textsuperscript{287} Pursuant to section 775.084 of the Florida Statutes, the trial court sentenced Daniels to consecutive sentences of life in prison, with consecutive fifteen-year minimum mandatory sentences for each conviction.\textsuperscript{288} The Florida Supreme Court reversed, agreeing with Daniels that section 775.082, Florida Statutes, provided no basis for the imposition of consecutive mandatory punishments.\textsuperscript{289} The Florida Supreme Court distinguished instances where penalty-oriented statutes require mandatory minimum sentences. For example, in State v. Enmund,\textsuperscript{290} the Florida Supreme Court determined that the mandatory portion of the penalty imposed for the offense of first degree murder was statutorily required,\textsuperscript{291} because the applicable penalty provision contained language to the effect that any person convicted of first degree murder must serve twenty-five years before becoming eligible for parole. In other words, the statute requires the imposition of a mandatory sentence. Therefore, the trial court could impose consecutive mandatory sentences.\textsuperscript{292}

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\begin{itemize}
  \item [285] Id. at 23 (emphasis omitted) (quoting F.L.A. STAT. § 775.084(4)(a) (Supp. 1988)). The Barnens Court also suggested that the Florida Legislature reexamine § 775.084 to assure that the present statute carries out its intent and purpose. Id. at 24 n.2.
  \item [286] Daniels v. State, 595 So. 2d 952 (Fla. 1992).
  \item [287] Id. at 954.
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    \begin{itemize}
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    \begin{itemize}
    \item (1) The defendant has previously been convicted of a felony or an
statute permits the imposition of habitual violent felony offender sanctions for nonviolent felony offenses. Bobby Ross was convicted of escape, a nonviolent offense. The trial court sentenced Ross to thirty years imprisonment as a habitual violent felony offender.

Ross argued that although he otherwise qualified as a habitual violent felony offender, that it was irrational, and a violation of his due process rights, "to classify him as a habitual violent felony offender in this case." The Florida Supreme Court disagreed, reasoning that "[t]he State is entirely justified in enhancing an offender's present penalty for a nonviolent crime based on an extensive or violent criminal history."*


In Scates v. State, the Florida Supreme Court examined the relationship between the alternative sentencing provision of section 397.012 of the Florida Statutes, and section 893.13(1)(e), which provides a

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<td>a. Arson,</td>
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<td>b. Sexual battery,</td>
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was for: A

FLA. STAT. § 775.084(1)(b)1 (Supp. 1988).

300. Id. The supreme court emphasized that "[t]he entire focus of the statute is not on the present offense, but on the criminal offender's prior record." Id. It is unclear whether the Ross Court's reference to "an extensive or violent criminal history" has any legal significance for due process purposes. The most logical answer is "no." The tenor of the supreme court's opinion suggests that "extensive" refers only to the requirements of subsection 775.084(1)(a), and that "violent" is strictly a reference to the requirements of subsection 775.084(1)(b). The Florida Supreme Court stated: "Provided the offender is charged with an offense punishable by more than a year in prison, that offender remains subject to habitualization if the other terms of the statute are met; and this is true even if the present offense is not itself violent." Id. 302. 17 Fla. L. Weekly S467 (1992).

303. Florida Statute § 397.011(2) provides in pertinent part, "[f]or a violation of any provision of chapter 893 . . . relating to possession of any substance regulated thereby, the trial court may order the defendant to participate in a drug treatment

mandatory minimum sentence of three years imprisonment without the possibility of parole for persons who purchase controlled substances within one thousand feet of a school.* 304

Carrick A. Scates was charged with purchasing cocaine within one thousand feet of a school. The trial court found that Scates had purchased the cocaine for his personal use, was a first-time offender, and was amenable to rehabilitation. Based upon these findings, the trial court sentenced Scates to two years probation, and directed that he undergo treatment pursuant to section 397.012 of the Florida Statutes. 305

In Scates, a 4-3 majority of the Florida Supreme Court agreed that the trial court could alternatively sentence the defendant to a drug abuse program, notwithstanding the mandatory language of section 893.13(1)(e). 306

The majority reasoned that unlike other chapter 893 offenses with mandatory
statute permits the imposition of habitual violent felony offender sanctions for nonviolent felony offenses. Bobby Ross was convicted of escape, a nonviolent offense. The trial court sentenced Ross to thirty years imprisonment as a habitual violent felony offender.

Ross argued that although he otherwise qualified as a habitual violent felony offender, that it was irrational, and a violation of his due process rights, "to classify him as a habitual violent felony offender in this case." The Florida Supreme Court disagreed, reasoning that "[t]he State is entirely justified in enhancing an offender's present penalty for a nonviolent crime based on an extensive or violent criminal history." 301


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g. Murder,
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**FLA. STAT. § 775.084(1)(b) (Supp. 1988).** 300. **Ross, 601 So. 2d at 1193 (emphasis added).**

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minimum sentencing provisions. The language of section 893.13(1)(e) contains no proviso forbidding the trial court from avoiding the three year minimum mandatory sanction by suspending, deferring, or withholding the imposition of sentence. To the contrary, the majority emphasized that "the word mandatory is not used" in section 893.13(1)(e). The majority concluded that "the omission of this language implies that the legislature intended a different construction, allowing trial judges greater discretion in sentencing decisions under section 893.13(1)(e)."

H. Restitution

Section 775.089 of the Florida Statutes, directs that "the court shall order the defendant to make restitution to the victim . . . unless it finds clear and compelling reasons not to order such restitution." In State v. MacLeod, the Florida Supreme Court held that a sentence which fails to include restitution is not an "illegal" sentence for purposes of section 924.07 of the Florida Statutes, if the trial court provides reasons for the

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308. See Fla. Stat. § 893.20 provides in pertinent part:

309. See Fla. Stat. § 893.241(1)-(3).

310. Id. In the final analysis, the Florida Supreme Court's decision in Scates was probably more a rejection of § 893.13(1)(e) than it was a celebration of the vitality of § 977.02. Section 893.13(1)(e) has come under increasing scrutiny, especially for its treatment of first-time offenders suffering from drug addiction. See State v. Vola, 591 So. 2d 12 (Fla. 4th Dist. Ct. App. 1991) (suggesting that § 893.13(1)(e) is "draconian," "unduly harsh," and "excessive"), decision quashed by 604 So. 2d 1233 (Fla. 1992). In an era of hostage crisis, prison overcrowding, and an increased emphasis on rehabilitation, § 893.13(1)(e) simply becomes less palatable. In the same sense, it is highly likely that other life and alternative sentencing provisions, like § 956.06 of the Florida Statutes (1991), will be muted.

Florida Statute § 956.06, which pertains to the sentencing of youthful offenders, provides:

The court, upon motion of the defendant, or upon its own motion, may within 60 days after imposition of sentence suspend the further execution of the sentence and place the defendant on probation in a community control program upon such terms as the court may require. The department of corrections shall forward to the court, not later than 3 working days prior to the hearing on the motion, all relevant material on the youthful offender's progress while in custody.

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H. Restitution

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denial of restitution.\textsuperscript{314} David Michael MacLeod pleaded no contest to the offense of DUI, resulting in serious bodily injury. The Florida Supreme Court agreed with the trial court's conclusion that restitution was inappropriate, due to the fact that the victim's guardian executed a release in a civil proceeding, in exchange for an insurance settlement.\textsuperscript{315}

I. Collateral Effects of Sentencing

1. Legislative Enactments

   a. Purchasing or Receiving Delivery of a Firearm

Section 790.065 of the Florida Statutes regulates the sale of firearms by licensed dealers, and requires dealers to notify the Department of Law

\begin{itemize}
  \item[(1)] The state may appeal from:
  \item[(a)] An order dismissing an indictment or information or any count thereof.
  \item[(b)] An order granting a new trial.
  \item[(c)] An order arresting judgment.
  \item[(d)] A ruling on a question of law when the defendant is convicted and appeals from the judgment. Once the state's cross-appeal is instituted, the appellate court shall review and rule upon the question raised by the state regardless of the disposition of the defendant's appeal.
  \item[(e)] The sentence, on the ground that it is illegal.
  \item[(f)] A judgment discharging a prisoner on habeas corpus.
  \item[(g)] An order adjudicating a defendant insane under the Florida Rules of Criminal Procedure.
  \item[(h)] All other pretrial orders, except that it may not take more than one appeal under this subsection in any case.
  \item[(i)] A sentence imposed outside the range recommended by the guidelines authorized by s. 921.001.
  \item[(j)] A ruling granting a motion for judgment of acquittal after a jury verdict.
  \item[(2)] An appeal under this section shall embody all assignments of error in each pretrial order that the state seeks to have reviewed. The state shall pay all costs of such appeal except for the defendant's attorney's fee.
\end{itemize}

FLA. STAT. § 924.07(1)-(2) (1989).

The State of Florida also sought appellate review by certiorari, which was denied by the district court of appeal. MacLeod, 17 Fla. L. Weekly at S261; 314. The supreme court specifically limited their decision to instances "where the trial judge has set forth reasons for the denial of restitution." Id. 315. Id. at S260-61.

316. Chapter 92-183, § 3 of the Laws of Florida provides in pertinent part:

(1) No licensed importer, licensed manufacturer, or licensed dealer shall sell or deliver from his inventory at his licensed premises any firearm to another person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, until he has:

(2) Requested, by means of a toll-free telephone call, the Department of Law Enforcement to conduct a check of the defendant as reported and reflected in the Florida Crime Information Center and National Crime Information Center systems as of the date of the request.

(3) Upon receipt of a request for a criminal history record check, the Department of Law Enforcement shall, during the licensee's call or by return call, forthwith:

(a) Review criminal history records to determine if the potential buyer or transferee has been convicted of a felony and is prohibited from receipt or possession of a firearm pursuant to s. 790.23 or has had adjudication of guilt withheld or imposition of sentence suspended on any felony unless 3 years have elapsed since probation or any other conditions set by the court have been fulfilled or expunction has occurred.

317. Id.

318. Telephone interview with Martha Wright, Bureau Chief, Crime Information Bureau, Division of Criminal Justice Information Systems, Florida Department of Law Enforcement (Aug. 21, 1992).

denial of restitution. The Florida Supreme Court agreed with the trial court's conclusion that restitution was inappropriate, due to the fact that the victim's guardian executed a release in a civil proceeding in exchange for an insurance settlement.

I. Collateral Effects of Sentencing

1. Legislative Enactments

a. Purchasing or Receiving Delivery of a Firearm

Section 790.065 of the Florida Statutes regulates the sale of firearms by licensed dealers, and requires dealers to notify the Department of Law Enforcement prior to transacting the sale of any firearm. Once notified, the Department is required to conduct a criminal background check of each applicant, and approve or disapprove any sale.

In Chapter 92-183, section 3, Laws of Florida, the Florida Legislature amended section 790.065 of the Florida Statutes to prohibit the sale of firearms to persons who have "had adjudication of guilt withheld or imposition of sentence suspended on any felony unless three years have elapsed since probation or any other conditions set by the court have been fulfilled or expunction has occurred." Furthermore, the Department of Law Enforcement has opted to enforce the amendments to section 790.065 retrospectively, to any person who has not had three years elapse since the termination of probation, or the satisfaction of any other sentencing condition.

Any restriction on the right to bear arms is subject to constitutional scrutiny. Although section 790.065 is in all likelihood a reasonable restriction on the right to bear arms, the retrospective application Chapter 92-183, section 3, Laws of Florida, raises serious constitutional questions. Specifically, the retrospective application of Chapter 92-183, section 3, Laws of Florida provides in pertinent part:

1. No licensed importer, licensed manufacturer, or licensed dealer shall sell or deliver from his inventory at his licensed premises any firearm to another person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, until he has:

   (c) Requested, by means of a toll-free telephone call, the Department of Law Enforcement to conduct a check of the information as reported and reflected in the Florida Crime Information Center and National Crime Information Center systems as of the date of the request.

2. Upon receipt of a request for a criminal history record check, the Department of Law Enforcement shall, during the licensee's call or by return call, forthwith:

   (a) Review criminal history records to determine if the potential buyer or transferee has been convicted of a felony and is prohibited from receipt or possession of a firearm pursuant to 18 U.S.C. 922 or has had adjudication of guilt withheld or imposition of sentence suspended on any felony unless 5 years have elapsed since probation or any other conditions set by the court have been fulfilled or expunction has occurred.

316. Chapter 92-183, § 3 of the Laws of Florida provides in pertinent part:

(1) No licensed importer, licensed manufacturer, or licensed dealer shall sell or deliver from his inventory at his licensed premises any firearm to another person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, until he has:

   (c) Requested, by means of a toll-free telephone call, the Department of Law Enforcement to conduct a check of the information as reported and reflected in the Florida Crime Information Center and National Crime Information Center systems as of the date of the request.

   (2) Upon receipt of a request for a criminal history record check, the Department of Law Enforcement shall, during the licensee's call or by return call, forthwith:

      (a) Review criminal history records to determine if the potential buyer or transferee has been convicted of a felony and is prohibited from receipt or possession of a firearm pursuant to 18 U.S.C. 922 or has had adjudication of guilt withheld or imposition of sentence suspended on any felony unless 5 years have elapsed since probation or any other conditions set by the court have been fulfilled or expunction has occurred.

317. Id.

318. Telephone interview with Martha Wright, Bureau Chief, Crime Information Bureau, Division of Criminal Justice Information Systems, Florida Department of Law Enforcement (Aug. 21, 1992).


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of Florida, may violate the ex post facto clause.320

V. CONCLUSION

The sentencing guidelines again commanded a disproportionate amount of the Florida Supreme Court’s time and attention. As expected, the supreme court adequately resolved many menacing sentencing issues, including several issues pertaining to Florida’s habitual offender statute.321 On the other hand, the supreme court’s efforts to define what constitutes an escalating pattern of criminal activity remains its watermark.

Although the supreme court afforded itself a fresh start in the Barfield-Gordon-Dodd trilogy,322 it scored a direct hit—in the foot—in Taylor v. State.323 The directive in Taylor that “prior offenses committed within a close temporal proximity may be a basis for departure when found in conjunction with any one of the three factors outlined in Barfield”324 guarantees the courts of appeal, and ultimately, the Florida Supreme Court, a full plate of necessarily fact-intensive inquiries. The Florida Supreme Court’s aim also proved true in Williams v. State,325 where it defined the term “multiple probation violations” to include “successive violations which follow the reinstatement or modification of probation.”326 Clearly, the supreme court’s test fails to consider the fact that modifications or the reinstatement of probation may result from appropriate conduct, or almost any other reason.

On the horizon, the Florida Supreme Court has accepted jurisdiction in a number of interesting cases. For example, in State v. Munoz,327 the supreme court is expected to decide whether the enactment of section 777.201 of the Florida Statutes abolished the objective entrapment test.

328. See supra text accompanying notes 222-30.
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of Florida, may violate the ex post facto clause.\(^{320}\)

V. CONCLUSION

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Although the supreme court afforded itself a fresh start in the Barfield-Gordon-Dodd trilogy,\(^{322}\) it scored a direct hit—in the foot—in Taylor v. State.\(^ {323}\) The directive in Taylor that “prior offenses committed within a close temporal proximity may be a basis for departure when found in conjunction with any one of the three factors outlined in Barfield”\(^ {324}\) guarantees the courts of appeal, and ultimately, the Florida Supreme Court, a full plate of necessarily fact-intensive inquiries. The Florida Supreme Court’s aim also proved true in Williams v. State,\(^ {325}\) where it defined the term “multiple probation violations” to include “successive violations which follow the reinstatement or modification of probation.”\(^ {326}\) Clearly, the supreme court’s test fails to consider the fact that modifications or the reinstatement of probation may result from appropriate conduct, or almost any other reason.

On the horizon, the Florida Supreme Court has accepted jurisdiction in a number of interesting cases. For example, in State v. Munoz,\(^ {327}\) the supreme court is expected to decide whether the enactment of section 777.201 of the Florida Statutes abolished the objective entrapment test established in Cruz v. State.\(^ {328}\) Additionally, in Hewett v. State\(^ {329}\) the supreme court must reconcile the apparent tension between its recent decision in Clark v. State\(^ {330}\) concerning modifications of probation, and subsection 948.06(4) of the Florida Statutes,\(^ {331}\) which was added to section 948.06 by a 1984 legislative amendment.\(^ {332}\) Finally, the Florida Supreme Court has granted review in State v. Lite,\(^ {333}\) in which the Fourth District Court of Appeal affirmed the constitutionality of section 322.055(1) of the Florida Statutes,\(^ {334}\) concerning the mandatory revocation of the drivers’

\(^{320}\) 655 So. 2d 516 (Fla. 1995), cert. denied, 473 U.S. 905 (1988).


\(^{323}\) Section 948.06(4) of the Florida Statutes provides in pertinent part:

In any hearing in which the failure of a probationer or offender in community control to pay restitution or the cost of supervision . . . as directed, is established by the state, if the probationer or offender asserts his inability to pay restitution or the cost of supervision, it is incumbent upon him to prove by clear and convincing evidence that he does not have the present resources available to pay restitution or the cost of supervision despite sufficient bona fide efforts legally to acquire the resources to do so. If the probationer or offender cannot pay restitution or the cost of supervision despite sufficient bona fide efforts, the court shall consider alternative measures of punishment other than imprisonment.

Only if alternative measures are not adequate to meet the state’s interests in punishment and deterrence may the court imprison a probationer or offender in community control who has demonstrated sufficient bona fide efforts to pay restitution or the cost of supervision.


\(^{325}\) See 1984 Fla. Laws ch. 84-337, § 3.


\(^{327}\) Section 322.055(1) provides in pertinent part:

Upon the conviction of a person 18 years of age or older for possession or sale of, trafficking in, or conspiracy to possess, sell, or traffic in a controlled substance, the court shall direct the department to revoke the driver’s license or driving privilege of the person. The period of such revocation shall be 2 years or until the person is evaluated for and, if deemed necessary by the evaluating agency, completes a drug treatment and rehabilitation program approved or regulated by the Department of Health and Rehabilitative Services. However, the court may, in its sound discretion, direct the department to issue a license for driving privileges restricted to business or employment purposes only, as defined by s. 322.271, if the person is otherwise qualified for such license.


\(^{329}\) Section 322.055(1), Florida Statutes, was amended in 1990 by Chapter 90-265, § 7, Laws of Florida (effective July 1, 1990). The former § 322.055(1) requires the drivers’
license of persons convicted of certain drug related offenses, including possession, sale, and trafficking in controlled substances. Other drug related offenses, such as purchasing cocaine, are not similarly sanctioned.

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* This article will also survey several cases dealing with opening statements and closing arguments. Although these cases are not governed by the rules of evidence, the author believes they merit treatment due to the absence of a Trial Advocacy survey.

** J.D., Nova Center for the Study of Law, 1987 (with honors); B.A., University of Florida, 1978; Partner in the firm of Bruschi, Eng & Koerner, P.A. 1990-92; Assistant State Attorney Broward County, 1987-90.

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