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CRIMINAL LAW: 2010–2012 SURVEY OF FLORIDA LAW

PEARL GOLDMAN∗

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I. INTRODUCTION

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

II. CRIMES

A. Burglary

1. Burglary of a Dwelling

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

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

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

In Jacobs v. State, on the other hand, the First District held that “[t]he enclosure need not be continuous and an ungated opening for ingress and egress does not preclude” a finding that the yard is part of the curtilage.
The residential yard in *Jacobs* was an enclosure, the court explained, because it was “fenced on three sides,” with a “low-walled ‘stoop’ in . . . front” and an “opening for the driveway.”18 The court also rejected the defendant’s argument that the house ceased to be a “dwelling” after it was damaged in a fire.19 The house, which was being restored, had a roof, floors, walls, and “plumbing and electric utilities [that were turned off] because the home was unoccupied.”20 Accordingly, the court held that the fire had not “substantially changed the character of the house to the extent that it was unsuitable for lodging by people.”21 As authority, the court cited *Munoz v. State*,22 a Second District opinion that was called into question in two cases during the survey period.23

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

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18. *Jacobs*, 41 So. 3d at 1006; see also *Dicks v. State*, 75 So. 3d 857, 858–60 (Fla. 1st Dist. Ct. App. 2011) (holding that a prosecutor’s misstatement of law during closing argument by defining the term “dwelling” to include a trespass on the unenclosed property surrounding the dwelling did not constitute fundamental error because the defendant was found beneath the victim’s mobile home where he was removing its copper wiring).
19. *Jacobs*, 41 So. 3d at 1005–06.
20. *Id.* at 1006.
21. *Id.* at 1007.
22. 937 So. 2d 686 (Fla. 2d Dist. Ct. App. 2006).
23. *Young v. State (Young I)*, 73 So. 3d 825, 825 (Fla. 5th Dist. Ct. App. 2011) (per curiam) (certifying conflict with *Munoz*), review granted, 84 So. 3d 1033 (Fla. 2012); Michael v. *State*, 51 So. 3d 574, 575 (Fla. 5th Dist. Ct. App. 2010) (certifying conflict with *Munoz*); *Jacobs*, 41 So. 3d at 1006–07 (citing *Munoz*, 937 So. 2d at 689).
24. *Munoz*, 937 So. 2d at 689 (citing *Perkins v. State (Perkins II)*, 682 So. 2d 1083, 1084 (Fla. 1996) (per curiam)).
25. *Id.* at 688–89 (relying on *Perkins II*, 682 So. 2d at 1084).
26. 51 So. 3d 574 (Fla. 5th Dist. Ct. App. 2010).
27. *Id.* at 575; see also *Munoz*, 937 So. 2d at 689.
28. *Michael*, 51 So. 3d at 575.
29. *Id.*; see also *Munoz*, 937 So. 2d at 690–91 (Canady, J., dissenting).
quired only that a “dwelling” be “designed” for habitation. 30 Second, it was inconsistent with the decision of the Supreme Court of Florida in Perkins v. State (Perkins II), 31 which made clear that in determining whether a structure qualified as a dwelling, “‘the design of the structure’ . . . is ‘paramount.’” 32 Therefore, according to the Munoz dissent, the home’s temporary transformation had not altered its use for human habitation. 33 Adopting this reasoning, the Michael court affirmed the defendant’s conviction for burglary of a dwelling and certified conflict with Munoz. 34 The Fifth District again certified conflict with Munoz in Young v. State (Young I). 35 The Supreme Court of Florida has accepted jurisdiction in Young v. State (Young II). 36

2. Ownership and Possession of the Burglarized Premises

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

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30. Munoz, 937 So. 2d at 690 (Canady, J., dissenting) (citing State v. Bennett, 565 So. 2d 803, 805 ( Fla. 2d Dist. Ct. App. 1990) (per curiam)).
31. 682 So. 2d 1083 (Fla. 1996) (per curiam).
32. Munoz, 937 So. 2d at 691 (Canady, J., dissenting) (quoting Perkins v. State (Perkins I), 630 So. 2d 1180, 1181 (Fla. 1st Dist. Ct. App. 1994), review granted per curiam, 673 So. 2d 30 (Fla. 1996)).
33. Id.
34. Michael v. State, 51 So. 3d 574, 575 (Fla. 5th Dist. Ct. App. 2010) (citing Baker v. State, 636 So. 2d 1342, 1344 (Fla. 1994)).
35. 73 So. 3d 825, 825 (Fla. 5th Dist. Ct. App. 2011) (per curiam), review granted, 84 So. 3d 1033 (Fla. 2012); see also Munoz, 937 So. 2d at 689–90.
36. 84 So. 3d 1033, 1033 (Fla. 2012) (unpublished table decision).
37. D.S.S. v. State, 850 So. 2d 459, 461 (Fla. 2003) (citing In re M.E., 370 So. 2d 795, 796 (Fla. 1979)).
39. 77 So. 3d 699 (Fla. 3d Dist. Ct. App. 2011).
40. Id. at 702.
41. Id. at 700.
42. Id. at 702.
remained there, he went back and forth between the two properties, and the victim returned her key on her last night in the unit.\textsuperscript{43} Although a lessee’s legal interest in the leased premises does not conclusively establish his possessory interest, in this case, the evidence showed that the defendant’s legal interest in the property was superior or “at least equal to the victim’s temporary possessory interest.”\textsuperscript{44} As a result, the appellate court reversed and remanded with instructions to enter a judgment of acquittal on the burglary count.\textsuperscript{45}

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

3. Remaining in the Premises

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

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

B. Criminal Mischief

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

\begin{footnotes}
\footnotetext[54]{Id. at 924–25 (citing FLA. STD. JURY INSTR. (CRIM.) 13.1 (2008)).}
\footnotetext[55]{Id. at 923, 925 (reversing and remanding the judgment and sentence for burglary).}
\footnotetext[56]{71 So. 3d 881 (Fla. 2011) (per curiam).}
\footnotetext[57]{Id. at 891 (citing Jackson v. State, 413 So. 2d 112, 114 (Fla. 2d Dist. Ct. App. 1982)).}
\footnotetext[58]{Id. at 886–87, 891.}
\footnotetext[59]{Id. at 883–84.}
\footnotetext[60]{See id. at 884, 886 (citing FLA. STAT. § 806.13(1)(b)(3) (2012)).}
\footnotetext[61]{Marrero II, 71 So. 3d at 884.}
\footnotetext[62]{Id.}
\footnotetext[63]{Id. at 884–85.}
\footnotetext[64]{Marrero v. State (Marrero I), 22 So. 3d 822, 823 (Fla. 3d Dist. Ct. App. 2009) (quoting T.B.S. v. State, 935 So. 2d 98, 99 (Fla. 2d Dist. Ct. App. 2006)), \textit{review granted}, 29 So. 3d 291 (Fla. 2010), and \textit{quashed}, 71 So. 3d 881 (Fla. 2011).}
\end{footnotes}
The Supreme Court of Florida reversed and remanded for entry of a judgment for misdemeanor criminal mischief. Application of the “life experience” exception was invalid on due process grounds, the court explained, because “the amount of damage is an essential element of the crime of felony criminal mischief.” In so ruling, the court disapproved Jackson v. State, a Second District case interpreting the theft statute to permit a petty theft conviction when, in the absence of proof of value, no reasonable person could doubt that the value of the stolen property exceeded one hundred dollars.

The court held that Jackson had misinterpreted the theft statute, which permits a jury to determine a minimum value only if it is impossible to ascertain the value of the stolen items. However, the jury may not do so if the state fails to prove the value of property that is capable of valuation. Finally, the court observed, “application of a ‘life experience’ exception to any criminal statute, including the criminal theft statute, is inconsistent with the uniform system of justice that both the Florida and Federal Constitutions require and should not be left to the whim of individual jury members.

C. Homicide

1. Felony Murder

   a. Merger Doctrine

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

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65. Marrero II, 71 So. 3d at 891.
66. Id. at 887, 889.
67. 413 So. 2d 112 (Fla. 2d Dist. Ct. App. 1982).
68. Marrero II, 71 So. 3d at 888–89 (citing Jackson, 413 So. 2d at 112); see Fla. Stat. § 812.012(10)(b) (2012).
69. Marrero II, 71 So. 3d at 888–89 (citing Jackson, 413 So. 2d at 112); see Fla. Stat. § 812.012(10)(b).
70. Marrero II, 71 So. 3d at 889 (citing Jackson, 413 So. 2d at 112).
71. Id.; see also Colletti v. State, 74 So. 3d 497, 498, 500 (Fla. 2d Dist. Ct. App. 2011) (citing Marrero II, 71 So. 3d at 891) (reversing the defendant’s felony murder conviction, which was based on the underlying felony of grand theft, because the State failed to present any evidence showing the value of the items taken from the victim’s home).
72. 94 So. 3d 434 (Fla. 2012).
73. 918 So. 2d 181 (Fla. 2005) (per curiam), abrogated in part by State v. Sturdivant, 94 So. 3d 434 (Fla. 2012).
act of aggravated child abuse.”

Sturdivant was convicted of both first-degree felony murder and aggravated child abuse because he struck his two-year old victim on the head so forcefully that the child fell and hit his head on a concrete wall. The First District reversed and certified the following question: “Whether Brooks precludes a conviction for felony murder based on the predicate offense of aggravated child abuse when the abuse consists of a single act, despite the language of section 782.04(1)(a)2., the felony-murder statute.”

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

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

74. Compare Sturdivant, 94 So. 3d at 442, with Brooks, 918 So. 2d at 198 (holding that the underlying felony of aggravated child abuse could not serve as the predicate felony crime in a first-degree felony murder charge if only a single act led to the child’s death because in that situation the felony would merge into the homicide).
75. Sturdivant, 94 So. 3d at 436.
76. Id. at 437 (citing Fla. Stat. § 782.04(1)(a)2. (2012)).
77. Id. at 437 n.3.
78. Id. at 440 (alteration in original) (quoting Fla. Stat. § 782.04(1)(a)2.h.).
79. Id.; see also § 782.04(1)(a)2.h.
80. Sturdivant, 94 So. 3d at 440–42 (citing Brooks v. State, 918 So. 2d 181, 198 (Fla. 2005) (per curiam), abrogated in part by State v. Sturdivant, 94 So. 3d 434 (Fla. 2012)).
81. Id. at 441 (citing Dorsey v. State, 868 So. 2d 1192, 1199 (Fla. 2003); Mills v. State, 476 So. 2d 172, 177 (Fla. 1985) (per curiam)); see also Brooks, 918 So. 2d at 198.
82. Sturdivant, 94 So. 3d at 441; see also Brooks, 918 So. 2d at 217 (Lewis, J., dissenting).
83. Sturdivant, 94 So. 3d at 441.
84. 476 So. 2d 172 (Fla. 1985) (per curiam).
single gunshot blast.\textsuperscript{85} Mills was inapposite, the court explained, because the underlying crime in that case was an unenumerated felony.\textsuperscript{86} The felony murder statute has been amended since Mills\textsuperscript{87} to include aggravated child abuse as an enumerated predicate felony.\textsuperscript{88} Accordingly, the court quashed the decision of the First District, receded from Brooks, and held that “the merger doctrine does not preclude a felony-murder conviction predicated upon a single act of aggravated child abuse that caused the child’s death since aggravated child abuse is an enumerated underlying offense in the felony murder statute.”\textsuperscript{89}

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

\textsuperscript{85} Id. at 177; see also Sturdivant, 94 So. 3d at 442 (citing Mills, 476 So. 2d at 177).
\textsuperscript{86} Sturdivant, 94 So. 3d at 442 (citing Mills, 476 So. 2d at 177).
\textsuperscript{87} Mills, 476 So. 2d at 177. Although Mills was decided in 1985, the court relied on the 1979 statute. Id.; see also Fla. Stat. § 782.04(1)(a) (1979), amended by Fla. Stat. § 782.04(1)(a)2.h. (Supp. 1984).
\textsuperscript{88} Fla. Stat. § 782.04(1)(a)2.h. (2012).
\textsuperscript{89} Sturdivant, 94 So. 3d at 442.
\textsuperscript{90} 90 So. 3d 931 (Fla. 1st Dist. Ct. App. 2012).
\textsuperscript{91} 91. Id. at 932–33.
\textsuperscript{92} Id.
\textsuperscript{93} Id. at 934 (citing Smith v. State, 973 So. 2d 1209, 1210–11 (Fla. 2d Dist. Ct. App. 2008); Jackson v. State, 868 So. 2d 1290, 1291 (Fla. 4th Dist. Ct. App. 2004)).
\textsuperscript{94} Id.; see also Blockburger v. United States, 284 U.S. 299, 304 (1932) (citing Gavieres v. United States, 220 U.S. 338, 342 (1911)).
\textsuperscript{95} Williams, 90 So. 3d at 934.
\textsuperscript{96} Id. at 935.
merger principle.97 Accordingly, the court affirmed Williams’ conviction for attempted premeditated first-degree murder and reversed his conviction for attempted felony murder.98

b. Underlying Felony

In Hernandez v. State (Hernandez II),99 the Supreme Court of Florida reversed a defendant’s first-degree felony murder convictions on the ground that the evidence failed to establish the predicate crime of trafficking or attempted trafficking in cocaine.100 In this case, the State charged Hernandez with two counts of first-degree felony murder, alleging that the victims were killed while he was engaged in the underlying felony of trafficking or attempting to traffic in cocaine.101 The Third District affirmed, holding that the evidence was sufficient evidence for a jury to infer that the parties contemplated a sale of twenty-eight grams or more of cocaine.102 The Supreme Court of Florida granted discretionary review based on conflict with Williams v. State,103 where the First District overturned a conviction for conspiracy to traffic in twenty-eight or more grams of cocaine because “‘no specific amounts were discussed on the two occasions when appellant was present, nor did appellant agree to furnish a specific amount of cocaine.’”104 This, then, was the context for the decision of the Supreme Court of Florida in Hernandez.105

The court decided that, as in Williams, the evidence was insufficient to establish the predicate crime.106 Testimony that Hernandez intended to sell 10,000 grams of counterfeit cocaine was unhelpful in establishing his intent

97. Id.
98. Id.
99. 56 So. 3d 752 (Fla. 2010).
100. Id. at 758; see Fla. Stat. § 782.04(1)(a)2.a. (2012) (stating that an unlawful killing committed “in the perpetration of, or in the attempt to perpetrate, [a] [t]rafficking offense prohibited by s[ection] 893.135(1)” is first-degree murder); see also Fla. Stat. § 893.135(1)(b)1.; Williams v. State, 592 So. 2d 737, 739 (Fla. 1st Dist. Ct. App. 1992).
101. Hernandez II, 56 So. 3d at 754; see also Fla. Stat. §§ 782.04(1)(a)2.a., 893.135(1)(b)1.
102. Hernandez v. State (Hernandez I), 994 So. 2d 488, 490 (Fla. 3d Dist. Ct. App. 2008), review granted, 15 So. 3d 590 (Fla. 2009), and rev’d, 56 So. 3d 580 (Fla. 2010); see also Fla. Stat. § 893.135(1)(b)1.a.
104. Hernandez II, 56 So. 3d at 754, 758 (quoting Williams, 592 So. 2d at 739); see also Hernandez I, 994 So. 2d at 490.
105. Hernandez II, 56 So. 3d at 754, 757–58.
106. Id. at 762.
to traffic in actual cocaine, the court explained.\footnote{Id. at 760–61 (citing Hernandez I, 994 So. 2d at 490).} The inference that Hernandez believed that the transaction was going to be for $30,000 was also insufficient.\footnote{Id. at 761–62.} There was no evidence of the value of the cocaine, the court stated, adding that the price of this drug is not “sufficiently known to the public at large that a jury can be left to infer on its own that a dollar value alone proves that a trafficking quantity of cocaine was involved.”\footnote{Id. at 762.} Finally, Hernandez’s statement that the seller arrived at the transaction with a large box was likewise insufficient because no evidence showed that drugs were in the box or that Hernandez even believed the box contained $30,000 worth of cocaine.\footnote{Hernandez II, 56 So. 3d at 761.} However, the court found that the evidence was sufficient to convict Hernandez of an “attempt[] to engage in a transaction involving an unspecified quantity of cocaine,” which is a predicate felony for third-degree felony murder.\footnote{Id. at 763–64 (citing Ross v. State, 528 So. 2d 1237, 1241 (Fla. 3d Dist. Ct. App. 1988)); see also FLA. STAT. § 782.04(4) (2012).} Accordingly, the court vacated his first-degree felony murder convictions and directed entry of judgment for third-degree felony murder.\footnote{Hernandez II, 56 So. 3d at 754, 764.}

2. Second-Degree Depraved Mind Murder

In Black v. State,\footnote{37 Fla. L. Weekly D593 (2d Dist. Ct. App. Mar. 9, 2012).} the issue before the Second District was whether extreme recklessness alone is legally sufficient to establish the actual malice element of second-degree murder.\footnote{Id. at D594.} In this case, Black told a friend that he wanted to commit suicide and “intended to make big headlines and go out with a bang.”\footnote{Id.} He then drove into a parking lot and accelerated directly into a group of people.\footnote{Id.} After driving away from his first victim, Black crossed into oncoming traffic and drove toward a pregnant pedestrian, killing her and her unborn child.\footnote{Id.} A jury convicted the defendant, \textit{inter alia}, of two counts of second-degree murder and one count of attempted second-degree murder.\footnote{Id. at D593.} On appeal, he argued that extreme recklessness alone is legally insufficient to establish the actual malice element of second-degree

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

3. Manslaughter

   a. Manslaughter by Act

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

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

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

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

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


124. *Id.* at D594–95.


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

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

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

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

129. Id. at 257 (emphasis added); FLA. STD. JURY INSTR. (CRIM.) 7.7. (2006).
131. See Montgomery II, 39 So. 3d at 259.
132. Id. at 256 (citing FLA. STD. JURY INSTR. (CRIM.) 7.7).
133. Id. at 257 (quoting In re Standard Jury Instructions in Criminal Cases—Report No. 2007-10, 997 So. 2d 403, 403 (Fla. 2008) (per curiam)). Montgomery II “does not apply retroactively to convictions [that] were final before” the Supreme Court of Florida issued its opinion in that case. Ross v. State, 82 So. 3d 975, 976 (Fla. 4th Dist. Ct. App. 2011) (per curiam) (citing Harricharan v. State, 59 So. 3d 1162, 1163 (Fla. 5th Dist. Ct. App. 2011) (per curiam), review denied, 92 So. 3d 213 (Fla. 2012); Rozzelle v. State, 29 So. 3d 1141, 1142 (Fla. 1st Dist. Ct. App. 2009), review denied, 92 So. 3d 214 (Fla. 2012)).
134. In re Standard Jury Instructions in Criminal Cases, 997 So. 2d at 403 (citing Hall v. State, 951 So. 2d 91, 96 (Fla. 2d Dist. Ct. App. 2007) (en banc)).
135. Id. at 404 (citing FLA. STD. JURY INSTR. (CRIM.) 7.7).
136. Montgomery II, 39 So. 3d at 257.
137. See In re Standard Jury Instructions in Criminal Cases, 997 So. 2d at 404 (citing FLA. STD. JURY INSTR. (CRIM.) 7.7).
138. Montgomery II, 39 So. 3d at 257 n.3 (citing In re Amendments to Standard Jury Instructions in Criminal Cases—Instruction 7.7 (In re Amendments to Instruction 7.7 I), 41 So. 3d 853, 853 (Fla. 2010) (per curiam), amended by 75 So. 3d 210 (Fla. 2011)).
mit an act that was not justified or excusable and which caused death.” 139 After receiving comments about the 2010 instruction, the court issued the most recent instruction—the 2011 instruction. 140 This 2011 instruction provides that the State is not required “to prove that the defendant had an intent to cause death, only an intent to commit an act that was not merely negligent, justified, or excusable and which caused death.” 141 Together with these amendments, the Montgomery II decision has unleashed a veritable tsunami of conflicting decisions on the applicability of that ruling in myriad situations. 142 The following discussion attempts to categorize and synthesize those opinions.

i. The 2008 Jury Instruction

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

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

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

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147. 77 So. 3d 714 (Fla. 3d Dist. Ct. App. 2011).
148. Id. at 714.
149. Id. at 715 (citing Montgomery II, 39 So. 3d at 256–57); see also Page v. State, 81 So. 3d 525, 526 (Fla. 3d Dist. Ct. App. 2012) (“[I]t is difficult to believe, much less hold, that the [s]upreme [c]ourt would even ‘authorize’ a purportedly curative instruction which was fundamentally wrong.”).
150. *Figueroa*, 77 So. 3d at 715–16 (certifying conflict with Noack, 61 So. 3d at 1208, Pryor, 48 So. 3d at 162–63, and Riesel, 48 So. 3d at 886).
151. 72 So. 3d 227 (Fla. 2d Dist. Ct. App. 2011), review granted, 79 So. 3d 744 (Fla. 2012).
152. Id. at 230.
153. Id. (citing Montgomery II, 39 So. 3d at 257).
155. *Daniels I*, 72 So. 3d at 230, 232 (quoting Montgomery II, 39 So. 3d at 257).
156. Id. at 232.
157. Id.; see also Riesel v. State, 48 So. 3d 885, 886–87 (Fla. 1st Dist. Ct. App. 2010) (per curiam), review denied, 66 So. 3d 304 (Fla. 2011).
158. 79 So. 3d 744, 744 (Fla. 2012) (unpublished table decision).
Instructing the Jury on Both Manslaughter by Act and Manslaughter by Culpable Negligence

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

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


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

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

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

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

164. Id. at 1036–37.

165. Id. at 1037.
lieved the defendant intended his act but not the resulting death, “then neither form of manslaughter provided a viable lesser offense” on which to convict him.\textsuperscript{166} Although the evidence supported the second-degree murder verdict, the court found it “impossible to speculate what the jury would have found had it been properly instructed that manslaughter by act does not require the intent-to-kill.”\textsuperscript{167} For this reason, the Second District certified the following question to the Supreme Court of Florida:

If a jury returns a verdict finding a defendant guilty of second-degree murder in a case where the evidence does not support a theory of culpable negligence, does a trial court commit fundamental error by giving a flawed manslaughter by act instruction when it also gives an instruction on manslaughter by culpable negligence?\textsuperscript{168}

The Supreme Court of Florida has accepted discretionary review of Haygood I.\textsuperscript{169}

iii. The Attempted Manslaughter by Act Instruction

Although the manslaughter by act instruction has been amended three times since the trial court decision in Montgomery II,\textsuperscript{170} the corresponding instruction for attempted manslaughter has remained unchanged.\textsuperscript{171} This instruction requires the State to prove that the defendant committed an act that was intended to cause the victim’s death, and would have caused death, if the defendant had not failed or been prevented from doing so.\textsuperscript{172} A conflict exists among the district courts as to whether this instruction remains viable

\textsuperscript{166} Id.

\textsuperscript{167} Id. But cf. Carey v. State, 84 So. 3d 404, 405–06 (Fla. 4th Dist. Ct. App. 2012) (per curiam) (finding it irrelevant that the evidence did not support a theory of manslaughter by culpable negligence because the term “intentional act” did not mislead jurors into thinking that an intent-to-kill was required).


\textsuperscript{169} See Haygood v. State (Haygood II), 61 So. 3d 410, 410 (Fla. 2011).

\textsuperscript{170} See In re Amendments to Instruction 7.7 I, 41 So. 3d 853, 853, 857 (Fla. 2010) (per curiam), amended by 75 So. 3d 210 (Fla. 2011); Montgomery II, 39 So. 3d 252, 254 (Fla. 2010); Fla. Std. Jury Instr. (Crim.) 7.7 (2011).

\textsuperscript{171} See Fla. Std. Jury Instr. (Crim.) 6.6 (1994).

\textsuperscript{172} Id. When “attempted manslaughter is . . . defined as a lesser included offense of attempted first-degree premeditated murder,” the jury is also instructed that the State need not “prove that the defendant had a premeditated intent to cause death.” Id.
in light of *Montgomery II*. The debate centers on the question whether the instruction improperly adds an intent-to-kill element that is not an element of the statutory crime of attempted manslaughter by act.

During the last survey period, the First District decided *Lamb v. State* and *Rushing v. State*, which held that the attempted manslaughter by act instruction improperly requires the jury to find that the defendant intentionally attempted to kill the victim. The Fourth District rejected this argument in *Williams v. State (Williams I)*. There, the court refused to extend *Montgomery II* to the attempted manslaughter by act instruction because that crime “requires an intent to commit an unlawful act that would have resulted in the victim’s death rather than an intent-to-kill.” The court also concluded that the instruction, as worded, did not confuse the jury because the defendant’s second-degree murder conviction reflected the jury’s finding that he intended to commit an “imminently dangerous [act evincing] a depraved mind.”

The Fourth District certified conflict with *Lamb* and also certified the following questions of great public importance: (1) Does the standard jury instruction on attempted manslaughter constitute fundamental error? (2) Is attempted manslaughter a viable offense in light of [*Montgomery II*]? More recently, in *Houston v. State*, the Second District held that the attempted manslaughter instruction suffers from the same infirmity as the 2008 manslaughter instruction in *Montgomery II* and constitutes fundamental

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

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


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

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

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

180. *Id.* at 75.

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

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

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

183. Id. at 3–4; see also Montgomery II, 39 So. 3d 252, 259–60 (Fla. 2010).
185. See id. § 777.04.
186. Houston, 87 So. 3d at 2 (citing Bass v. State, 45 So. 3d 970, 971 (Fla. 3d Dist. Ct. App. 2010) (per curiam); Lamb v. State, 18 So. 3d 734, 735 (Fla. 1st Dist. Ct. App. 2009) (per curiam)).
190. Thomas v. State, 91 So. 3d 880, 882 (Fla. 5th Dist. Ct. App. 2012) (finding the attempted manslaughter instruction to be fundamental error because “the jury could reasonably have concluded that the offenses were presented in descending order of seriousness and that attempted voluntary manslaughter was less serious than aggravated battery,” and certifying conflict with Williams I). But see Pavolko v. State, 78 So. 3d 86, 87–88 (Fla. 5th Dist. Ct. App. 2012) (per curiam) (emphasis omitted) (finding that a non-standard instruction requiring the state to prove that the defendant “intentionally committed an act, which would have resulted in the death of [the victim] except that someone prevented [the defendant] from killing [the victim] or he failed to do so,” could not have been reasonably understood by the jury “as including an [element of] intent to cause death”).
191. See supra notes 188–90 and accompanying text.
192. Williams v. State (Williams II), 64 So. 3d 1262, 1262 (Fla. 2011) (unpublished table decision).
ally” before “committed an act.”\textsuperscript{194} In other words, the proposed revision would require the State to prove that the “[d]efendant intentionally committed an act . . . [that] would have resulted in the [victim’s] death” if the defendant had not failed or been prevented from doing so.\textsuperscript{195}

iv. Ineffective Assistance of Appellate Counsel

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

v. Conclusion

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


\textsuperscript{195} Id.


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

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

\textsuperscript{199} See McClendon v. State, 93 So. 3d 1131, 1131–32 (Fla. 2d Dist. Ct. App. 2012); Mendenhall v. State, 82 So. 3d 1153, 1154 (Fla. 5th Dist. Ct. App. 2012) (per curiam) (citing \textit{Montgomery II}, 39 So. 3d 252, 256–58 (Fla. 2010)).

\textsuperscript{200} Compare \textit{Montgomery II}, 39 So. 3d at 256, with Fortner v. State, 161 So. 94, 96 (Fla. 1935) (Brown, J., concurring).
sults in death, although with no intent-to-kill.\textsuperscript{201} In such cases, \textit{Montgomery II} correctly holds that fundamental error occurs when the trial court instructs a jury that intent-to-kill is an element of manslaughter by act.\textsuperscript{202} Manslaughter by act is voluntary, on the other hand, when the defendant intends to kill “another in a sudden heat of passion due to adequate provocation, and not with malice.”\textsuperscript{203} In \textit{Taylor v. State},\textsuperscript{204} the Supreme Court of Florida explained that nothing in the statutory definition of manslaughter excludes all intentional killings and provided heat of passion killings as an example of an intentional killing that constitutes manslaughter.\textsuperscript{205} The \textit{Taylor} court extended this reasoning to conclude that the crime of attempted manslaughter would include “situations where, if death had resulted, the defendant could have been found guilty of voluntary manslaughter.”\textsuperscript{206}

Arguably, by removing the intent-to-kill element from the jury instruction, the Supreme Court of Florida has eliminated the crime of voluntary manslaughter and possibly attempted voluntary manslaughter as well.\textsuperscript{207} Separate jury instructions for voluntary manslaughter and involuntary manslaughter could eliminate the seemingly endless interpretive problems described in this section.\textsuperscript{208}

b. Manslaughter by Culpable Negligence

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

\begin{small}
\begin{comment}
\textsuperscript{201} Hall v. State, 951 So. 2d 91, 95–96 (Fla. 2d Dist. Ct. App. 2007) (en banc).
\textsuperscript{202} \textit{Montgomery II}, 39 So. 3d at 258. Courts recognize a “narrow exception” when the erroneous manslaughter by act instruction is accompanied by the manslaughter by culpable negligence instruction because the latter option permits the jury to return a manslaughter verdict without finding an intent-to-kill. \textit{See Sullivan v. State}, 50 So. 3d 33, 34 (Fla. 1st Dist. Ct. App. 2010) (citing Joyner v. State, 41 So. 3d 306, 306–07 (Fla. 1st Dist. Ct. App. 2010)), \textit{review denied}, 67 So. 3d 1050 (Fla. 2011).
\textsuperscript{203} \textit{Fortner}, 161 So. at 96 (Brown, J., concurring).
\textsuperscript{204} Santarelli v. State, 62 So. 3d 1211 (Fla. 5th Dist. Ct. App.), \textit{review denied}, 77 So. 3d 1255 (Fla. 2011).
\end{comment}
\end{small}
house from allowing minors to consume intoxicants on the premises.\(^{211}\) In this case, two teenagers were killed in a drunk driving incident after leaving a house party, hosted by Santarelli, at which minors were permitted to consume alcohol and other illegal substances.\(^{212}\) After the trial court denied her motion to dismiss the manslaughter counts, Santarelli was acquitted of manslaughter and convicted of two misdemeanor “count[s] of allowing an open house party . . . and . . . of contributing to the delinquency of a minor.”\(^{213}\) On appeal, she argued that “the judgments and sentences . . . on the misdemeanor counts [were] void” because the circuit court would have lost jurisdiction over these counts if the two felony manslaughter counts had been properly dismissed.\(^{214}\)

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

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

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

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

221. Davila v. State (Davila II), 75 So. 3d 192, 195 (Fla. 2011); Delgado v. State (Delgado II), 71 So. 3d 54, 56 (Fla. 2011).
222. 75 So. 3d 192 (Fla. 2011).
223. Id. at 193, 197.
224. Id. at 192–94.
225. Davila v. State (Davila I), 26 So. 3d 5, 6 (Fla. 3d Dist. Ct. App. 2009), review granted, 75 So. 3d 192 (Fla. 2010), and aff’d, 75 So. 3d 192 (Fla. 2011).
226. Id. at 7 (citing Johnson v. State, 637 So. 2d 3, 4 (Fla. 3d Dist. Ct. App. 1994) (per curiam)).
227. Id. (quoting Lafleur v. State, 661 So. 2d 346, 349 (Fla. 3d Dist. Ct. App. 1995)).
228. 764 So. 2d 729 (Fla. 2d Dist. Ct. App. 2000).
229. Davila I, 26 So. 3d at 7 (citing Muniz, 764 So. 2d at 731).
230. See Davila II, 75 So. 3d 192, 197 (Fla. 2011) (citing Muniz, 764 So. 2d at 729).
231. Id.
232. Id. at 196; see also Fla. Stat. § 787.01(1)(a) (2012).
233. Davila II, 75 So. 3d at 197; see also Fla. Stat. § 787.01(1)(b).
parent who confines a child necessarily consents to that confinement.  Instead, the section simply provides “a method of proof which allows the State to establish that the overt act on the part of the defendant was against a person’s will when that person is a child under the age of thirteen.” The court concluded that “if the Legislature intended to exempt a [custodial] parent from [such] criminal liability . . . it would have expressly stated so.”

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

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

234. Davila II, 75 So. 3d at 197.
235. Id. at 196; see also Fla. Stat. § 787.01(1)(b).
236. Davila II, 75 So. 3d at 196.
237. Id. at 199 (Canady, C.J., dissenting); see also Fla. Stat. § 787.01(1)(b).
238. Davila II, 75 So. 3d at 199.
239. Id. at 197 (Pariente, J., concurring) (citing Davila II, 75 So. 3d at 199 (Canady, C.J., dissenting)).
240. Id.
241. 71 So. 3d 54 (Fla. 2011).
242. Id. at 61.
243. Id. at 57 & n.2.
244. Id. at 58.
State was satisfied when the defendant became aware of the child’s presence in the truck and continued to confine her.246

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

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

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

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

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

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

245. 426 So. 2d 963 (Fla. 1983).

246. See Delgado v. State (Delgado I), 19 So. 3d 1055, 1057–58 (Fla. 3d Dist. Ct. App. 2009) (citing Faison, 426 So. 2d at 965), review granted, 32 So. 3d 622 (Fla. 2010), and quashed, 71 So. 3d 54 (Fla. 2011).

247. Faison, 426 So. 2d at 965 (quoting State v. Buggs, 547 P.2d 720, 731 (Kan. 1976)).

248. 19 So. 3d 1055 (Fla. 3d Dist. Ct. App. 2009), review granted, 32 So. 3d 622 (Fla. 2010), and quashed, 71 So. 3d 54 (Fla. 2011).

249. Id. at 1057–58.

250. Delgado II, 71 So. 3d 54, 56, 60 (Fla. 2011).

251. Id. at 60.

252. Id. at 61.

253. Id. at 63–64, 68; see also Fla. Stat. § 787.01(1)(a)2. (2012).
tion, the court remanded the case with instructions to vacate Delgado’s kid-
napping conviction.254

E. Sexual Offenses

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

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

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

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

F. Theft

In Sanders v. State, the Fourth District considered the limits of Florida’s jurisdiction over a defendant whose offense occurred “on a commercial

266. Id. at 458 (Morris, J., concurring in part and dissenting in part) (citing Stelmack, 58 So. 3d at 877).
267. Id.
268. Parker, 81 So. 3d at 453 (majority opinion).
269. Id. at 457.
270. 62 So. 3d 693 (Fla. 2d Dist. Ct. App. 2011).
271. Id. at 694–95; see also Fla. Stat. §§ 384.24(2) (2012).
273. L.A.P., 62 So. 3d at 694; see also Fla. Stat. § 384.24(2).
274. L.A.P., 62 So. 3d at 694; see also Fla. Stat. § 826.04.
276. Id. at 694 (quoting Fla. Stat. § 826.04).
277. Id.; see also Fla. Stat. § 384.24(2).
278. L.A.P., 62 So. 3d at 695.
279. 77 So. 3d 914 (Fla. 4th Dist. Ct. App. 2012).
flight from Arizona before it entered Florida airspace. The State alleged that, before the flight landed in Fort Lauderdale, Sanders stole $500 from another passenger’s handbag but was forced to return the money when a flight attendant interceded. The plane was not in Florida’s airspace when the theft or recovery of the stolen funds occurred. Sanders was charged with grand theft.

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

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

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

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

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

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

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

1. Must the trial court instruct the jury to perform the selection process described in section 812.025 of the Florida Statutes?

2. If so, must the appellate court order a new trial on both offenses if the trial court fails to give the instruction?

3. If the appellate court is not required to mandate a new trial, must it require the trial court to select the greater offense or the lesser offense when the two offenses are offenses of different degrees or of different severity ranking?

305. Id. at 361; see also Fla. Stat. § 812.025; Wilkins v. State, 78 So. 3d 18, 19 (Fla. 2d Dist. Ct. App. 2011) (certifying conflict with Kiss v. State, 42 So. 3d 810, 812 (Fla. 4th Dist. Ct. App. 2010)).

306. Williams, 66 So. 3d at 365.

307. See id.

308. Id. at 363; see also Fla. Stat. § 812.025.

309. See Williams, 66 So. 3d at 364.

310. Id. at 361.

311. Id. at 365 (emphasis added). The Second District again certified these three questions in Poole v. State, 67 So. 3d 431, 432 (Fla. 2d Dist. Ct. App. 2011) (per curiam).
In *Kablitz v. State*, the Fourth District reaffirmed the approach it took in *Kiss* and certified conflict with *Blackmon* and *Williams*.

**G. Trespass**

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

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

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313. Id. at D2358 (citing *Williams*, 66 So. 3d at 365; *Blackmon v. State*, 58 So. 3d 343, 347 (Fla. 1st Dist. Ct. App.), review granted, 67 So. 3d 198 (Fla. 2011); *Kiss v. State*, 42 So. 3d 810, 811, 813 (Fla. 4th Dist. Ct. App. 2010)).
314. FLA. STAT. § 810.097(2) (2012); see also FLA. STD. JURY INSTR. (CRIM.) 13.5(b) (2007).
316. 43 So. 3d 176 (Fla. 3rd Dist. Ct. App.), review granted, 47 So. 3d 1287 (Fla. 2010), and quashed, 67 So. 3d 1029 (Fla. 2011).
317. Id. at 177 (citing FLA. STAT. § 810.097).
318. Id.; FLA. STAT. § 810.097(2).
319. *D.J. I*, 43 So. 3d at 177 (quoting Downer v. State, 375 So. 2d 840, 845–46 (Fla. 1979)).
320. *See id.*
321. *D.J. II*, 67 So. 3d 1029, 1031 (Fla. 2011) (citing State v. Dye, 346 So. 2d 538, 542 (Fla. 1977)).
322. 70 So. 3d 666 (Fla. 1st Dist. Ct. App. 2011).
810.097(2)."  Because this decision conflicted with D.J. I, the First District certified conflict. 323

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

H. Miscellaneous

In Anderson v. State, 331 the Supreme Court of Florida held that the offense of driving with a suspended license in violation of section 322.34 of the Florida Statutes did not require actual knowledge of the suspension by the defendant. 332 The knowledge element of the offense is satisfied, the court wrote, by evidence that written notice was mailed to a defendant’s last known address, and proof that this was the defendant’s address at the time of mailing. 333 In so ruling, the court disapproved of the decisions of the First and Fourth District courts in Haygood v. State 334 and Brown v. State, 335 which

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

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

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335. 764 So. 2d 741 (Fla. 4th Dist. Ct. App. 2000) (per curiam), overruled in part by An-
derson v. State, 87 So. 3d 774 (Fla. 2012).
336. Anderson, 87 So. 3d at 779–81 (citing Haygood, 17 So. 3d at 896; Brown, 764 So. 2d
at 743–44).
337. 76 So. 3d 371 (Fla. 3d Dist. Ct. App. 2011).
338. Id. at 372–73 (quoting FLA. STAT. § 893.02(3) (2012)).
339. Id. at 374; see also FLA. STAT. § 893.135(1)(a).
340. Estrada, 76 So. 3d at 372.
341. Id. at 373 (quoting State v. Velasquez, 879 So. 2d 1259, 1260 n.1 (Fla. 3d Dist. Ct.
App. 2004) (per curiam). Cannabis is defined as “all parts of any plant of the genus Cannabis,
whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and
every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds
or resin.” FLA. STAT. § 893.02(3).
342. Estrada, 76 So. 3d at 373 (quoting Cronin v. State, 470 So. 2d 802, 803 (Fla. 4th Dist.
Ct. App. 1985)).
343. See id. at 374 (citing Cronin, 470 So. 2d at 804).
345. Estrada, 76 So. 3d at 373 n.5 (quoting Hatch, 585 So. 2d at 1079).
courts to estimate the retail price of cannabis.\(^{346}\) Accordingly, the Third District reversed the order dismissing the charges.\(^{347}\)

In *Pinkney v. State*,\(^{348}\) the Second District clarified the mental state required for assault under section 784.011(1) of the *Florida Statutes*.\(^{349}\) This defendant was charged with aggravated assault because he backed his vehicle in the direction of a police officer.\(^{350}\) On appeal, Pinkney argued that the State had not proven his "specific intent to do violence to [his] victim,"\(^{351}\) as required by the Second District in *State v. Shorette*.\(^{352}\) Conceding that this was an accurate statement of *Shorette*, the court nevertheless receded from that case on the ground that it incorrectly stated the law.\(^{353}\) In so ruling, the court held that the State must prove that the defendant’s act "was substantially certain to put the victim in fear of imminent violence, not that the defendant had the intent to do violence to the victim."\(^{354}\) A statute’s use of the word “intentionally,” without more, signifies that the statute “‘prohibits either a specific voluntary act or something that is substantially certain to result from the act,’” rather than an act committed accidentally or negligently.\(^{355}\) Thus, the “‘subjective intent to cause the particular result is irrelevant,’” the court explained.\(^{356}\) In light of his vehicle’s proximity to the officer, Pinkney’s act constituted a threat of violence because it was substantially certain to put the officer in fear of imminent violence.\(^{357}\)

The issue confronting the First District in *Wess v. State*\(^{358}\) was whether a defendant commits robbery by sudden snatching by taking property that is “close to the victim or within the victim’s reach or control.”\(^{359}\) The victim in this case was sitting on a bench with her purse next to her, touching her hip.\(^{360}\) She felt it move and then spotted the defendant running away with

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\(^{346}\) *Id.*

\(^{347}\) *Id.* at 374.

\(^{348}\) 74 So. 3d 572 (Fla. 2d Dist. Ct. App. 2011) (en banc), *reviewed denied*, 95 So. 3d 213 (Fla. 2012).

\(^{349}\) *Id.* at 576 (citing FLA. STAT. § 784.011(1) (2012)).

\(^{350}\) *Id.* at 573–74.

\(^{351}\) *Id.* at 575.


\(^{353}\) *Pinkney*, 74 So. 3d at 575.

\(^{354}\) *Id.* at 576.

\(^{355}\) *Id.* (quoting Linehan v. State, 442 So. 2d 244, 247 (Fla. 2d Dist. Ct. App. 1983) (en banc)).

\(^{356}\) *Id.* (quoting *Linehan*, 442 So. 2d at 247).

\(^{357}\) *Id.* at 577.

\(^{358}\) 67 So. 3d 1133 (Fla. 1st Dist. Ct. App. 2011).

\(^{359}\) *Id.* at 1135–36.

\(^{360}\) *Id.* at 1134.
it.\textsuperscript{361} Wess was convicted of robbery by sudden snatching under section 812.131 of the \textit{Florida Statutes}, which applies when money or other property is taken “from the victim’s person.”\textsuperscript{362} The appellate court interpreted this phrase to require the property to be “on” the person of the victim.\textsuperscript{363} The essential difference between this crime and robbery, which applies when property is taken from a “victim’s immediate vicinity and/or control,”\textsuperscript{364} is that robbery by sudden snatching requires property to be “‘abruptly and unexpectedly plucked from the embrace of the person.’”\textsuperscript{365} It is not enough that the property is next to her, even if it is touching her or within her reach or control.\textsuperscript{366} Therefore, the court reversed the defendant’s conviction for robbery by sudden snatching and directed the trial court to enter a judgment for misdemeanor theft.\textsuperscript{367}

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

\textsuperscript{361} Id.
\textsuperscript{362} Id. at 1134–35 (quoting FlA. Stat. § 812.131(1) (2012)).
\textsuperscript{363} Wess, 67 So. 3d at 1137.
\textsuperscript{364} Id. at 1135.
\textsuperscript{365} Id. (quoting Brown v. State, 848 So. 2d 361, 364 (Fla. 4th Dist. Ct. App. 2003)).
\textsuperscript{366} See id. at 1136–37.
\textsuperscript{367} Id. at 1137.
\textsuperscript{368} 75 So. 3d 810 (Fla. 2d Dist. Ct. App. 2011).
\textsuperscript{369} Id. at 810, 812.
\textsuperscript{370} Id. at 810–11 (citing FLA. STAT. § 828.12(2) (2012)). Under section 828.12(2), any intentional act resulting in “the cruel death, or excessive or repeated infliction of unnecessary pain or suffering” of an animal is a felony. FLA. STAT. § 828.12(2).
\textsuperscript{371} Morival, 75 So. 3d at 811.
\textsuperscript{372} Id. at 812; see also FLA. STAT. § 828.12(1)–(2).
provision. The court therefore reversed and remanded on the ground that the issue could not “be resolved by a motion to dismiss.”

III. DEFENSES

A. Abandonment

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

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

373. See Morival, 75 So. 3d at 811–12 (quoting FLA. STAT. § 828.12(2)).
374. Id. at 812.
376. Id.
377. Id.
378. Id.
379. Id. at D534–35 (citing Simmons v. State, 551 So. 2d 607, 608 (Fla. 5th Dist. Ct. App. 1989) (per curiam); State v. Baker, 540 So. 2d 847, 848 (Fla. 3d Dist. Ct. App. 1989)).
381. Rockmore, 37 Fla. L. Weekly at D534 (quoting FLA. STAT. § 812.13(3)(b) (2012)).
382. Id. (quoting FLA. STAT. § 812.13(3)(b)).
tory act motivated by fear of apprehension. Even if Rockmore’s acts constituted abandonment, however, a judgment of acquittal was precluded by the factual dispute as to whether he had dropped all the merchandise before displaying the firearm. Moreover, no special jury instruction on abandonment was required, the court held, because the standard instruction tracks the statutory language and the proffered special instruction inaccurately stated the law. Upholding the conviction, the Fifth District acknowledged conflict with a line of cases holding that the taking and the force or threat are not a “continuous series of acts or events” if the property is abandoned before the defendant uses some force or threat to escape.

B. Prescription Defense

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

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

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

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

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

[N]othing in either sections 499.03(2) or 893.13(7)(a)8., Florida Statutes, eliminates the valid prescription defense to trafficking or possession of a controlled substance if the prescription is obtained in violation of the doctor shopping statute. That may have been the intention of the Legislature, but we are constrained by the rules of statutory interpretation to follow the plain language of the statute.

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

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

FLA. STAT. § 893.13(7)(a)8.

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

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

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

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

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

424. 88 So. 3d 1020, 1022 (Fla. 2d Dist. Ct. App. 2012).
426. Santiago, 88 So. 3d at 1023.
427. Id.
428. Id. at 1023–24.
429. Id. at 1023, 1025.
430. Id. at 1024 n.1.
431. Santiago, 88 So. 3d at 1024–25.
432. Id. at 1024.
433. Id. at 1025.
434. Id.
435. Id.
the State’s request, that the applicable forcible felony was murder.\textsuperscript{436} Therefore, finding that Santiago’s claim of ineffective assistance of counsel was facially sufficient, the court reversed the summary denial of his post-conviction claim and remanded for further proceedings.\textsuperscript{437}

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

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

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

D. \textit{Stand Your Ground Law}

Under Florida’s “Stand Your Ground” Law,\footnote{The term “Stand Your Ground Law” refers to sections 776.012–.013 and 776.031–
.032 of the Florida Statutes collectively. Montanez v. State, 24 So. 3d 799, 801 (Fla. 2d Dist. Ct. App. 2010); see also Fla. Stat. §§ 776.012–.013, .031–.032 (2012).} which was signed into
law on April 26, 2005, an individual is permitted to use defensive force,
fully and forcibly enter[s] [the] dwelling, residence, or occupied vehicle” of
another person.\footnote{Fla. Stat. § 776.013(1)(a) (2012).} The law also abrogated the common law duty to retreat
before using defensive force whenever the actor “is not engaged in an unlawful activity and . . . is attacked in any other place where he or she has a right to be.”\footnote{Id. § 776.013(2)(a).} Until the recent fatal shooting of an unarmed teenager in Sanford,
Florida, the law had generated scant controversy in Florida’s judicial sys-
tem.\footnote{Frances Robles, Lt. Gov.: Stand Your Ground Is Not ‘Shoot First’ Law, Ledger (Lakeland), June 12, 2012.} When Trayvon Martin was shot and killed by George Zimmerman, who claimed that Martin had attacked him, the police cited the Stand Your
Ground Law as the reason Zimmerman was not immediately arrested.\textsuperscript{458} Zimmerman has since been charged with second-degree murder, and Governor Rick Scott has convened a nineteen-member Task Force on Citizen Safety and Protection to address ambiguities in the Stand Your Ground Law.\textsuperscript{459}

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

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

\textsuperscript{458} \textit{Id.}


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

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

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

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

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

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

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

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

A different issue arose in \textit{Dorsey v. State},\textsuperscript{477} where the Fourth District
was called upon to decide how a jury should be instructed when the defen-
dant is “‘engaged in an unlawful activity’ at the time . . . deadly force” is
used against an attacker.\textsuperscript{478} This case involved a convicted felon’s use of a
concealed firearm to kill two attackers who were part of a group that sur-
rounded him as his back was against a vehicle.\textsuperscript{479} During the charging con-
ference, the defense made two requests.\textsuperscript{480} The first request asked the court to

\begin{thebibliography}{99}
\bibitem{} Dennis, 51 So. 3d at 463–64.
\bibitem{} Id. at 463–64.
\bibitem{} Id. at D1746.
\bibitem{} Id.
\bibitem{} Id.
\bibitem{} Id. (citing Tsavaris v. Scruggs, 360 So. 2d 745, 747 (Fla. 1977); State \textit{ex rel. Reynolds} v. Newell, 102 So. 2d 613, 615 (Fla. 1958); State \textit{ex rel. Marshall} v. Petteway, 164 So. 872, 874 (Fla. 1935) (en banc)).
\bibitem{} 90 So. 3d 929 (Fla. 1st Dist. Ct. App. 2012).
\bibitem{} Id. at 931.
\bibitem{} 74 So. 3d 521 (Fla. 4th Dist. Ct. App. 2011).
\bibitem{} See \textit{id.} at 525–26; see also \textit{FLA. STAT.} § 776.013 (2012).
\bibitem{} Dorsey, 74 So. 3d at 522–23.
\bibitem{} Id. at 525–26.
\end{thebibliography}
exclude the Stand Your Ground instruction because Dorsey was “engaged in an unlawful activity” and had no right to stand his ground without retreating. The second request asked the court to give a special instruction based on “the pre-2005 standard jury instruction [for] the justifiable use of deadly force,” which would have informed the jury of the scope of the duty to retreat when a defendant is engaged in an unlawful activity. The court denied both requests and gave the jury the standard Stand Your Ground instruction based on section 776.013(3). Dorsey was convicted, inter alia, of two counts of second-degree murder.

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

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

A. Cruel and Unusual Punishment

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

1. Execution of Mentally Retarded Defendants

In 2001, the Florida Legislature enacted legislation prohibiting the execution of mentally retarded defendants and establishing a procedure for determining which capital defendants are mentally retarded.491 The following year, in Atkins v. Virginia,492 the Supreme Court of the United States held that the execution of a mentally retarded criminal defendant constitutes cruel and unusual punishment.493 However, the Court relegated to the states the task of determining specific rules for classifying defendants as mentally retarded.494 Since then, Florida has required an IQ score of seventy or below to establish “‘significantly subaverage general intellectual functioning.’”495 During the survey period, the Supreme Court of Florida addressed the constitutionality of this cut-off score in Franqui v. State,496 where the defendant argued that this threshold violated both the Eighth Amendment and the decision in Atkins because “Atkins approved a wider range of IQ . . . results that can meet the test for mental retardation.”497 The Franqui court rejected this argument, finding that Florida’s definition of mental retardation is consistent with diagnostic criteria used by the American Psychiatric Association and is

491. FLA. STAT. § 921.137(2), (4); see also State v. Herring (Herring I), 76 So. 3d 891, 894 (Fla. 2011) (per curiam) (citing FLA. STAT. § 921.137), cert. denied, 80 U.S.L.W. 3707 (U.S. June 25, 2012).
493. Id. at 321 (quoting Ford v. Wainwright, 477 U.S. 399, 405, 406 (1986)).
494. Id. at 317 (quoting Ford, 477 U.S. at 405, 416–17).
496. 59 So. 3d 82 (Fla. 2011) (per curiam), cert. denied, 132 S. Ct. 2110 (2012). The court affirmed the trial court’s order denying the defendant’s mental retardation claim. Id. at 90, 106.
497. Id. at 92.
within “the broad authority given in Atkins to the states to enact their own laws to determine who is mentally retarded, without any requirement that the states adhere to one definition over another.” 498 The court therefore affirmed the trial court’s order denying the defendant’s mental retardation claim. 499

2. Lethal Injection Protocol

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

3. Life Sentences Without Parole for Juvenile Offenders

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

498. Id. at 94 (citing Nixon v. State, 2 So. 3d 137, 143 (Fla. 2009) (per curiam)).
499. Id. at 100, 106; see also Herring I, 76 So. 3d 891, 895 (Fla. 2011) (per curiam), cert. denied, 80 U.S.L.W. 3707 (U.S. June 25, 2012) (citing Zack v. State, 911 So. 2d 1190, 1201 (Fla. 2005) (per curiam)) (confirming that the Supreme Court of Florida has adopted a bright-line rule that a death sentence is not precluded by a defendant’s intellectual disability unless the defendant’s IQ tests below seventy).
500. 70 So. 3d 530 (Fla.) (per curiam), cert. denied, 132 S. Ct. 1 (2011).
501. Id. at 538, 546.
502. Id. at 536–37.
503. Id. at 541, 546 (citing DeYoung v. Owens, 646 F.3d 1319, 1326 n.4 (11th Cir. 2011)).
504. Id. at 553.
506. Id. at 2030; see U.S. CONST. amend. VIII.
courts have been called upon to consider whether *Graham* applies to convictions for attempted murder, felony murder, and nonhomicide offenses committed in conjunction with homicide offenses, and to determine what constitutes a life-without-parole sentence.\(^508\)

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

In *Arrington v. State*,\(^515\) the Second District decided that “felony murder is not a ‘nonhomicide’ offense for purposes of the categorical rule announced in *Graham,*” even when someone other than the juvenile offender actually committed the killing.\(^516\) Nevertheless, the court held that in this context, the trial court must have discretion to prevent a “grossly disproportionate” sentence in violation of the Eighth Amendment.\(^517\) To this end, courts should engage in the three-prong, case-specific proportionality analysis endorsed in *Graham*, comparing: (1) “[t]he gravity of the offense . . . to the severity of the sentence;” (2) the mandatory sentence “for juveniles involved in felony


\(^{509}\) See *Arrington*, 37 Fla. L. Weekly at D156; *Washington*, 37 Fla. L. Weekly at D155; *Manuel*, 48 So. 3d at 97.

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

\(^{511}\) Id. at 96.

\(^{512}\) Id. at 97.

\(^{513}\) Id. at 97–98.

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


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

\(^{517}\) Id. at D158.
murders with the sentences received by other [defendants] in Florida;” and (3) the mandatory sentence for juveniles involved in felony murders “with the sentences imposed for the same crime in other [states].” 518 Applying this analysis to the facts of Arrington’s case, the Second District reversed and remanded on the ground that the mandatory life-without-parole sentence for felony murder was grossly disproportionate in this juvenile’s case. 519 In La-Fountain v. State 520 the Second District declined to apply Arrington retroactively. 521

Finally, in Washington v. State, 522 the Second District considered Graham’s “exception for juveniles who commit nonhomicide offenses in conjunction with homicide offenses.” 523 Here, the defendant appealed his sentences of life-without-parole for kidnapping and felony murder offenses committed when he was a juvenile. 524 In contrast to the juvenile in Arrington, “Washington was nearly eighteen at the time of [his crimes],” and he participated extensively in acts of exceptional cruelty. 525 The appellate court remanded for resentencing, holding that the trial “court [was] required to resentence [the defendant] to life without possibility of parole for these homicides unless it determines under the facts of this case that such a penalty is disproportionate.” 526 However, the court reversed the sentences for the kidnapping offenses, finding that their constitutionality “probably hinges on whether the trial court, on remand, imposes life-without-parole for felony murders.” 527 In other words, after determining the appropriate sentences for the felony murders, the trial court might find the homicides to be “aggravating factor[s] in the sentencing of the [kidnapping] offense[s].” 528 Until such a determination is made, however, the Second District was required to hold that the sentences of life-without-parole for kidnapping, a nonhomicide crime, constituted cruel and unusual punishment under Graham. 529 Thus, the court reversed Washington’s sentences and directed the trial court to resen-

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

Florida’s appellate courts have also considered whether a term-of-years sentence for a juvenile is the “functional equivalent” of a life sentence.531 In Thomas v. State,532 the First District held that a fifty-year sentence was not a de facto sentence of life-without-parole because if Thomas served his entire sentence, he “would be in his late sixties when he [wa]s released from prison.”533 The court reached the same result in Gridine v. State (Gridine I)534 regarding a seventy-year sentence but later certified the following question as one of great public importance: “Does the United States Supreme Court decision in Graham v. Florida prohibit sentencing a fourteen-year-old to a prison sentence of seventy years for the crime of attempted first-degree murder?”535

In Floyd v. State,536 the First District held that an eighty-year sentence was the functional equivalent of a life sentence without parole and thus constituted cruel and unusual punishment.537 However, in Henry v. State,538 the Fifth District concluded that a ninety-year aggregate term-of-years sentence, without the possibility of parole, for multiple nonhomicide offenses was not a de facto life sentence under Graham.539 The court did make the following observation:

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

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

The issue was reframed by Judge Padovano in a concurring opinion in *Smith v. State*,541 where he criticized judicial efforts to determine whether a particular sentence of a term-of-years without parole is a de facto life sentence.542 These efforts are misdirected, he wrote, because the question under *Graham* is not whether a defendant “will . . . have a meaningful portion of his life left” upon release or “a significant part of his life remaining at the end of the sentence.”543 Instead, the question is “whether the defendant will have a reasonable opportunity to show that he has been rehabilitated during the course of the sentence and is therefore deserving of release at some point before the sentence expires.”544

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

540.  *Henry*, 82 So. 3d at 1089 (footnote omitted); see also *Graham*, 130 S. Ct. at 2034.
541.  93 So. 3d 371 (Fla. 1st Dist. Ct. App. 2012).
542.  *See id.* at 375 (Padovano, J., concurring).
543.  *Id.*
544.  *Id.*
546.  *Id.* at 2460, 2475, 2477.
547.  *Id.* at 2460, 2468.
548.  *Id.* at 2469.
549.  *Id.* at 2475.
B. **Double Jeopardy**

1. **Oral Sentencing Error**

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

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

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

561. Dunbar II, 89 So. 3d at 908 (Canady, C.J., dissenting) (quoting Kentucky v. Stincer, 482 U.S. 730, 745 (1987)).
562. Id. (citing Stincer, 482 U.S. at 745).
563. Valdes v. State, 3 So. 3d 1067, 1069 (Fla. 2009) (citing Hayes v. State, 803 So. 2d 695, 699 (Fla. 2001)).
564. Hayes, 803 So. 2d at 700 (citing Sirmons v. State, 634 So. 2d 153, 153–54 (Fla. 1994) (per curiam)). Section 775.021(4)(b) prohibits multiple convictions and punishments for “(1) [o]ffenses which require identical elements of proof; (2) [o]ffenses which are degrees of the same offense as provided by statute; [and] (3) [o]ffenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.” FLA. STAT. § 775.021(4)(b)(1)–(3) (2012).
565. Valdes, 3 So. 3d at 1072 (quoting FLA. STAT. § 775.021(4)(b)).
566. FLA. STAT. § 775.021(4)(b)(2).
567. 3 So. 3d 1067 (Fla. 2009).
568. Id. at 1077 (construing FLA. STAT. § 775.021(4)(b)(2)).
569. See id. at 1078; McKinney v. State (McKinney I), 24 So. 3d 682, 683–84 (Fla. 5th Dist. Ct. App. 2009), aff’d, 66 So. 3d 852 (Fla. 2011), cert. denied, 132 S. Ct. 527 (2011); Shazer v. State, 3 So. 3d 453, 454 (Fla. 4th Dist. Ct. App. 2009) (per curiam).
570. 3 So. 3d 453 (Fla. 4th Dist. Ct. App. 2009) (per curiam).
and grand theft violate[d] double jeopardy rights because the same property formed the basis for both convictions.\textsuperscript{571} However, in \textit{McKinney v. State (McKinney I)},\textsuperscript{572} the Fifth District disagreed, holding that the rule against double jeopardy is not violated by dual convictions for grand theft and robbery with a firearm arising out of “a single taking of cash and a cell phone at gunpoint.”\textsuperscript{573} Reasoning that “robbery is not a degree of theft nor is theft a degree of robbery,” the court upheld McKinney’s convictions and certified express and direct conflict with \textit{Shazer}.\textsuperscript{574}

The Supreme Court of Florida accepted jurisdiction in \textit{McKinney v. State (McKinney II)},\textsuperscript{575} affirmed the Fifth District’s decision in \textit{McKinney I}, and disapproved \textit{Shazer}.\textsuperscript{576} The latter decision, the court wrote, “failed to follow \textit{Valdes} in its decision, or to note a reason for its departure from controlling precedent.”\textsuperscript{577} In so ruling, the court addressed three of McKinney’s arguments.\textsuperscript{578} First, the court dismissed his claim “that robbery and theft are simply aggravated forms of the same underlying offense.”\textsuperscript{579} Because “robbery is not a degree of theft [and theft is not] a degree of robbery,” section 775.021(4)(b)2. did not bar McKinney’s dual convictions for these crimes.\textsuperscript{580} Second, McKinney’s convictions were not exempt under section 775.021(4)(b)1., which precludes multiple convictions for offenses requiring identical elements of proof.\textsuperscript{581} “Robbery requires that the State show that ‘force, violence, assault, or putting in fear was used in the course of the taking,’ and grand theft requires that the State show the value of the property taken,” the court wrote.\textsuperscript{582} For the same reason, the court rejected his third argument that section 775.021(4)(b)3. barred his dual convictions because grand theft was a lesser-included offense of robbery, reasoning that “neither offense is wholly subsumed by the other.”\textsuperscript{583}

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

\textsuperscript{571.} \textit{Id.} at 454 (reversing the grand theft conviction and remanding with directions to the trial court to vacate the conviction and sentence).

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

\textsuperscript{573.} \textit{Id.} at 683–84.

\textsuperscript{574.} \textit{Id.} at 684 (citing \textit{Shazer}, 3 So. 3d at 454).

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

\textsuperscript{576.} \textit{Id.}

\textsuperscript{577.} \textit{Id.} at 856 n.4.

\textsuperscript{578.} \textit{See id.} at 856–57 (quoting \textit{McKinney I}, 24 So. 3d at 683–84).

\textsuperscript{579.} \textit{Id.} (citing \textit{McKinney I}, 24 So. 3d at 684).

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

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

\textsuperscript{582.} \textit{McKinney II}, 66 So. 3d at 857 (quoting FLA. STAT. § 812.13(1)).

\textsuperscript{583.} \textit{Id.; see also FLA. STAT.} § 775.021(4)(b)3.
issued it, and . . . wrong in application today.”\textsuperscript{584} Valdes, he stated, “departed from decades of well-established law” when it discarded the primary evil approach to double jeopardy challenges “[w]ithout reference to any decisional law from this Court or Florida’s district courts of appeal that exhibited the impracticality of that approach, any necessity to abrogate it, or any miscarriage of justice . . . .”\textsuperscript{585} Grand theft and robbery “involve the same evil,” he continued, because each crime punishes the defendant for depriving another person of property.\textsuperscript{586} Therefore, according to the dissent, dual convictions for grand theft and robbery “in a single episode and single act punish[] an individual twice for the same evil and violate[] double jeopardy.”\textsuperscript{587}

In \textit{Ivey v. State},\textsuperscript{588} the Third District considered \textit{Valdes} in the context of convictions for leaving the scene of a fatal accident, vehicular homicide, and DUI manslaughter.\textsuperscript{589} Holding “that \textit{Valdes} did not overrule the well-settled principle that a single death cannot give rise to dual homicide convictions,” the court concluded that the dual homicide convictions arising from a single death violated double jeopardy.\textsuperscript{580} The court therefore “vacate[d] the convictions for vehicular homicide and leaving the scene of a fatal accident, and affirm[ed] the DUI manslaughter conviction and sentence.”\textsuperscript{581}

In \textit{Avila v. State},\textsuperscript{592} the Second District held that double jeopardy did not preclude a defendant’s retrial after the jury deadlocked on that charge at the defendant’s first trial.\textsuperscript{593} In this case, the defendant was charged, \textit{inter alia}, with sexual battery with a deadly weapon.\textsuperscript{594} After a preliminary vote, the first jury sent a note to the court advising that there was unanimous agreement to a lesser charge on the sexual battery count, but no agreement on the

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

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

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

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

C. Due Process

1. Uncharged Crimes

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

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607. Id. at 751.
608. Id. at 749.
609. Id. at 751.
610. Id. at 749.
611. Morse, 77 So. 3d at 749.
612. Id. at 751 (citing Beahr v. State, 992 So. 2d 844, 846 (Fla. 1st Dist. Ct. App. 2008), abrogated on other grounds by Smith v. State, 41 So. 3d 1041 (Fla. 1st Dist. Ct. App. 2010)).
613. Id. (citing Beahr, 992 So. 2d at 846).
614. 51 So. 3d 445 (Fla. 2010).
615. Id. at 449, 451 (citing State v. Gray, 435 So. 2d 816, 818 (Fla. 1983)).
616. Id. at 447 (emphasis omitted); see also FLA. STAT. § 784.045(1)(a) (2012).
617. Jaimes II, 51 So. 3d at 447 (citing Jaimes v. State (Jaimes I), 19 So. 3d 347, 348 (Fla. 2d Dist. Ct. App. 2009) (per curiam), review granted, 29 So. 3d 291 (Fla. 2010), and rev’d, 51 So. 3d 445 (Fla. 2010)).
The Supreme Court of Florida agreed, holding that the defendant’s conviction for aggravated battery violated his due process rights because it was based on causing great bodily harm, “which requires an element not contained in the charging document” and therefore not addressed at trial. The erroneous jury instruction that resulted in this conviction constituted fundamental error “by definition,” the court held, and was subject to correction on appeal even in the absence of contemporaneous objection. In so ruling, the court distinguished its decision in *Weaver*, which held that a trial court’s error in instructing on an alternative theory does not constitute fundamental error when that alternative theory is never at issue in the trial and “it may be assumed that the defendant was convicted of the form of the offense on which the state actually based its arguments.” In *Jaimes II*, however, the verdict was based specifically on the jury’s determination that Jaimes had caused the victim great bodily harm, and so the court could not assume, as it had done “in *Weaver*, that the improper instruction had no effect on the jury’s decision.” In such case, the fundamental error exception is justified based on a violation of the defendant’s due process rights. Accordingly, the court directed entry of a verdict for the lesser included crime of simple battery, which was “supported by the charging document and the proof at trial, and each element of the offense was determined by the jury beyond a reasonable doubt.”

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

618. *Id.* (quoting *Jaimes I*, 19 So. 3d at 348).
619. *Id.* at 447–48 (citing State v. Weaver, 957 So. 2d 586, 589 (Fla. 2007), abrogated by Sanders v. State, 959 So. 2d 1232 (Fla. 2d Dist. Ct. App. 2007), overruled by Beasley v. State, 971 So. 2d 228 (Fla. 4th Dist. Ct. App. 2008)).
620. *Id.* at 449.
621. *Id.*
622. *Jaimes II*, 51 So. 3d at 451 (citing Weaver, 957 So. 2d at 589).
623. *Id.*; see Weaver, 957 So. 2d at 589.
624. *Jaimes II*, 51 So. 3d at 451 (citing State v. Gray, 435 So. 2d 816, 818 (Fla. 1983)).
625. *Id.* at 452 (citing State v. Sigler, 967 So. 2d 835, 842 (Fla. 2007)).
626. 76 So. 3d 1080 (Fla. 2d Dist. Ct. App. 2011).
627. *Id.* at 1081 (citing *Jaimes II*, 51 So. 3d at 451).
charged.”

The court rejected the State’s argument that the case should be remanded for sentencing on attempted robbery because there was no evidence or finding that the robbery was incomplete, as would be required for an attempt conviction. The court cautioned that, on remand, “the State may not be limited to proceeding on the existing charge of attempted robbery with a firearm.” In other words, the State could charge Harris with the completed robbery, thereby exposing him “to the same mandatory life sentence he is currently serving.”

2. Florida Comprehensive Drug Abuse Prevention and Control Act

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

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

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

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

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

645. Id.
646. Id. at S451.
647. Id. at S452.
651. Id.; see Fla. Stat. § 893.13.
653. Id. at S453.
654. Id.
Justice Pariente concurred in the result but wrote separately to state that she would not rule out a successful “as-applied challenge . . . on due process grounds” if criminalizing the innocent conduct of a specific defendant would subject that individual to a substantial prison term.655 The relevant standard jury instruction supports such a challenge, she explained, because it allows a jury to presume a defendant’s guilty knowledge once “the affirmative defense is raised.”656 Justice Perry dissented, writing that the majority’s decision “shatters bedrock constitutional principles and builds on a foundation of flawed ‘common sense.’”657 Innocent possession is more common than the court stated, he wrote, and the permissive presumption of guilty knowledge requires an innocent defendant “to shoulder the burden of proof and present evidence to overcome that presumption.”658 This, he concluded, “makes neither legal nor common sense, . . . offends all notions of due process, and threatens core principles of the presumption of innocence and burden of proof.”659

D. Ex Post Facto Laws

In *Shenfeld v. State (Shenfeld II)*,660 the Supreme Court of Florida examined the constitutional provision prohibiting ex post facto laws.661 At issue was whether an amendment to a probation tolling statute, which allows adjudication of a probation violation without an arrest warrant, “may constitutionally be applied to a probationer who was placed on probation before the amendment became effective.”662 In this case, based on the new tolling law and alleged probation violations, the trial court revoked Shenfeld’s probation and sentenced him to fifteen years.663 The Fourth District affirmed, holding that the amendment was merely procedural and did not deprive the trial court of jurisdiction to revoke Shenfeld’s probation and to sentence

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655. *Id.* (Pariente, J., concurring).
656. *Id.* at S455 (citing FLA. STD. JURY INSTR. (CRIM.) 25.2 (2007)).
658. *Id.* at S457 (citing Stimus v. State, 995 So. 2d 1149, 1151 (Fla. 5th Dist. Ct. App. 2008)).
659. *Id.* at S458.
660. 44 So. 3d 96 (Fla. 2010).
661. *Id.* at 98; see also FLA. CONST. art. 1, § 10.
662. *Shenfeld II*, 44 So. 3d at 98; see also FLA. CONST. art 1, § 10; FLA. STAT. § 948.06(1) (2001) (current version at FLA. STAT. § 948.06(1)(a) (2012)).
663. *Shenfeld II*, 44 So. 3d at 99; see also Shenfeld v. State (*Shenfeld I*), 14 So. 3d 1021, 1023 (Fla. 4th Dist. Ct. App.), review granted, 29 So. 3d 292 (Fla. 2009), and aff’d, 44 So. 3d 96 (Fla. 2010).
him. Approving this decision, the Supreme Court of Florida concluded that the amended tolling provision did not fall within any of the four categories of ex post facto laws because it did not criminalize an act that was innocent when the law passed, aggravate a crime previously committed, inflict a greater punishment than that in effect when the crime was committed, or change the proof necessary to convict. Instead, the court held, it merely modified the applicable tolling procedures. The amendment was analogous to a “statutory extension of a statute of limitations” that takes effect before prosecution is time-barred, the court wrote, concluding that if the limitations period for prosecution “may constitutionally be extended before the prosecution has been time-barred, it follows that a [tolling provision] may be applied to [an unexpired] probationary term.”

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

E. Freedom of Speech and Association

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

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

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

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

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

On the other hand, the court held that section 874.11, the electronic communications statute, was unconstitutionally overbroad and offended substantive due process. 693 Because its “sweeping language” criminalizes innocent communications “without reference to actual or imminent criminal activity,” it impermissibly prohibits expressive and associational activity that seeks “to benefit, promote, or further even the non-criminal interests of a criminal gang.” 694 Accordingly, the court reversed Enoch’s conviction and sentence under section 874.11. 695

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687. Id. at 350.
689. Enoch, 95 So. 3d at 351–52, 357 (citing New York v. Ferber, 458 U.S. 747, 757 (1982); State v. J.P., 907 So. 2d 1101, 1116–17 (Fla. 2004); State v. T.B.D., 656 So. 2d 479, 482 (Fla. 1995)).
690. Id. at 355 (citing Fla. Stat. § 874.02(1) (2012)).
691. Id. at 352–53; see also Fla. Stat. § 874.05(1).
692. Enoch, 95 So. 3d at 357 (citing State v. Beasley, 317 So. 2d 750, 753 (Fla. 1975)); see also Fla. Stat. § 874.05(1).
693. Enoch, 95 So. 3d at 366; see also Fla. Stat. § 874.05(1).
696. Id. at 366; see also Fla. Stat. § 874.11.
F. The Right to Bear Arms

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

V. Conclusion

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

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697. 55 So. 3d 710 (Fla. 1st Dist. Ct. App. 2011).
698. Id. at 711 (citing FLA. STAT. § 790.23(1)(a)).
699. Id. (citing McDonald v. City of Chi., Ill., 130 S. Ct. 3020, 3047, 3050 (2010); District of Columbia v. Heller, 554 U.S. 570, 635 (2008); see also FLA. STAT. § 790.23(1)(a).
700. *Epps*, 55 So. 3d at 711 (citing *McDonald*, 130 S. Ct. at 3047, 3050; *Heller*, 554 U.S. at 635).
701. Id. (quoting *McDonald*, 130 S. Ct. at 3047; *Heller*, 554 U.S. at 626).
702. Id.
I. INTRODUCTION

Don King, a well-known boxing promoter, sued ESPN, Inc. for defamation based on certain statements made in a television program—ESPN Sports Century—broadcast about King’s life and career. In Don King Productions, Inc. v. Walt Disney Co., the Florida Fourth District Court of Appeal affirmed the trial court’s grant of summary judgment for the broadcaster, holding that the promoter had failed to establish that the
defendant broadcaster had acted with actual malice—with reckless disregard for the truth—in broadcasting the challenged statements.\(^3\)

II. THE CASE

[Don King], an admitted public figure . . . had the burden of establishing—[by] clear and convincing record evidence—that ESPN published the SportsCentury biography program . . . with actual malice—i.e., that ESPN knew the challenged statements were false or in fact entertained serious doubts about their probable falsity. . . . [The First Amendment] require[s] that summary judgment be “liberally granted” [against plaintiffs] in public figure defamation cases [brought] against media defendants.\(^4\)

In this case, the trial court evaluated King’s actual malice arguments, found them deficient as a matter of law, and granted ESPN’s motion for summary judgment in its entirety.\(^5\)

Specifically, the trial court concluded that ESPN had not “published the statements with actual malice.”\(^6\) It concluded that “a failure to investigate or a failure to investigate sufficiently, does not constitute actual malice,” but found that ESPN had, in fact, sufficiently investigated the

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3. \(\text{Id. at 42, 46.}\)
   The contents of the . . . statements at issue consist of the following:
   1. [Don] Elbaum indicated that King organized a benefit exhibition fight for Forest City Hospital. The hospital only received $1,500 out of the $85,000 in ticket sales.
   2. [Don] Elbaum described a private conversation he had with Meldrick Taylor in which they discussed Taylor being owed $1,300,000 for a fight, and King giving Meldrick a check for only $300,000.
   3. [Don] Elbaum asserted that King threatened to have Meldrick Taylor killed.
   4. [Don] Elbaum stated that King convinced doctors to invest $250,000 in a movie about his life that was never made; [and]
   5. [Jack] Newfield described an encounter he had with King at a press conference where King went crazy and threatened to kill him.
   \(\text{Id. at 42–43.}\)

4. \(\text{Appellees’ Answer Brief at 1, Don King Prods., Inc. v. Walt Disney Co., 40 So. 3d 40 (Fla. 4th Dist. Ct. App. 2010) (No. 4D08-3704) (footnote omitted); see also Don King Prods., Inc., 40 So. 3d at 43 (quoting St. Amant v. Thompson, 390 U.S. 727, 731 (1968)).}\)

5. \(\text{Don King Prods., Inc., 40 So. 3d at 43–44; see also Order at 4–8, Don King Prods., Inc. v. Walt Disney Co., No. 05-000524(02) (Fla. 17th Cir. Ct. July 28, 2008) [hereinafter Order for Summary Judgment].}\)

6. \(\text{Don King Prods., Inc., 40 So. 3d at 43.}\)
The court also held that “casting doubt on the credibility of a journalist’s source is insufficient to sustain the burden of proving actual malice,” but in any event, found that ESPN’s sources were sufficiently credible. Finally, the trial court concluded that “[i]ll-will, spite, and negativity are wholly irrelevant to actual malice.” The trial court also granted summary judgment in favor of ESPN on the ground that “King had failed to establish the falsity of [certain] statements.”

On appeal, however, the Fourth District Court of Appeal directed its attention solely to the lack of actual malice—the second basis for the trial court’s grant of summary judgment—affirming on the ground that the lower court determination “was proper because there [was] no record evidence . . . that a jury could find, by clear and convincing evidence, that ESPN acted with actual malice in publishing the five [challenged] statements.”

A. The Factual Context

“The sworn affidavits and testimony from the ESPN producers [reflected] . . . the[ir] belie[f] [that] everything contained in the [broadcast] was true and accurate. This testimony also . . . show[ed] that ESPN had no doubt . . . about the truth of the [p]rogram.” “King’s principal argument focuse[d] on one [source], Don Elbaum. King claim[ed] that Elbaum was so incredible that there were ‘obvious reasons’ to doubt him.” The undisputed record evidence, however, showed that ESPN’s producers had no reason to doubt Elbaum.

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7. Order for Summary Judgment, supra note 5, at 6 (citing St. Amant, 390 U.S. at 733; Palm Beach Newspapers, Inc. v. Early, 334 So. 2d 50, 52–53 (Fla. 4th Dist. Ct. App. 1976) (per curiam)).
8. Id. at 6–7 (citing Thomas v. Patton, 34 Media L. Rptr. 1188, 1191 (Fla. 4th Cir. Ct. 2005)).
9. Id. at 8 (citing Palm Beach Newspapers, Inc., 334 So. 2d at 52–53).
10. Don King Prods., Inc., 40 So. 3d at 43.
11. Id.
12. Appellees’ Answer Brief, supra note 4, at 2; see also Don King Prods., Inc., 40 So. 3d at 45. “King ha[d] no evidence to the contrary . . . .” Appellees’ Answer Brief, supra note 4, at 2; see also Don King Prods., Inc., 40 So. 3d at 45. The record testimony reflected that ESPN repeatedly tried to interview King. Don King Prods., Inc., 40 So. 3d at 46. He refused. Id. “As part of the editorial process, [a] senior member of the production team [actually] deleted many [negative] items . . . he viewed as inadequately substantiated and added several positive statements about King.” Appellees’ Answer Brief, supra note 4, at 3.
13. Appellees’ Answer Brief, supra note 4, at 3; see also Don King Prods., Inc., 40 So. 3d at 45–46.
14. Don King Prods., Inc., 40 So. 3d at 45; Appellees’ Answer Brief, supra note 4, at 3.
[Elbaum had known] King intimately for over [thirty] years and had been personally involved in each of the statements he made [in the broadcast]. In addition, everything Elbaum said was consistent with what other interviewees had said and what prior [publications] had reported for decades. Extensive interview tape[s] and scores of [media] of all kinds . . . repeatedly stated that King was a huckster who had threatened, intimidated, and cheated, or underpaid many, including boxers.

Faced with this . . . evidence, King[] . . . attempt[ed] to “thread the needle” with the hope of finding something that constitute[d] actual malice. . . . King, [thus] claim[ed] that one ESPN producer expressed doubts about certain statements, which were ignored.15

“But the record actually show[ed] each of those statements was deleted” and each was not in the final broadcast.16

King also claim[ed] that ESPN, [in fact, did] doubt[] Elbaum[’s] [veracity] because ESPN’s fact-checker Larry Schwartz . . . testif[ied] that he “noticed” that Elbaum was a “con artist.” But Schwartz’ [sic] videotaped deposition makes clear that [he] actually stated the exact opposite: “I never said he [Elbaum] was a con artist.”

King [next] argue[d] that ESPN published five of 183 statements in the [broadcast] with actual malice because (i) ESPN’s producers were out “to get” King, (ii) [ESPN’s investiga-tion was insufficient], (iii) two of ESPN’s 45 sources were not credible . . . and (iv) ESPN exhibited poor journalism in putting together the Program.17

None of these arguments satisfied King’s burden of proving actual malice by clear and convincing evidence.18 “In light of the . . . record [about] King’s . . . history, [his] focus on just seconds of the Program itself re-veal[ed],” at best, a marginal defamation claim.19 The program had 178

15. Appellees’ Answer Brief, supra note 4, at 3–4; see also Don King Prods., Inc., 40 So. 3d at 42, 44–45.
17. Id. (citing Exhibit 83, Don King Prods., Inc. v. Walt Disney Co., 40 So. 3d 40 (Fla. 4th Dist. Ct. App. 2010) (No. 4D08-37004)).
18. Don King Prods., Inc., 40 So. 3d at 45.
19. Appellees’ Answer Brief, supra note 4, at 5.
unchallenged statements. ESPN submitted (with its summary judgment motion), a video of the broadcast, excluding the five challenged statements. “[A]s a matter of law, the gist of the Program [was determined to be] the same, with or without the five statements.”

B. The Rationale of the Appellate Court

The Fourth District Court of Appeal reasoned that King failed to establish that ESPN acted with actual malice. Writing for that court, Judge Dorian K. Damoorgian began by explaining the general principle that governs claims for defamation. He then analyzed the heightened standard concerning public figure defamation actions—“more than mere negligence on the part of the publisher” is required and the public figure “must prove that the publisher acted with actual malice.”

In the landmark case of New York Times Co. v. Sullivan, the Supreme Court of the United States defined “actual malice” as knowledge by a publisher that a statement is false or that it was made in “reckless disregard of whether it was false or not.” As Judge Damoorgian observed, “[r]ecklessness may be found where ‘there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.’ Under these circumstances, the publisher’s profession that he published the defamatory statements in good faith is generally insufficient to obtain a summary judgment.”

20. Id.
21. Id. (citing Exhibit 86, Don King Prods., Inc. v. Walt Disney Co., 40 So. 3d 40 (Fla. 4th Dist. Ct. App. 2010) (No. 4D08-3704)).
22. Id.
23. Don King Prods., Inc., 40 So. 3d at 42 (“At issue in this appeal are five of the statements made during the course of the Sports Century program, which King alleges are actionable defamatory statements.”).
24. Id. at 43 (citing Mile Marker, Inc. v. Petersen Pub’g, L.L.C., 811 So. 2d 841, 845 (Fla. 4th Dist. Ct. App. 2002)) (“A common law claim for defamation requires the unprivileged publication (to a third party) of a false and defamatory statement concerning another, with fault amounting to at least negligence on behalf of the publisher, with damage ensuing.”).
28. Don King Prods., Inc., 40 So. 3d at 43 (quoting St. Amant, 390 U.S. at 731–32).
less disregard for [the] truth or falsity” of the statement and may constitute actual malice.29

Although the appellate court did not adopt the trial court’s findings regarding the factual deficiencies of certain statements, it still found the defamation claim unsustainable because King failed to establish that ESPN published the statements with actual malice.30 The court then separately addressed each of King’s contentions in support of his claim that ESPN had acted with actual malice.31

C. The Ill Will Contention

King argued “that ESPN harbored ill will towards him and intended to portray him in a negative light.”32 In support of this argument, he directed attention to unfavorable emails, script notations, and adverse comments made by ESPN producers.33 The Fourth District Court of Appeal disagreed and pointed out that ill will is not actual malice under the standard established in New York Times Co.34 “[A] showing of ill will, alone, cannot establish actual malice.”35 “[W]hen combined with other evidence,” however, ill will or motive may be a factor in concluding that a publisher has acted with actual malice.36 Yet, “[d]espite the relevance of ill will and motive,” the appellate court emphasized that “‘courts must be careful not to place too much [relevance] on such factors.’”37

The Fourth District Court of Appeal made clear in its opinion that “[a]ny ill will or evil intent in the emails and production notations . . .

29. Id. (quoting St. Amant, 390 U.S. at 731).
30. Id. at 44–45. In so doing, the appellate court held that “summary judgments are to be more liberally granted in defamation actions against public figure plaintiffs.” Id. (citing Dockery v. Fla. Democratic Party, 799 So. 2d 291, 294 (Fla. 2d Dist. Ct. App. 2001) (per curiam)).
[O]n a motion for summary judgment in a public-figure defamation case, the burden is on the plaintiff to “present record evidence sufficient to satisfy the court that a genuine issue of material fact exists which would allow a jury to find by clear and convincing evidence the existence of actual malice on the part of the defendant.” Id. (quoting Mile Marker, Inc., 811 So. 2d at 846–47).
31. Don King Prods., Inc., 40 So. 3d at 44–46.
32. Id. at 44.
33. Id.
34. Id. at 45.
35. Id. at 44.
36. Don King Prods., Inc., 40 So. 3d at 44 (citing Harte-Hanks Commc’ns, Inc. v. Connaughton, 491 U.S. 657, 667–68 (1989)) (“[A] plaintiff [may prove] the defendant’s state of mind through circumstantial evidence such as evidence of motive.”).
37. Id. (quoting Harte-Hanks Commc’ns, Inc., 491 U.S. at 668).
[did] not amount to actual malice.” 38 It concluded that “nothing in the record [indicated] that ESPN [knowingly or] purposely made false statements about King [either] to bolster the theme of the program or to inflict harm on King.” 39

The “intention to portray a public figure in a negative light, even when motivated by ill will or evil intent, is not sufficient to show actual malice unless the publisher intended to inflict harm through knowing or reckless falsehood.” 40

Moreover, the Fourth District Court of Appeal concluded that “ESPN was not required to present positive statements about King to balance any negative statements, or to search until it found someone who would defend King.” 41

King argued “that ESPN knew or should have known that [witness] Elbaum was” a convict, unreliable, and harbored animosity towards King, and, accordingly, ESPN should have taken additional steps to verify Elbaum’s statements. 42 “Unlike Elbaum, [however,] King [did] not question [Jack] Newfield’s general credibility, but assert[ed] that ESPN had reason to [question the truth] of Newfield’s statement[s] that King [had] threatened to kill him.” 43 King argued that ESPN “had a copy of the [subject] videotape which show[ed] . . . the confrontation between King and Newfield, and which [did] not contain any evidence of a death threat.” 44 The court nonetheless dispensed with King’s contention that ESPN ignored obvious reasons to doubt witness statements. 45

The appellate court responded to the argument by strictly focusing on the applicable evidentiary standard. 46 Thus, it concluded that the “evidence, even taken as a whole, [was] not sufficient to prove, by clear and convincing evidence, that ESPN acted with actual malice in publishing the statements about King.” 47 King, the court found, “had not pre-

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38. Id.
39. Id. at 45.
41. Don King Prods., Inc., 40 So. 3d at 45 (citing Levan v. Capital Cities/ABC, Inc., 190 F.3d 1230, 1243 (11th Cir. 1999)).
42. Id.
43. Id.
44. Id.
45. Id.
46. Don King Prods., Inc., 40 So. 3d at 45.
47. Id.
presented any evidence that ESPN in fact doubted Elbaum’s credibility or the veracity of Newfield’s statement[s].”

The court reiterated that the evidence King relied on was “neither clear nor convincing.” Thus, “[a]ssuming ESPN knew of Elbaum’s tax fraud conviction, or had any duty to perform a criminal background check on him, a single criminal conviction more than a decade before publication, [it opined,] does not require a publisher to question a source’s credibility on all matters.” Although the “contentious relationship between King and Elbaum [was] more suspicious, [that was] still insufficient to show ESPN acted with reckless disregard for the truth.”

Finally, the Fourth District Court of Appeal noted that

[the event that sparked the animosity between King and Elbaum [had] occurred in 1973 [and that] King [had] presented no evidence that this event created long-lasting tension[s] between himself and Elbaum. Regarding [the] Newfield [matter, although the . . . video [did] not show King threatening Newfield’s life, Newfield’s account of the confrontation . . . supported, at the very least, his perception that King [had] threatened his life. In [his] book, Newfield recounted King’s long tirade against him . . . . After King walked away from Newfield, someone associated with King approached [the author] and whispered, “Better watch your back, Jack. This is Don’s town.” In the court’s view, “[i]t was not unreasonable for Newfield to interpret this comment as a threat, nor did [it conclude that] ESPN ha[d] reason to doubt Newfield’s perception of the comment . . . ESPN producers testified . . . that they believed the events may have occurred off-camera.” The court accepted that as a reasonable conclusion. “Moreover, King [had] declined ESPN’s attempts to interview him . . . and thus provide . . . his version of the confrontation. [Although] King [wa]s under no obligation to participate in the production . . . the fact that ESPN did not have

48. Id.
49. Id.
50. Id.
51. Don King Prods., Inc., 40 So. 3d at 45.
52. Id.
53. Id. at 45–46.
54. Id. at 46.
access to [his] version of the event[...]

D. The Contention that ESPN Failed to Conduct a Thorough Investigation

“King contend[ed] that ESPN should have conducted a more searching investigation into the challenged statements, [in particular,] interviewing additional sources to verify the statements.” 56 By its failure to do so, “King assert[ed] that ESPN [had] deviated from accepted standards of journalism.” 57 Again, the court disagreed. 58 The law in this regard, in the view of the appellate court, is well established: “[T]he failure to investigate, without more, does not constitute actual malice.” 59

“Although a publisher’s departure from accepted standards of journalism is not entirely irrelevant,” the court noted that “[a]ctual malice requires more than a departure from reasonable standards of journalism.” 60 However, in this case, ESPN did produce evidence that it had “interviewed people with direct knowledge of the events” at issue, and thus, did satisfy professional standards. 61 It also attempted more than once to interview King, but was rebuffed. 62 In the record, “[t]here were no obvious reasons” to doubt the information that ESPN had compiled and used for the broadcast. 63 “[I]ts failure to conduct a more searching investigation” did not, in the court’s view, constitute the requisite actual malice required to overcome the motion for summary judgment. 64

III. THE RULING

After reviewing the record and considering King’s arguments, Judge Damoorgian, writing for a unanimous panel, determined that King could not meet his burden “that a genuine issue of material fact exist[ed] which
would allow a jury to find actual malice by clear and convincing evi-
dence."65

The appellate court held that none of the following evidentiary sce-
narios presented by King constituted actual malice.66 None were suffi-
cient to satisfy the constitutional test set forth in New York Times Co.
showing that a publisher acted with reckless disregard for the truth or
without regard to the truth or falsity of a statement when publishing about
a public figure.67 The Fourth District Court of Appeal ultimately rejected
King’s contentions that there is “actual malice” when a plaintiff shows
(1) negativity or ill will;68 (2) the failure to investigate or to interview
every person with knowledge;69 (3) use of sources who are biased or who
have been convicted of crimes;70 and (4) a “‘departure from reasonable
standards of journalism.’”71

IV. CONCLUSION

In Don King Productions, Inc., the Fourth District Court of Appeal
followed the standard set forth in New York Times Co.72 In so doing, it
reiterated clear guidelines supported by governing precedent for the uni-
form application of law regarding the determination of actual malice
where a public figure sues a media publisher in Florida.73

65. Id. at 46.
66. Don King Prods., Inc., 40 So. 3d at 44–46.
67. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964); Don King Prods., Inc., 40
So. 3d at 43, 46.
68. Don King Prods., Inc., 40 So. 3d at 44–45.
69. Id. at 46 (citing St. Amant v. Thompson, 390 U.S. 727, 733 (1968); Palm Beach
Newspapers, Inc. v. Early, 334 So. 2d 50, 52–53 (Fla. 4th Dist. Ct. App. 1976)); see Levan v.
Capital Cities/ABC, Inc., 190 F.3d 1230, 1243 (11th Cir. 1999).
70. Don King Prods., Inc., 40 So. 3d at 45; see also Secord v. Cockburn, 747 F. Supp.
779, 794 (D.D.C. 1990); Sunshine Sportswear & Elecs., Inc. v. WSOC Television, Inc., 738 F.
Supp. 1499, 1508–09 (D.S.C. 1989); Turf Lawnmower Repair, Inc. v. Bergen Record Corp.,
71. Don King Prods., Inc., 40 So. 3d at 46 (quoting Levan, 190 F.3d at 1239).
72. Id. at 43 (citing N.Y. Times Co., 376 U.S. at 279–80; Mile Marker, Inc. v. Petersen
Pub’g, L.L.C., 811 So. 2d 841, 845 (Fla. 4th Dist. Ct. App. 2002)).
73. Id. (citing N.Y. Times Co., 376 U.S. at 279–80).
WHEN IS A CANDIDATE FOR PUBLIC OFFICE IN FLORIDA OFFICIALLY ELECTED?

PAUL D. ASFOUR*

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The question has arisen, on many occasions, about when a candidate for public office in Florida is considered “officially elected.” Governors have requested opinions from the Supreme Court of Florida on the issue, since judicial vacancies occurred for various reasons, and the governors were unsure of whether they had the authority to appoint replacements or whether they had to wait for the election process to select them. In addition, county supervisors of elections have requested opinions determining the specific date a candidate is elected, from either the Florida Attorney General or Florida Department of State Division of Elections, for various other elected offices. This article will review the Florida Constitution, Florida Statutes, advisory opinions, and case law in an attempt to determine, with as much specificity as possible, the date when a candidate for public office in Florida is considered officially elected.

I. FLORIDA ELECTIONS AND THE SUNSHINE LAW

The word “election,” when standing alone, is defined as the act of choosing; choice; the act of selecting one or more from oth-

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2. E.g., Advisory Op. to the Governor re Judicial Vacancy Due to Resignation, 42 So. 3d 795, 796 (Fla. 2010) (per curiam); Advisory Op. to the Governor re Appointment or Election of Judges, 983 So. 2d 526, 528 (Fla. 2008).

ers. Hence, appropriately, the act of choosing a person to fill an office or employment by any manifestation of preference, as by vote, uplifted hands, or viva voce.\(^4\)

Once elected, the candidate becomes a “candidate elect” and, therefore, subject to Florida’s Sunshine Law, which prohibits members of the same elected body (board, commission, council, etc.) from discussing matters that may foreseeably come before that elected body for a vote.\(^5\) As soon as the candidates-elect become subject to the Sunshine Law, they are also subject to penalties for violating it.\(^6\) However, there must be proof of scienter for there to be a criminal violation of the Sunshine Law.\(^7\) As a result, a violation could not occur by accident.\(^8\)

Some may question why a candidate, immediately upon being elected, is subject to the Sunshine Law. Why not wait until the individual takes the oath of office, and actually begins his term? That seems logical, and would obviously avoid the issue about which date controls when the candidate becomes subject to the Sunshine Law.

That issue was addressed by the Third District Court of Appeal in the case of \textit{Hough v. Stembridge}\(^9\). Following a special election in the City of North Miami Beach, meetings were held between an incumbent councilman who was elected mayor, and two other individuals who were elected to the office of city council but were not incumbents.\(^10\) One of the meetings took place before the individuals had taken their respective oaths of office.\(^11\) The

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7. Bd. of Pub. Instruction v. Doran, 224 So. 2d 693, 699 (Fla. 1969); \textit{see also} \textit{FLA. STAT.} § 286.011(3).
8. \textit{See} Bd. of Pub. Instruction v. Doran, 224 So. 2d 693, 699 (Fla. 1969); \textit{see also} \textit{FLA. STAT.} § 286.011(3).
10. \textit{Id.}
11. \textit{Id.}
trial court found that all three individuals had violated Florida Statutes section 286.011.\textsuperscript{12}

The appellants argued that the trial court erred in ruling that they had violated the statute since the first meeting between them took place when two of them were councilmen-elect, and only one of them was an elected official subject to the statute.\textsuperscript{13} Consequently, they claimed that they were not members of a governing body subject to the Sunshine Law.\textsuperscript{14}

The court stated:

\begin{quote}
We find the position untenable to hold on the one hand that Florida Statute[s] [section] 286.011 is applicable to elected board or commission members who have been officially sworn in and on the other hand inapplicable to members-elect who as yet merely have not taken the oath of public office. An individual upon immediate election to public office loses his status as a private individual and acquires the position more akin to that of a public trustee.

Therefore, we hold that members-elect of boards, commissions, agencies, etc. are within the scope of the Government in the Sunshine Law. To hold otherwise would be to frustrate and violate the intent of the statute which “having been enacted for the public benefit, should be interpreted most favorably to the public.”\textsuperscript{15}
\end{quote}

As stated previously, the Sunshine Law does not apply to candidates for office prior to the date on which they are considered elected, “unless the candidate is an incumbent seeking reelection.”\textsuperscript{16} However, it would not necessarily be considered a violation of the Sunshine Law if an incumbent candidate in attendance at a candidates’ forum expressed his or her opinion on a matter that “may foreseeably come before” that elected body for a vote.\textsuperscript{17} Furthermore, a non-incumbent may express his opinion on a matter that could foreseeably come before the elected body for a vote as long as there was no discussion taking place between an incumbent and another member of the board who happened to be in attendance at the forum.\textsuperscript{18}

\textsuperscript{12} Id. at 289–90 (citing FLA. STAT. § 286.011(1); Canney v. Bd. of Pub. Instruction, 278 So. 2d 260, 263 (Fla. 1973)).

\textsuperscript{13} Id. at 289.

\textsuperscript{14} Hough, 278 So. 2d at 289.

\textsuperscript{15} Id. at 289–90 (quoting Canney, 278 So. 2d at 263); see also FLA. STAT. § 286.011.


\textsuperscript{17} 92-05 Fla. Op. Att’y Gen. 2; see also FLA. STAT. § 286.011.

II. DATE OF ELECTION

The most logical date a candidate could be considered elected is the date of the general election, assuming there was more than one candidate who qualified for the race, votes were counted, and a winner declared. But what about a candidate who qualified for the seat, but ran unopposed, whether or not he was the incumbent? Would it be the date the qualifying period ended, the date of the election, the date the election results are certified as official, or the date the term begins? Unfortunately, a 2010 Supreme Court of Florida advisory opinion, discussed below, complicated the issue.

Florida Statutes section 100.041 details how various Florida officials shall be elected and in one case, when an officer of one elective office—county commissioner—is considered elected. It would be an overstatement to consider it the definition of clarity.

Florida Statutes section 100.041(2)(a) provides that “[a] county commissioner is ‘elected’ for purposes of this paragraph on the date that the county canvassing board certifies the results of the election pursuant to section 102.151.” However, no mention is made of when other officers listed in that section are considered elected.

What is puzzling about the language in Florida Statutes section 100.041(2)(a) is that, according to the court in Morse v. Dade County Canvassing Board, (1) the county canvassing board does not have “standing to challenge . . . election results,” and (2) the circuit court does not have jurisdiction unless there is a challenge to “an election result filed by [either] a candidate or an elector qualified to vote in the election.”

Although Florida Statutes section 102.112(2) provides that a canvassing board must certify the results by the twelfth day after the general elec-

   A general election shall be held in each county on the first Tuesday after the first Monday in November of each even-numbered year to choose a successor to each elective federal, state, county, and district officer whose term will expire before the next general election and, except as provided in the state Constitution, to fill each vacancy in elective office for the unexpired portion of the term. Id.
20. See Advisory Op. to the Governor re Judicial Vacancy Due to Resignation, 42 So. 3d 795, 798 (Fla. 2010) (per curiam).
22. See id. § 100.041.
23. Id. § 100.041(2)(a).
24. See id. § 100.041.
26. Id. at 1314; see also Fla. Stat. § 100.041(2)(a).
tion, it can do so before then. Consequently, a county commissioner from one county could be considered elected at a time different than a county commissioner from another county, even though the election was held on the same day and the results were clear. That result would appear to conflict with Florida Statutes section 97.012(2), which mandates “uniform standards for the proper and equitable implementation of the registration laws.” The Morse decision, coupled with both Florida Statutes section 97.012(2), and the fact that the various county canvassing boards can meet at different times, mandates a careful review of the language in Florida Statutes section 100.041(2)(a).

The question about when an unopposed candidate is considered elected is even more unsettled. Florida Statutes section 101.151(7) provides: “Except for justices or judges seeking retention, the names of unopposed candidates shall not appear on the general election ballot. Each unopposed candidate shall be deemed to have voted for himself or herself.” The implication is that the unopposed candidate voted for himself or herself at the general election and not at any other time during the election process, such as on the date the qualifying period ended, or on the date of the primary election. Therefore, is the person elected on that date, or on the date the canvassing board meets to certify the election results?

III. JUDICIAL VACANCIES

The Supreme Court of Florida further muddied the waters in an advisory opinion to Governor Charlie Crist in 2010. Although the advisory opinion concerns a judicial vacancy and is specific to the facts of the case, it complicated the matter for the Florida Department of State, which renders advisory opinions to Florida Supervisors of Elections and other interested parties regarding when a candidate is considered elected.

27. See Fla. Stat. § 102.112(2).
28. See id.
29. Id. § 97.012(2). Compare id. § 102.112(2), with id. § 97.012(2).
30. See Fla. Stat. §§ 97.012(2), 102.112(2), 100.041(2)(a); Morse, 456 So. 2d at 1314–15.
32. See id.
33. Advisory Op. to the Governor re Judicial Vacancy Due to Resignation, 42 So. 3d 795, 798 (Fla. 2010) (per curiam).
In that case, incumbent Escambia County Court Judge David Ackerman qualified for the seat on April 28, 2010. The qualifying period ran from noon on April 26, 2010 to noon on April 30, 2010. Since no other candidate qualified, the judge was unopposed at the time the qualifying period ended.

Judge Ackerman’s current term was to expire on January 3, 2011, with his new term beginning on January 4, 2011. However, he submitted a resignation letter to Governor Crist on May 24, 2010, which was accepted by the Governor on May 28, 2010. That resignation created a judicial vacancy that would last for approximately seven months—until his new term began on January 4, 2011—if the Governor could not name a replacement prior to the date of the election. To compound the uncertainty, Judge Ackerman stated that he would not “resume his judicial duties until February 1, 2011.”

The first question that must be answered is when the vacancy occurred. Article X, section 3 of the Florida Constitution states:

> Vacancy in office shall occur upon the creation of an office, upon the death, removal from office, or resignation of the incumbent or the incumbent’s succession to another office, unexplained absence for sixty consecutive days, or failure to maintain the residence required when elected or appointed, and upon failure of one elected or appointed to office to qualify within thirty days from the commencement of the term.

Consequently, the vacancy created by Judge Ackerman’s resignation occurred on the date Governor Crist accepted the resignation, May 28, 2010.

Unfortunately, the Florida Constitution contains two sections that address “judicial” vacancies. Article V, section 11(b) states:

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35. *Advisory Op. to the Governor re Judicial Vacancy Due to Resignation*, 42 So. 3d at 795–96.
36. *Id.* at 795.
37. *Id.* at 796.
38. *Id.* at 795.
39. *Id.*
40. *Advisory Op. to the Governor re Judicial Vacancy Due to Resignation*, 42 So. 3d at 796.
41. *Id.*
42. * Fla. Const. art. X, § 3* (emphasis added).
43. *Advisory Op. to the Governor re Judicial Vacancy Due to Resignation*, 42 So. 3d at 795, 796.
44. * Fla. Const. art. V, §§ 10(b)(1)–(2), 11(b).*
The governor shall fill each vacancy on a circuit court or on a county court, wherein the judges are elected by a majority vote of the electors, by appointing for a term ending on the first Tuesday after the first Monday in January of the year following the next primary and general election occurring at least one year after the date of appointment, one of not fewer than three persons nor more than six persons nominated by the appropriate judicial nominating commission. An election shall be held to fill that judicial office for the term of the office beginning at the end of the appointed term.\textsuperscript{45}

On the other hand, article V, section 10(b)(1) provides that:

The election of circuit judges shall be preserved . . . unless a majority of those voting in the jurisdiction of that circuit approves a local option to select circuit judges by merit selection and retention rather than by election. The election of circuit judges shall be by a vote of the qualified electors within the territorial jurisdiction of the court.\textsuperscript{46}

Section 10(b)(2) states the same for county judges, substituting the term “circuit” with “county.”\textsuperscript{47}

The Supreme Court of Florida previously determined that how a judicial vacancy should be filled depended upon when the vacancy occurred.\textsuperscript{48} The vacancy would be filled by appointment if it occurred before the qualifying period began and would be filled by election if the vacancy occurred after the election process began.\textsuperscript{49} The court determined that the election process began at the beginning of the statutory qualifying period.\textsuperscript{50} That date was chosen to promote consistency in the process of filling judicial vacancies, since it was a fixed point marking the commencement of the election process.\textsuperscript{51}

In Judge Ackerman’s case, the court stated that since his candidacy...
was uncontested, pursuant to section 105.051 [of the] Florida Statutes, he was deemed elected to serve as a judge on the Escambia County Court for the term beginning January 4, 2011. Thus, this particular election process ended on April 30, 2010, when the qualifying period ended, and no individual other than Judge Ackerman can now fill the vacancy by election.52

The language in Florida Statutes section 105.051(1)(a) is similar to the language in Florida Statutes section 101.151(7).53 Section 105.051(1)(a) states: “The name of an unopposed candidate for the office of circuit judge, county court judge, or member of a school board shall not appear on any ballot, and such candidate shall be deemed to have voted for himself or herself at the general election.”54 Once again, the implication is that the unopposed candidate voted for himself or herself at the “general election,” and not at any other time during the election process.55 If the legislature did not intend for the date of the general election to be the determining date for election of an unopposed candidate for office, it could have so stated by providing a different date. It did not.56

The court continued:

[An incumbent office holder resigned after the election process had effectively concluded. A vacancy was thus created at a time when the election process had ceased. There is no issue here with regard to preserving the right of the people to elect county court judges. Instead, the issue is whether an incumbent judge who had been reelected without opposition may then retire from office and leave a judgeship vacant for an extended period before resuming the duties of the office when it is convenient for him to do so.57

IV. CHANGE FROM PREVIOUS POSITION

The Supreme Court of Florida distinguished the Ackerman case from others that it had addressed previously regarding whether a judicial vacancy

52. Advisory Op. to the Governor re Judicial Vacancy Due to Resignation, 42 So. 3d 795, 797 (Fla. 2010) (per curiam) (emphasis added); see also Fla. Stat. § 105.051(1)(a) (2012).
55. See id.
56. See id. §§ 101.151(7), 105.051(1)(a), 105.051(1)(c).
57. Advisory Op. to the Governor re Judicial Vacancy Due to Resignation, 42 So. 3d at 797.
should be filled by appointment or election. The Ackerman decision also appears to contradict both an earlier supreme court opinion and an earlier attorney general opinion concerning when a “county commission” candidate is elected.

In opinion 74-293, the attorney general was asked to answer the following four questions posed by the attorney for Clay County. Only the first three are relevant to the issue presented here: (1) Whether “a county commissioner [must] be a resident of the . . . district in which he [was] elected;” (2) whether he must be a resident at the time of election or at the time he qualified for the position; (3) when the candidate must become a resident of the district to which he was elected, if not at the time of qualifying; and (4) whether “the name of [the] candidate . . . [must] be removed from the ballot if it [was] determined that [he] did not reside in the district [to] which he [was] elect[ed] at the time” he qualified for the position.

The attorney general relied on article VIII, section 1(e), of the Florida Constitution, which provides:

(e) Commissioners. Except when otherwise provided by county charter, the governing body of each county shall be a board of county commissioners composed of five or seven members serving staggered terms of four years. After each decennial census the board of county commissioners shall divide the county into districts of contiguous territory as nearly equal in population as practicable. One commissioner residing in each district shall be elected [by the electors of the county].

58. See Advisory Op. to the Governor re Appointment or Election of Judges, 983 So. 2d 526, 529–30 (Fla. 2008) (holding that a vacancy created “during a qualifying period in which any candidate qualifies for the judicial office is to be filled by election” where the vacancy arose due to the involuntary retirement of a county court judge during the qualifying period); Advisory Op. to the Governor re Sheriff & Judicial Vacancies Due to Resignations, 928 So. 2d 1218, 1219–20 (Fla. 2006) (holding that vacancy occurred when the Governor accepted the resignation of a circuit court judge on April 14, 2006, and that because the vacancy was created before the qualifying period commenced on May 8, 2006, the position was to be filled by appointment); Advisory Op. to the Governor re: Appointment or Election of Judges, 824 So. 2d 132, 135–36 (Fla. 2002) (holding that a vacancy created when a judge involuntarily retired after the conclusion of the qualifying period—in which the incumbent judge did not qualify for election but three other candidates did qualify—was to be filled by election).


61. Id.

62. Fla. Const. art. VIII, § 1(e) (emphasis added).
Therefore, the attorney general concluded, in the answer to the second question posed in opinion 74-293, that “a candidate did not have to meet the residence requirements at the time of qualifying for office.”

However, the attorney general raised an interesting caveat in the answer to the second question, which could obviously pose other problems for a candidate.

The execution of the candidate oath at a time when the candidate is not a resident of the appropriate district raises the possibility of conflict with statutory provisions relating to false swearing and perjury and, therefore, the suggested practice would be for a candidate to establish his residence in the appropriate district prior to qualifying for office.

In response to the third question posed in opinion 74-293, the attorney general stated:

The language of [article VIII, section 1(e) of the Florida Constitution] requires residence in the appropriate county commission district as of the day of the election. Accordingly, in order to be sure of complying with this constitutional provision, a candidate should establish his residence in the district he seeks to represent by no later than the day before the election.

Fourteen years later, the Supreme Court of Florida reinforced the decision reached in opinion 74-293. In State v. Grassi, William Grassi was charged with violating a statute imposing residency qualifications. Grassi intended to run for Broward County commissioner in District 4, but decided to run in District 3 when he “learned that the seat in District 4 was not open.” Grassi was charged with knowingly and unlawfully qualifying as a candidate for Broward County Commissioner, District 3, without being a resident thereof, in violation of section 99.032, Florida Statutes (1983). Section 99.032 requires that “[a] candidate for the office of county

64. See id.
65. Id. (citations omitted).
66. Id.
68. 532 So. 2d 1055 (Fla. 1988).
69. Id. at 1055.
70. Id.
commissioner shall, at the time he qualifies, be a resident of the district from which he qualifies,” violation of which is a first-degree misdemeanor.71

The trial court held that section 99.032 was inconsistent with article VIII, section 1(e) of the Florida Constitution and dismissed the case against Grassi.72 The district court affirmed the order to dismiss.73 The supreme court approved the district court’s ruling, stating, “if article VIII, section 1(e), of the Florida Constitution provides qualifications for the office of county commissioner, the legislature is prohibited from imposing any additional qualifications.”74 The court concluded by stating that “[t]he Florida Constitution requires residency at the time of election. Therefore, section 99.032 [of the] Florida Statutes is unconstitutional as it imposes the additional qualification for the office of county commissioner of residency at the time of qualifying for election.”75

The Supreme Court of Florida, based upon its decision in Grassi, confirmed that a candidate for county commission was not considered elected on the date he qualified for the position.76

With that decision in hand, the obvious question is why the Supreme Court of Florida decided that Ackerman was considered elected after the qualifying period ended without any other candidate having qualified. The decision is especially puzzling considering that it appears to conflict with Florida Statutes section 105.051(1)(a), as previously stated.77 It may have something to do with the reason behind Ackerman’s resignation coupled with his intention to reclaim his seat on his own terms.78 In other words, the court may have sent a message to all public officials who wanted to use the system to their own advantage.

71. Id. at 1055–56 (second alteration in original); see also FLA. STAT. § 99.032 (1983) (repealed 1991).
72. Grassi, 532 So. 2d at 1056; see also FLA. CONST. art. VIII, § 1(e); FLA. STAT. § 99.032.
73. Grassi, 532 So. 2d at 1056.
74. Id.
75. Id. (emphasis added); see also FLA. CONST. art. VIII, §1(e); FLA. STAT. § 99.032.
76. See Grassi, 532 So. 2d at 1056.
77. See supra notes 53–59 and accompanying text; see also FLA. STAT. § 105.051(1)(a) (2012); Advisory Op. to the Governor re Judicial Vacancy Due to Resignation, 42 So. 3d 795, 796–98 (Fla. 2010) (per curiam).
78. See Advisory Op. to the Governor re Judicial Vacancy Due to Resignation, 42 So. 3d at 797–98.
According to published reports, Ackerman resigned so he could collect a lump sum retirement payout of nearly $1.3 million. He informed the same reporter that he intended to return to the bench “next year” as a result of his de facto reelection. However, if he returned to the bench before an unspecified date in 2011, he would be required to return the lump sum payment.

With that in mind, the court made it clear that it did not appreciate what it may have perceived as Judge Ackerman’s attempt to manipulate the system, especially when it had a negative impact on the citizens Judge Ackerman was sworn to serve. “The consideration that must predominate here is the right of the people of Escambia County to the services of a county judge when the incumbent has presented himself to the people for reelection but then has laid aside the duties of his office.” The court continued by stating, “[a] judgeship is not an office that may be temporarily forsaken at will for personal benefit. When a vacancy arises from such circumstances, the Governor may properly fill the vacancy by appointment pursuant to article V, section 11(b).”

The “from such circumstances” portion of the last sentence quoted above seems to indicate that the situation was unique, and if the circumstances warrant, a different outcome may be in the offing. Nevertheless, the decision that an unopposed candidate was deemed elected at the conclusion of the qualifying period has compounded the problem for those who provide opinions on such matters such as the Florida Attorney General and the Florida Department of State Division of Elections.

79. Kris Wernowsky, Judge’s Quick Exit Nets $1.3 Million, PENSACOLA NEWS J., May 27, 2010, at 1A.
80. Id.
81. See id.
82. See Advisory Op. to the Governor re Judicial Vacancy Due to Resignation, 42 So. 3d at 797–98.
83. Id. at 797 (citing In re Advisory Op. to the Governor (Judicial Vacancies), 600 So. 2d 460, 462 (Fla. 1992)).
84. Id. at 798 (emphasis added); see also FLA. CONST. art. V, §11(b).
85. See Advisory Op. to the Governor re Judicial Vacancy Due to Resignation, 42 So. 3d at 798.
V. MOST RECENT ADVISORY OPINION

A July 26, 2010 letter from the Division of Elections highlights the dilemma faced by those who render opinions on election matters. The Pinellas County Supervisor of Elections requested an interpretation of the Election Code as it pertained to when state legislators and county commissioners were considered elected.

The Pinellas County Supervisor of Elections asserted that it was logical that a candidate be considered “officially elected on the date when the election results are certified as official.” The Division of Elections’ response highlighted the uncertainty created by the Ackerman decision: “While this may be a proper conclusion under some circumstances, it is not possible or practicable for the Division to definitively establish this as the election date for all purposes under the Election Code.”

Addressing the Ackerman decision, the Division of Elections stated that when a candidate is considered elected depends on the facts presented. “[A] candidate could be deemed elected on Election Day, on the date when the final canvassing board certifies the election results, on a date specified by a court in an election case, or some other date as dictated by the particular factual circumstances at issue.”

A candidate elected on the date that the canvassing board meets to certify the results of the election is impractical, “consider[ing] that an ‘election’ . . . trigger[s] . . . deadlines and activities that occur both before and after Election Day.”

88. Id. at 1.
89. Id. at 1, 2 (emphasis added).
90. Id. at 2, 4; see also Fla. Const. art. V, § 10; Fla. Stat. § 100.181 (2012).
92. Id. at 3; see also Fla. Const. art. III, § 3(a) (stating that the legislature shall convene “[o]n the fourteenth day following each general election . . . [for] organization and selection of officers”); Fla. Stat. § 101.68(2)(a) (2009) (amended 2011) (“The county canvassing board may begin the canvassing of absentee ballots at 7 a.m. on the sixth day before the election, but not later than noon on the day following the election.”); Fla. Stat. § 101.657(d) (2009) (amended 2011) (“Early voting shall begin on the 15th day before an election and end on the 2nd day before an election.”); Fla. Stat. § 97.053(6) (2006) (amended 2007) (stating that a “provisional ballot shall be counted . . . if the applicant presents evidence . . . sufficient to verify [certain information provided on the application by] 5 p.m. of the second day following the election”).

Obviously, these constitutionally and statutorily-mandated activities depend on an election taking place on a date certain, and that date being Election Day. If an election ends when the results are certified, it would be meaningless for a voter applicant to submit information to verify
The Division of Elections letter concludes by providing that it may be practical, although not legal, to consider a candidate as being elected when the results are certified. As a matter of fact, opinion 82-26 by the Division of Elections opined that very fact. Unfortunately, “[h]owever, the Florida Constitution, Florida Election Code, and related authorities conclusively establish that a candidate may be deemed ‘elected’ on another day, e.g., the day of an ‘election’ under a particular factual situation.” In fact, section 100.181 [of the Florida Statutes] entitled ‘Determination of person elected,’ without mentioning the certification of results, merely states: “The person receiving the highest number of votes cast in a general or special election for an office shall be elected to the office.”

VI. CONCLUSION

It is imperative that the uncertainty surrounding when a candidate for public office in Florida is considered elected be resolved. That should be done, not only for the candidates, but also for the Division of Elections, the county supervisors of elections, and city and county attorneys charged with advising candidates and elected officials about what may constitute a violation of the Florida Sunshine Law, among other things.

The uncertainty should, and could, be easily remedied if the Florida Legislature simply reviewed the various election statutes and made them consistent, or simply wrote an additional election statute that addressed the issue. Of course, it is essential that any new statutes, or amendments to existing statutes, do not conflict with the Florida Constitution. In addition,
a constitutional amendment would also be in order if there were provisions in the Florida Constitution that conflict with one another.100

Finally, the answer to when a candidate for public office in Florida is considered officially elected can be boiled down to the first two words a first-year law student learns when asked a question...“it depends.”

100. See Advisory Op. to the Governor re: Appointment or Election of Judges, 824 So. 2d 132, 136 (Fla. 2002).
EX-SPUSES GET EVEN: PROPOSAL FOR USE OF CONTEMPT IN FLORIDA’S EQUITABLE DISTRIBUTION DECREE

JEANNETTE WATKIN*

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I. INTRODUCTION

Article I, section 11 of the Florida Constitution states: “No person shall be imprisoned for debt, except in cases of fraud.”† This provision has been

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† This provision has been
judicially interpreted to exempt child support and alimony. The public policy rationale behind this exception is that it is a duty owed to the child, the spouse, and to society as a whole. Florida does not enforce equitable distribution awards through contempt because such awards are considered debt among spouses and the Florida Constitution prohibits imprisonment for debt. Other states—like Arkansas, Iowa, Texas, North Carolina, New York, Oklahoma, and Ohio—have constitutional prohibitions against imprisonment for debt, but differ from Florida’s judicial interpretation of debt and the use of contempt for the willful violation of an equitable distribution award, within the context of child support and alimony. This paper proposes the idea that equitable distribution awards in Florida should not fall within the constitutional definition of “debt” and should therefore not be exempted from being enforced through contempt proceedings.

In 1981, Florida Fourth District Court of Appeal (“DCA”) tried to obtain some guidance as to what “debt” means for purposes of family law. The court certified the question to the Supreme Court of Florida as one of great public importance: Whether a spouse can be held in contempt of court for failing to pay a bank loan that was unrelated to alimony. The high court did not issue an opinion. Without any guidance as to this matter, Florida’s district courts have interpreted the constitutional provisions to include equitable distribution in the definition of “debt.”

ance in writing this paper. Lastly, the author wishes to thank the Nova Law Review for their hard work.

1. FLA. CONST. art. I, § 11.
2. Gibson v. Bennett, 561 So. 2d 565, 570 (Fla. 1990) (citing State ex rel. Krueger v. Stone, 188 So. 575, 576 (Fla. 1939)).
3. Fishman v. Fishman, 656 So. 2d 1250, 1252 (Fla. 1995) (citing Gibson, 561 So. 2d at 570).
6. See Schminkey, 400 So. 2d at 121–22; see also FLA. CONST. art. I, § 11.
7. Schminkey, 400 So. 2d at 122.
8. See id.
9. See Kea, 839 So. 2d at 904 (citing Hobbs v. Hobbs, 518 So. 2d 439, 440–41 (Fla. 1st Dist. Ct. App. 1988); Marks v. Marks, 457 So. 2d 1137, 1138 (Fla. 1st Dist. Ct. App. 1984);
Florida’s rationale for disallowing contempt for equitable distribution is based on the concept that transfer of money among spouses in the form of cash, securities and bonds, repayment of a mortgage, or repayment of a debt to a third party pursuant to a final judgment, is considered debt among spouses. The end result is an unfair situation where spouses—who have jointly acquired assets throughout the duration of their marriage—are afforded only creditor-debtor remedies to enforce otherwise equitable distribution awards.

II. THE TERM “SUPPORT” PURSUANT TO THE FLORIDA CONSTITUTION

For more than a century, the Supreme Court of Florida has recognized child support and alimony as exceptions to the no imprisonment for debt clause. As early as 1901, the court in *Bronk v. State*, recognized the right of alimony and child support as the responsibility of the spouse with the higher ability to maintain the other spouse “arising out of the duties incident to the marital status.” These exceptions are enforced through contempt because the court is not enforcing a debt, rather a duty owed to the former spouse, the children, and a “personal duty” from the payor spouse to society as a whole.


12. *Kea*, 839 So. 2d at 904.

13. *Schminkey*, 400 So. 2d at 122.

14. *Kea*, 839 So. 2d at 904; *Schminkey*, 400 So. 2d at 121.


17. 31 So. 248 (Fla. 1901).

18. See id. at 251–52.


Equitable distribution in Florida is enforced through contempt when the basis is in the nature of support, or in cases that include transfer of real property. Over the years, Florida has broadened its contempt powers but not far enough to include equitable distribution awards. In *Pabian v. Pabian*, the Fourth DCA found that car payments pursuant to the final judgment were in the form of support. The husband was held in contempt for failure to make the car payments and the court explained that a car is in the nature of support, just like food and shelter, because of the important “role which an automobile plays in our daily lives.” In *Cummings v. Cummings*, the Fourth DCA found the first two lump sum equitable distribution payments were contemplated as support payments for the wife and the children. The husband had the ability, but willfully failed to pay, and therefore, contempt was appropriate.

III. CONTEMPT OF TRANSFER OF MONEY PAYMENTS VS. PROPERTY INTEREST

In Florida, when enforcing equitable distribution awards, relief is usually limited to the ordinary claims between debtor and creditor. However, many courts will use contempt when the interest being conveyed is a property interest, and not a monetary payment. Florida Rule of Civil Procedure 1.570(c)(2) allows a court to enforce its orders, requiring performance of an act through contempt. Florida Family Law Rule of Procedure 12.570 incorporates Florida Rule of Civil Procedure 1.570, which means that a family

25. *Id.* at 238.
26. *Id.*
27. 37 So. 3d 287 (Fla. 4th Dist. Ct. App. 2010).
28. *Id.* at 290–91.
29. *Id.* at 291.
judge “may hold a spouse in contempt for fail[ure] to [abide by] a specific act” as stated in a final judgment.\footnote{33}

For example, in Riley v. Riley,\footnote{34} the trial court held the husband in contempt for failing to abide by the settlement agreement that required the husband to name the “former wife, as [the] beneficiary of a life insurance policy.”\footnote{35} The Fifth DCA affirmed that contempt was appropriate because the husband was required to do a specific act as required by the final dissolution of marriage, rather than pay money.\footnote{36} Likewise, in Burke v. Burke,\footnote{37} the final judgment of dissolution ordered the husband to execute and deliver various documents necessary to release the wife’s interest in a note and mortgage and to transfer securities to the wife.\footnote{38} The husband was held in contempt for failing to execute and deliver the documents.\footnote{39} The Fourth DCA affirmed, stating that “the trial court’s order of compliance, was in effect a mandatory order for the specific performance of that act.”\footnote{40} The husband was not required to pay money, but rather perform an act, and his refusal to abide by the court order “was willful and deliberate and not caused by his inability to comply.”\footnote{41} Similarly, in Firestone v. Ferguson,\footnote{42} the final judgment ordered the sale of the parties’ farm at a specific price.\footnote{43} The wife refused to execute the sale documents and was held in contempt.\footnote{44} The Third DCA affirmed, explaining that the wife was required to perform the act of executing the sale documents.\footnote{45}

In contrast, when a final divorce judgment requires one spouse to pay monies not in the nature of support, then the constitutional provisions of article I, section 11 are implicated.\footnote{46} In McQuady v. McQuady,\footnote{47} the parties borrowed $15,000 for a business loan using as collateral the wife’s separate

\footnotesize
\begin{footnotes}
\footnote{33} Roth v. Roth, 973 So. 2d 580, 592 (Fla. 2d Dist. Ct. App. 2008), review dismissed, 36 So. 3d 84 (Fla. 2010); see also FLA R. CIV. P. 1.570; FLA. FAM. L. R. P. 12.570.  
\footnote{34} 509 So. 2d 1366 (Fla. 5th Dist. Ct. App. 1987).  
\footnote{35} Id. at 1367.  
\footnote{36} Id. at 1370.  
\footnote{37} 336 So. 2d 1237 (Fla. 4th Dist. Ct. App. 1976).  
\footnote{38} Id. at 1238.  
\footnote{39} Id.  
\footnote{40} Id.  
\footnote{41} Id.  
\footnote{42} 372 So. 2d 490 (Fla. 3d Dist. Ct. App. 1979).  
\footnote{43} Id. at 491.  
\footnote{44} Id.  
\footnote{45} Id. at 492.  
\footnote{46} McQuady v. McQuady, 523 So. 2d 785, 786 (Fla. 5th Dist. Ct. App. 1988) (citing FLA. CONST. art. I, § 11).  
\footnote{47} 523 So. 2d 785 (Fla. 5th Dist. Ct. App. 1988).  
\end{footnotes}
property. In a separate agreement, the husband agreed to indemnify the wife and pay back the loan without any duty on her part. The final divorce judgment ordered the wife to pay the loan and ordered “the husband to pay the wife $15,000 ‘as lump sum alimony’ at $250 per month” over five years. The husband appealed and argued that he should not be forced to pay alimony “as a tool to accomplish an equitable distribution,” and the appellate court held that the husband could not be held in contempt for failing to pay the wife $15,000 because it violated Florida’s imprisonment for debt clause, despite their prior agreement.

IV. EQUITABLE DISTRIBUTION DECREES SHOULD NOT BE CONSIDERED “DEBTS” WITHIN THE MEANING OF ARTICLE I, SECTION 11 OF FLORIDA’S CONSTITUTION FOR PUBLIC POLICY REASONS

Successful marriages usually require spouses to forego certain career opportunities for the benefit of one another. The law recognizes those sacrifices, and therefore, acknowledges that one spouse may be more financially independent and successful than the other. Courts usually compensate for this disparity by granting unequal property awards and any other relief they find equitable in light of the circumstances. “Specific obligations of one party to deliver property to an ex-spouse should be viewed in light of this underlying purpose.” The law should not view final divorce decrees as a common commercial affair, but rather take into account the nature of the marriage relationship. It seems only logical that the assets accumulated through joint efforts and joint economies of the parties during their marriage be enforced in the same manner as child support and alimony. Public policy supports the idea that final judgment decrees be enforced through contempt since it involves rights and obligations from one spouse to the other. The reality is that without contempt of court to compel compliance with equitable distribution awards, the courts are powerless to compel transfers of

48. Id. at 786.
49. Id.
50. Id.
51. Id. 786–87 (citing FLA. CONST. art. I, § 11).
52. Lefkowitz, supra note 4, at 1315.
53. Id.
54. Id.; see also FLA. STAT. § 61.075(1)(a)–(j) (2012).
55. Lefkowitz, supra note 4, at 1315.
56. Id. at 1314.
57. See id. at 1313.
58. See id. (citing Ex parte Davis, 111 S.W. 394, 396 (Tex. 1908)).
cash, stocks, bonds, or property, which are unrelated to support. Jailing a party who refuses to comply with a court order by contempt is “the most effective [remedy] of enforcing divorce judgments.” Contempt and jail time are unpleasant affairs, and therefore, people will usually comply with a court order to avoid incarceration. The following are public policy reasons why the judiciary, through case law, should except equitable distribution from Florida’s no imprisonment for debt clause.

A. Delivery of an Asset Pursuant to a Final Divorce Judgment Should Not Be Considered Payment of a Debt

Florida Statute section 61.075 defines marital assets as

(a) Assets acquired . . . during the marriage, individually by either spouse or jointly by them; (b) [t]he enhancement in value and appreciation of nonmarital assets resulting either from the efforts of either party during the marriage or from the contribution to or expenditure thereon of marital funds or other forms of marital assets, or both; (c) [i]nterspousal gifts during the marriage; (d) [a]ll vested and nonvested benefits, rights, and funds accrued during the marriage in retirement, pension . . . and insurance plans and programs.

Marital assets, as defined by statute, previously belonged to both husband and wife, however titled. Derivation of the marital property may have been from enhancement, active appreciation, non-interspousal gifts or joint efforts during the marriage. Upon entry of a final judgment, Florida case law states that if the equitable distribution is not in the form of support, it is a debt, and the violating spouse cannot be incarcerated via the contempt power for non-payment. The enforcement problem begins when the equitable distribution is characterized as a debt. The court has previously established that debt is a marital asset for purposes of equitable distribution. This cha-

59. See, e.g., Kadanec v. Kadanec, 765 So. 2d 884, 886 (Fla. 2d Dist. Ct. App. 2000) (citing La Roche v. La Roche, 662 So. 2d 1018, 1019 (Fla. 5th Dist. Ct. App. 1995)).
60. Lefkowitz, supra note 4, at 1307.
61. See id.
63. Id. § 61.075(6)(a)1.a.
64. Id. § 61.075(6)(a)1.b.
67. See Kadanec, 765 So. 2d at 886.
Characterization is contrary to the modern conception of what a debt is. First, parties to a dissolution of marriage are joint owners of certain assets classified as marital property in the equitable distribution. Upon dissolution, a duty to separate assets is obligatory among the spouses and should not imply the creation of a debt because the assets previously belonged to both. To comply with constitutional provisions, the court should inquire whether an ability to pay the equitable distribution exists. If the court finds that a spouse willfully refuses to comply, then contempt is appropriate since the payor spouse holds “the key to his [own jail] cell.”

Second, a marital duty to deliver or pay is not the same as a debtor’s obligation to a creditor. The Supreme Court of Florida stated in *State ex rel. Lanz v. Dowling* that debt is within the meaning of the Florida Constitution, and debt “must be those arising exclusively from actions ex contractu.” Black’s Law Dictionary defines *ex contractu* as “[a]rising from a contract.” The general idea of dividing property belonging to spouses is very different than “the arm’s length transaction between the [commercial] debtor and creditor.” “Marriage . . . is not a matter of commerce, nor . . . a contract” in which debts are incurred. Rather, it “is a basic social institution of the highest type and importance, in which society at large has a vital interest.” The constitutional provision against imprisonment for debt was meant to apply to debts arising under the law, not from marital status.

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68. Compare id., with State ex rel. Lanz v. Dowling, 110 So. 522, 525 (Fla. 1926), and Black’s Law Dictionary 648 (9th ed. 2009).
69. See Fla. Stat. § 61.075(6)(a)2.
70. See, e.g., Ex parte Gorena, 595 S.W.2d 841, 846 (Tex. 1979).
71. See id.
74. 110 So. 522 (Fla. 1926).
75. Id. at 525 (noting that “the [F]ederal Constitution [has] no such provision” regarding imprisonment for debt and suggesting that one must look to state definitions to interpret the definition); see also Fla. Const. art. I § 11.
76. Dowling, 110 So. at 525 (citing Carr, 17 So. at 352).
78. Lefkowitz, supra note 4, at 1315.
80. Id.
tion to comply with equitable distribution awards is a duty that “arises out of the marital relationship and not [from] a business [negotiation].” 82 Therefore, when the Florida Constitution speaks about debt, the term should be construed and defined as a contract arising out of business relationships, and is not applicable in the marriage context. 83

B. Incarceration Is a Means to Punish the Willful Violation of a Court Order, Not for the Debt

The Florida Constitution currently prohibits the incarceration of a person due to debt, 84 and the courts have construed the refusal to abide by the equitable distribution within a final judgment decree as debt. 85 This is because under the judicial construction of the Florida Constitution, the surrendering of marital assets not related to support is ordinary debt. 86 Therefore, courts protect a willful violator in the same sense that they protect an indigent person from contempt regarding child support, or commercial debtors from creditors. 87

How is a court to enforce an equitable distribution award against a willful violator without contempt of court? Historically, courts need the power to enforce their own rulings; otherwise:

[W]ithout the power our judicial system would become a mere mockery for a party to a cause could make of himself a judge of the validity of orders which had been issued and by his own acts of disobedience set them aside, thereby ultimately producing the complete impotency of the judicial process. 88

As stated by the Riley court, “[t]oo restrictive a view of a court’s contempt powers would render it impotent like a toothless lion, who can only roar in dismay at the disobedience of his decrees.” 89

83. See Fla. Const. art. I, § 11; California Divorce Agreement—Alimony or Property Settlement?, supra note 82, at 739–40.
86. See, e.g., id.
87. See Demetree v. State ex rel. Marsh, 89 So. 2d 498, 501 (Fla. 1956); Kadanec, 765 So. 2d at 886.
88. Demetree, 89 So. 2d at 501.
89. Riley v. Riley, 509 So. 2d 1366, 1370 (Fla. 5th Dist. Ct. App. 1987).
When a former spouse is imprisoned, it is for the willful violation of a court order, not for the inability to pay the debt.90 The imprisonment is a consequence of the blatant disregard for a court order and does not violate constitutional provisions since he “‘carries the key of his prison in his own pocket.’”91 This means that upon the compliance of the court order, the jailed party is immediately released.92

In Florida, the courts do inquire as to whether the alleged contemnor has the ability to pay.93 Recognition that the Florida Constitution allows contempt to enforce equitable distribution awards promotes respect for the courts and the judicial system.94 Contempt powers are useful because they “enable[] courts to persuade parties to obey a prior order or decree of the court so that such prior order will not be rendered ineffectual by recalcitrant litigants.”95 The Florida Constitution allows supreme court judges, appellate judges, and circuit court judges the jurisdiction to issue writs of habeas corpus.96 It states that the courts “[m]ay issue . . . all writs necessary [or proper] to the complete exercise of [their] jurisdiction.”97 Therefore, it defies logic that the courts would be rendered powerless to execute their own orders in the family context, and allow willful violators to disregard the court order without any consequence.

C. Unjust Enrichment

“The doctrine [of unjust enrichment] is a recognition that a person is accountable to another on the ground that if the former were not required to do so, he would unjustly benefit, or the other would unjustly suffer loss.”98 The willful violator is unjustly enriched when he fails to comply with the equitable distribution award while the payee spouse has to spend money to enforce the award by hiring lawyers to pursue a civil remedy. Contempt of court is

90. Id. at 1368 (citing State ex rel. Krueger v. Stone, 188 So. 575, 576 (Fla. 1939); Bronk v. State, 31 So. 248, 251 (Fla. 1901); Howard v. Howard, 118 So. 2d 90, 94 (Fla. 1st Dist. Ct. App. 1960)).
91. Id.; Demetree, 89 So. 2d at 501 (quoting In re Nevitt, 117 F. 448, 461 (8th Cir. 1902)).
92. Demetree, 89 So. 2d at 501.
93. Elliott v. Bradshaw, 59 So. 3d 1182, 1184 (Fla. 4th Dist. Ct. App. 2011) (per curiam) (citing Bowen v. Bowen, 471 So. 2d 1274, 1277 (Fla. 1985)).
94. See Ex parte Gorena, 595 S.W.2d 841, 843 (Tex. 1979) (citing Ex parte Browne, 543 S.W.2d 82, 86 (Tex. 1976)).
95. Id. at 844 (citing Ex parte Werblud, 536 S.W.2d 542, 545 (Tex. 1976)).
97. Id. § 3(b)(7); see also id. §§ 4(b)(3), 5(b).
an easy remedy, for both the courts and for the spouse seeking to enforce the award. The public policy for allowing contempt is twofold: First, it would avoid unnecessary litigation in civil court to enforce a domestic matter, and second, it would allow an effective and quick remedy to enforce the courts’ orders.

Civil law has carved out statutes of limitations, causes of action, and remedies for unjust enrichment.99 The purpose of unjust enrichment is “‘to prevent the wrongful [custody] of a benefit, . . . money, or property [that belongs to someone else] in violation of good conscience and fundamental principles of justice or equity.’”100 The family court stands as the lone exception to the enforcement of unjust enrichment by failing to enforce equitable distribution awards.

It is a waste of resources for a spouse to file a civil suit to enforce a marital obligation and only be afforded a creditor-debtor remedy.101 Further, the payee spouse may not have the financial means to pursue a civil remedy, and therefore the equitable distribution award will be uncollectable, thereby enriching the payor spouse.102 In Murphy v. Murphy,103 the Third DCA held that the husband could not be held in contempt for failing to pay over $108,000 in special equity to the wife without explicit findings that he “‘had the [financial] ability to comply with the order and [had] willfully refused to do so.’”104 In Kadanec v. Kadanec,105 the husband failed to pay the wife “$20,945 as equitable distribution of the [h]usband’s profit sharing plan,” and was held in contempt by the trial court.106 The Second DCA “reversed because property division awards may not be enforced by contempt.”107 In the case at bar, the wife was denied alimony and only received half of the husband’s pension valued at $20,945.108 The court ordered a money payment of $20,945, which the wife was unable to enforce through contempt.109 The

99. See Fla. R. Civ. P. 1.110(a)–(b); 1 Norm Lacoé, LA COE’S PLEADINGS UNDER THE FLORIDA RULES OF CIVIL PROCEDURE WITH FORMS R. 1.110(427), at 590–91 (2011 ed.).
100. Golden, 15 So. 3d at 670 (quoting Henry M. Butler, Inc. v. Trizec Props., Inc., 524 So. 2d 710, 711 (Fla. 2d Dist. Ct. App. 1988)).
102. See Murphy, 370 So. 2d at 409.
103. 370 So. 2d 403 (Fla. 3d Dist. Ct. App. 1979).
104. Id. at 409 (quoting Adams v. Adams, 357 So. 2d 264, 265 (Fla. 3d Dist. Ct. App. 1978)).
105. 765 So. 2d 884 (Fla. 2d Dist. Ct. App. 2000).
106. Id. at 886.
107. Id. (citing La Roche v. La Roche, 662 So. 2d 1018, 1019 (Fla. 5th Dist. Ct. App. 1995)).
108. Id. at 885.
109. Id. at 886.
consequence of lack of contempt was to deprive the wife of the asset, as if
she had not received anything at all, and to unjustly enrich the husband by
keeping the full pension valued at $41,890.110 Contempt is an efficient and
effective tool for enforcing family court laws.111 When contempt is unavail-
able, the remedies become very expensive for the payee spouse (i.e. hiring an
attorney to enforce through specific performance or creditor-debtor remedy,
or even worse, not enforcing at all).112

D. Undermining Settlement Agreements

Under certain circumstances, parties in mediation or in private agree-
ments waive certain benefits to obtain others.113 For example, a spouse may
waive years of alimony for a quicker and more immediate equitable distribu-
tion payment.114 However, if enforcements of property settlement agree-
ments are not upheld by Florida courts, the quicker and more immediate
payment of money, as originally bargained for, is a fictitious proposition.
The spouse that trades his right to alimony forever waives the claim, and is
left with neither alimony nor equitable distribution monies.

In Randall v. Randall,115 the former wife, in an open court agreement,
waived alimony in exchange for a one-half ownership and one-half equity
value in the parties’ business valued at $500,000, which was titled in the
husband’s name.116 The husband was responsible for getting the business “in
order,” otherwise, the wife would take over the operations.117 The husband
was given permission to pay certain debts of the parties from the cash flow
of the business.118 Five months after the final judgment was ordered, the
court entered an order finding that the husband had “violated virtually every
provision of the final” divorce decree, and left the business worthless.119 The
court ordered the husband to report whether he had paid the wife $250,000 or

110. See Kadanec, 765 So. 2d at 886.
/Post_Judgment_Enforcement/Power_of_Contempt_in_Post_Judgment_Enforcement_Cases_
bl4488.htm.
112. E.g., Kadanec, 765 So. 2d at 886 (citing DeSantis v. DeSantis, 714 So. 2d 637, 638
(Fla. 4th Dist. Ct. App. 1998)).
113. See Randall v. Randall, 948 So. 2d 71, 71 (Fla. 3d Dist. Ct. App. 2007).
114. See id.
115. 948 So. 2d 71 (Fla. 3d Dist. Ct. App. 2007).
116. Id. at 71.
117. Id.
118. Id. at 71–72.
119. Id. at 72.
sold the warehouse. If he did not, he would be held in contempt and could only purge himself of contempt by complying with the order. In Randall, we see a spouse who took advantage of the fact that his wife waived alimony for a larger equitable distribution award. The husband sought to avoid paying his wife by making the asset worthless. In this case, the appellate court provided equity to the wife. Had the court not used its contempt power, the husband would have been able to take advantage of his wife and the court by simply not complying with the agreement without any repercussion.

V. ALLOWING CONTEMPT FOR FINAL DIVORCE DECREES—THE EQUITABLE SOLUTIONS

In Florida, there are minimal remedies available to enforce equitable distribution, and therefore the wise thing to do is to include the source of payment in the final judgment. Another possible solution is to enter an injunction preventing dissipation of those assets when one spouse owes money to the other or when a judge makes findings as to the existence of property or assets. These remedies would enforce the payment to the payee spouse, and save the judicial system time from hearing these matters. In addition, the Florida Statutes should enforce equitable distribution with the same remedies available for child support and alimony: “Attachment or garnishment,” “suspension or denial of professional licenses and certificates,” and “[s]uspension of driver’s licenses and motor vehicle registrations.” Enforcement of equitable distribution awards is unnecessarily problematic without action by the courts or the legislature.

120. Randall, 948 So. 2d at 72–73.
121. Id. at 73.
122. See id. at 71–72.
123. Id. at 72.
124. See id. at 74–75.
125. 2 Judge Renee Goldenberg, Florida Family Law & Practice § 21:05, at 21-8 (rev. 6 2011).
128. Id. § 61.13015.
129. Id. § 61.13016.
VI. CONTEMPT ARISING OUT OF PROPERTY SETTLEMENT AGREEMENTS IN OTHER STATES DO NOT VIOLATE THE STATE CONSTITUTION’S “NO IMPRISONMENT FOR DEBT” CLAUSE

Various states endorse the view that contempt proceedings should be enforced when one party willfully fails to comply with an equitable distribution award.130 In Brown v. Brown,131 an Arkansas case, the parties had “incorporat[ed] a property settlement agreement” into the divorce decree, which required the husband to pay the wife $50,000.132 “[P]rior to [the] divorce, [the husband] filed for voluntary Chapter 11 bankruptcy” and claimed that he was financially unable to pay his wife, but he never rendered a Chapter 11 plan, nor informed the court about a farming partnership he held with his mother.133 The trial court found that the husband “willfully fail[ed] to comply with” the order and held him in contempt of court.134 The husband appealed, arguing that his imprisonment violated article II, section 16 of the Arkansas Constitution for imprisonment of debt.135 The Supreme Court of Arkansas stated that “neither the bankruptcy [court] nor, . . . the chancellor, believed” that the husband was unable to pay the wife.136 The husband created his own inability to pay; therefore contempt was proper and did not violate the Arkansas Constitution.137

The Supreme Court of Iowa similarly found in In re Marriage of Lenger,138 that the husband was in contempt of court when he willfully failed to pay any part of the property settlement agreement to the wife, which consisted of a car and $55,000 payable in installments.139 The court held that contempt was appropriate and would not violate article I, section 19 of the Iowa Constitution for imprisonment of debt because it is necessary to enforce provisions of a divorce decree, despite it being independent from child support and alimony matters.140 The court reasoned that a debt, as referenced in

131. 809 S.W.2d 808 (Ark. 1991).
132. Id. at 808.
133. Id. at 808–09.
134. Id. at 808.
135. Id.
136. Brown, 809 S.W.2d at 809.
137. Id. (citing Ex parte Coffelt, 389 S.W.2d 234, 237 (Ark. 1965)).
138. 336 N.W.2d 191 (Iowa 1983).
139. Id. at 191.
140. Id. at 192–93 (citing Calleynius v. Blair, 309 N.W.2d 415, 418–19 (Iowa 1981); Roach v. Oliver, 244 N.W. 899, 902 (Iowa 1932) (per curiam); Roberts v. Fuller, 229 N.W. 163, 167–68 (Iowa 1930)); see IOWA CONST. art. I, § 19.
the Iowa Constitution, is defined as “an obligation growing out of a business transaction, and not to an obligation arising from the existence of the marital status.”141 Last, the court stated that the imprisonment was not only a punishment for the owing of monies, but also for the willful violation of a court order.142 Contempt of court was proper and not rendered a debt within the meaning of the Iowa Constitution.143

In Conrad v. Conrad,144 the husband failed to transfer over stock certificates and monies to the wife pursuant to a final judgment.145 The Court of Appeals of North Carolina allowed the husband to be released from jail upon the transfer of the property to the wife.146 The court further obliged the husband to pay for the wife’s attorney’s fees, as well as compensate her for the stock split and the dividends that occurred due to his failure to comply with the final judgment while he was incarcerated.147

New York also endorses the view that contempt orders are enforceable when parties violate equitable distribution orders.148 In Intrator v. Intrator,149 the court made an equitable distribution that mandated the husband to pay the wife, among other things, half of the proceeds of their boat if sold and half of the equity if not sold.150 The husband refused to do so for a period of over two years, and the wife filed for contempt of court for arrears as well as the boat payment.151 Subsequently, the parties entered into a stipulation where the husband was going to use his best efforts to pay the wife a settlement amount of $131,000, as well as sell the boat.152 In the stipulation, even though the wife waived her ability to hold the husband in contempt of court for failing to pay the judgment amount, the husband’s refusal to sell the boat was not waived by the stipulation.153 He was therefore held in contempt of court for failing to pay the wife her portion of the equal distribution.154

Similarly, Oklahoma has a no imprisonment for debt clause in its constitution under article II, section 13.155 In McCrary v. McCrary,156 the Su-

141. In re Marriage of Lenger, 336 N.W.2d at 193 (quoting Roberts, 229 N.W. at 167).
142. Id. (quoting Roberts, 229 N.W. at 167); see Roach, 244 N.W. at 902.
143. In re Marriage of Lenger, 336 N.W.2d at 193 (quoting Roberts, 229 N.W. at 167).
145. See id. at 350.
146. See id. at 349–50 (citing Blair v. Blair, 173 S.E.2d 513, 514 (N.C. Ct. App. 1970)).
147. Id. at 350.
150. Id. at 588.
151. Id.
152. Id.
153. Id. at 589.
154. Intrator, 929 N.Y.S.2d at 588.
Supreme Court of Oklahoma found no constitutional violation when the former wife filed contempt for the former husband’s failure to comply with a final divorce judgment to pay the couple’s back income tax liability. The court stated that the Oklahoma Constitution expressly provides for contempt as a means of punishment, and its purpose is twofold: First, as punishment for willful violation of a court order, and second, by obtaining compliance of a court order. Furthermore, the court explained that when a spouse has the means to comply with the final divorce decree, “and fails to do so, [the court finds] a willful disobedience” that takes it out of the constitutional provision against imprisonment for debt.

Another state supporting this proposition is Ohio. In *Harris v. Harris*, the Supreme Court of Ohio ratified that contempt proceedings do not violate the no imprisonment for debt clause for willful violations of a final divorce judgment. The husband failed in his obligation to transfer a Buick automobile to the wife and pay the debts owed on the car, plus $60,000. The wife filed for contempt and the husband argued violation of state constitutional provisions. The court affirmed the contempt order and reasoned that to enforce contempt based on the label of the terms in a divorce agreement, whether it is property settlement, alimony, or child support, is arbitrary and artificial. Property settlement agreements, child support, and alimony all fall under the marital exceptions in the Ohio Constitution. Furthermore, the use of contempt to enforce final divorce judgments supports the public policy of allowing the distribution of assets that have been accumulated throughout the marriage by the parties.

In *Ex parte Gorena*, the Supreme Court of Texas analyzed whether its no imprisonment for debt clause in article I, section 18 of the Texas Consti-
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The former husband was incarcerated after refusing to pay the former wife almost half of his military retirement benefits every month, pursuant to a final judgment decree. The judge questioned whether incarcerating him for non-payment was imprisonment for debt. The Supreme Court of Texas reasoned that incarcerating him was not unconstitutional since the court was merely requiring him to surrender property that was previously joined by the spouses pursuant to the final divorce judgment. Similarly, in Ex parte Anderson, a Texas trial court ordered Mr. Anderson to pay his former wife a portion of his military proceeds as long as he received it. When he failed to do so and was incarcerated, he alleged imprisonment for debt pursuant to the Texas Constitution, article I, section 18. The court first reasoned that "he is not paying a debt to [his wife] but is surrendering the share to which [she] is legally entitled." Additionally, the court reasoned that his status as trustee does not change into that of a debtor when he pays directly to the wife instead of depositing directly into the court registry to then forward it to his wife. Lastly, the court held that a huge burden would be placed on the district clerk if they were obliged to receive and disburse all payments, such as this.

VII. CARVING OUT THE RELIEF THROUGH CASE LAW

Child support and alimony are exceptions, which have been carved out from the no imprisonment clause of the Florida Constitution. However, these basic exceptions have not yet been expressly accounted for in the Constitution. They have become common knowledge and have been recog-

171. TEX. CONST. art. I, § 18.
172. Ex parte Gorena, 595 S.W.2d at 846; see also TEX. CONST. art. I, § 18.
173. Ex parte Gorena, 595 S.W.2d at 843.
174. Id. at 846; see also TEX. CONST. art. I, § 18.
175. Ex parte Gorena, 595 S.W.2d at 846 (citing Ex parte Sutherland, 526 S.W.2d 536, 539 (Tex. 1975)).
177. Id. at 287.
178. Id.; see also TEX. CONST. art. I, § 18.
179. Ex parte Anderson, 541 S.W. 2d at 287.
180. Id. at 288.
181. Id.
183. Marks & Colby, supra note 20, at 1521 n.7.
nized through case law.\textsuperscript{184} Similarly, if courts recognize equitable distribution awards pertaining to support obligations as another exception to article I, section 11, the exception will be carved out through judicial interpretation until the Constitution is revised.\textsuperscript{185}

\textbf{VIII. CONCLUSION}

Florida should use contempt as a means of enforcing equitable distribution awards in the same way it allows for enforcement of child support and alimony.\textsuperscript{186} It constitutes public policy to enforce the division of assets that were accumulated through joint efforts during an intact marriage.\textsuperscript{187} Florida should join the numerous other states that enforce final divorce decrees through contempt.\textsuperscript{188} In so doing, the Florida family courts will send a message that the surrendering of marital assets is obligatory upon a spouse and the violation of the courts’ rulings will be enforced through contempt.\textsuperscript{189}

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\textsuperscript{184}. See Gibson, 561 So. 2d at 570 (citing Stone, 188 So. at 576); Bronk, 31 So. at 252; Marks & Colby, supra note 20, at 1521 n.7.
\textsuperscript{185}. See Marks & Colby, supra note 20, at 1526–27; see also Fla. Const. art. I, § 11.
\textsuperscript{186}. See Marks & Colby, supra note 20, at 1521.
\textsuperscript{187}. Harris v. Harris, 390 N.E.2d 789, 793 (Ohio 1979).
\textsuperscript{189}. See Brown, 809 S.W.2d at 809; In re Marriage of Lenger, 336 N.W.2d at 192–93; Conrad, 348 S.E.2d at 350. But see Kadanec v. Kadanec, 765 So. 2d 884, 886 (Fla. 2d Dist. Ct. App. 2000) (citing La Roche v. La Roche, 662 So. 2d 1018, 1019 (Fla. 5th Dist. Ct. App. 1995)).
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JUST BECAUSE YOU CAN DOESN’T MEAN YOU SHOULD: 
RECONCILING ATTORNEY CONDUCT IN THE CONTEXT OF 
DEFAMATION WITH THE NEW PROFESSIONALISM

HEATHER M. KOLINSKY∗

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I. INTRODUCTION

Competence,1 advocacy,2 and ethics3 are the pillars of the practice of law; almost every professional obligation an attorney has flows from one of these three core concepts.4 An attorney must know the law.5 An attorney must advance his client’s position.6 An attorney must do so within the confines of what his colleagues and community find acceptable.7 The concept of a lawyer has not changed much, but how we perceive the larger legal community’s adherence to these pillars frequently shifts.8

2. See id. R. 3.1–3.9.
3. See id. scope para. 16.
4. See id. R. 1.1, 3.1–3.9, scope para. 16.
5. E.g., id. R. 1.1 (“Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”).
6. E.g., MODEL RULES OF PROF'L CONDUCT pmbl. para. 2 (“As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.”); see also id. R. 1.2(a) (“[A] lawyer shall abide by a client’s decisions concerning the objectives of representation . . . .”).
7. See, e.g., id. pmbl. para. 5 (“A lawyer should demonstrate respect for the legal system and for those who serve [in] it, including judges, other lawyers, and public officials.”). “Virtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system and to the lawyer’s own interest in remaining an ethical person while earning a satisfactory living.” Id. pmbl. para. 9.
8. See Donald E. Campbell, Raise Your Right Hand and Swear to Be Civil: Defining Civility as an Obligation of Professional Responsibility, 47 GONZ. L. REV. 99, 103–07 (2011–2012) (focusing on the rise and fall of civility and how it should be enforced going forward).

Whether the increased size of the bar has decreased collegiality, or the legal profession has become only a business, or experienced lawyers have ceased to teach new lawyers the standards to be observed, or because of other factors not readily categorized, we observe patterns of behavior that forebode ill for our system of justice.

Dondi Props. Corp. v. Commerce Sav. & Loan Ass’n, 121 F.R.D. 284, 286 (N.D. Tex. 1988) (per curiam)); see also Campbell, supra note 8, at 102. In fact, as the economy has downshifted, firms have switched practice areas or taken cases on in bulk, which has led to the same firms being penalized or sanctioned for failing to practice in an appropriate manner. See, e.g., Martha Neil, Federal Judge’s Unusual Order Puts Well-Known Bankruptcy Law Firm Under Fla. Bar Scrutiny, A.B.A. J. (June 16, 2011, 5:15 PM), http://www.abajournal.com/news/article/federal_judges_unusual_order_puts_well-known_bankruptcy_law_firm_under_flas/ (firm banned from bankruptcy court for improper practice); Matt Chandler, Baum Settles with AG; Will Pay $4M, BUFFALO BUS. FIRST (Mar. 22, 2012, 10:38 AM), http://www.bizjournals.com/buffalo/news/2012/03/22/baum-settles-
In theory, competence, advocacy, and ethics are all equally important—each must be given due consideration and rarely should one be considered paramount to the other. But the way this practice paradigm has evolved sometimes leaves good lawyers—and some less than good lawyers—struggling to find a balance between what can be done and what should be done.

This struggle comes into clear relief when considering the tension between advocacy and ethics. An attorney may defame a party in a proceeding, as long as such defamation has some relation to the legal proceeding, and be immune from civil liability. Even if false statements were knowingly made with malice, the immunity protects the attorney in the name of unfettered zealous advocacy. The Rules of Professional Conduct, however, prohibit an attorney from “conduct that is prejudicial to the administration of justice.” Professionalism demands even more—honesty and fair dealing. Is it fair to ask an attorney to weigh these competing interests without the benefit of clear guidance, indeed, should an attorney be required to make these choices at all?

Three competing but complementary obligations balance with these three core pillars of practice. The first obligation is to the client: to zealously represent the client, to hold that client’s confidences inviolate, and to serve the client’s needs. Second, an attorney has an obligation as an officer of the court. An attorney must understand that the overarching need for justice may come before an individual client’s needs, and that the attorney has a personal obligation to support and defend the judicial system. Third,
the attorney has an obligation to the public. The attorney should embrace his obligation to serve those who would not otherwise have access to the law, and to create in the public a confidence in those who serve as attorneys.

Reconciling these affirmative obligations to three very distinct audiences can be difficult. Over the years, rules of professional conduct have evolved from little more than civility codes to a complete body of law that helps define the outer boundaries of how these relationships interact with one another. More importantly, the rules of professional conduct, as they have evolved, have given guidance to lawyers to offer the floor below which no lawyer may fall. But, because the rules only provide a floor, the legal community has acknowledged that professionalism requires more than mere compliance. Since the rules do not define an ideal standard of professionalism, lawyers must step up from the minimum requirements in executing their

19. Id. R. 6.1 (encouraging voluntary pro bono public service), R. 6.2 (accepting appointments by the court to represent indigent clients), pmbl. para. 6.
20. Id. R. 6.1, pmbl. paras. 6–7.
21. See Campbell, supra note 8, at 128–37. In his article, Campbell traces the evolution of codes of professional conduct. See id. The first professional code of conduct in 1908 was ethos based, and generally an attempt to codify morality and behavior. Id. at 128. It was aspirational. Id. at 133. The 1960s saw a shift to a more practical approach with an emphasis on resolving ethical issues that arose in practice in addition to creating an enforcement mechanism. See id. at 134–35. The code was set out in three parts. Campbell, supra note 8, at 135. The Canons offered “axiomatic norms.” Id. Ethical considerations were identified but again, adherence was aspirational. Id. Finally, disciplinary rules were incorporated that set a floor for proper conduct. Id. The final significant shift occurred in 1983 when the rules evolved into black letter law with rules and comments to guide behavior and to impose discipline as necessary. Id. at 136.
22. See Model Rules of Prof’l Conduct scope paras. 14–16 (explaining the proper interpretation of the rules, including the words “shall,” “shall not,” “may,” and “should” when used in conjunction with the rules or the comments; setting the rules in a larger context of law and licensure; and clarifying the rules are not exhaustive of a lawyer’s moral and ethical obligations); see also Campbell, supra note 8, at 128–37.

No code or set of rules can be framed which will particularize all the duties of the lawyer. . . . The . . . canons of ethics are . . . a general guide, yet the enumeration of particular duties should not be construed as a denial of the existence of others equally imperative, though not specifically mentioned.

Model Rules of Prof’l Conduct pmbl. para. 7.

Many of a lawyer’s professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience . . . . A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession’s ideals of public service.
duties to client, court, and community. The rules, however, cannot dictate all of an attorney’s conduct or address every situation. Thus, they represent a starting point, not an end goal. This means, however, that there is a gap between what is required and what is expected. The problem occurs when that gap exposes a lawyer to divergent choices that serve competing interests—advocacy and protection of a client versus serving the goals of justice or professional conduct.

To truly satisfy her ethical obligation, a lawyer must do more than the minimum. Indeed, professionalism as a concept arose out of an acknowledgement that the rules were not enough. Somewhere between the floor and the ceiling, there must be a happy medium where competing obligations of practice and professionalism can be woven together to build a stronger, more complete foundation for the practice of law that provides clearer expectations for those who practice.

There has been a modern movement within the legal community to capture the ideals of professionalism and civility and articulate them as aspirations and goals for the practicing bar. The American Bar Association

24. See id. “Each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards.” MODEL CODE OF PROF’L RESPONSIBILITY pmbl. (1983).
25. See 4 FLA. JUR. 2D Attorneys at Law § 97 (2008). “The standards of professional conduct to be observed by members of the Florida Bar are not limited to the observance of rules and avoidance of prohibited acts, and . . . the failure to specify any particular act of misconduct [will not] be construed as tolerance thereof.” Id.
27. See id.
28. See id. scope para. 16.
29. See Deasonlaw, supra note 23.
Professionalism differs from ethics in the sense that ethics is a minimum standard . . . while professionalism is a higher standard expected of all lawyers. Professionalism imposes no official sanctions. It offers no official reward. Yet, sanctions and rewards exist unofficially. Who faces a greater sanction than lost respect? Who faces a greater reward than the satisfaction of doing right for right’s own sake?
Id. (quoting John W. Spears, Interview with Harold G. Clark, Chief Justice, Supreme Court of Georgia, DECATUR-DEKALB B. Q., May 24, 1990).
30. See Kez U. Gabriel, The Idealist Discourse of Legal Professionalism in Maryland: Delineating the Omissions and Eloquent Silences as a Progressive Critique, 41 U. BALTIMORE L. F. 120, 123–24 (2011) (reviewing the newly-adopted Ideals of Professionalism in Maryland). This movement is by no means new. See Hoefflich & Badgerow, supra note 15, at 414–15. As multiple scholars have pointed out, almost any generation of lawyers has a previous generation that bemoans their inability to conduct themselves professionally and civily. See id. at 413; Campbell, supra note 8, at 103. Neil Hamilton notes that “[t]he critical question at any point in the legal profession’s history is not whether the profession had more civility or a deeper sense of calling at an earlier period” but rather, it is “whether the profession and each individual lawyer can do better than they are doing today in realizing the profession’s public purpose, core values, and ideals.” Neil Hamilton, Professionalism Clearly Defined, 18 PROF.
(“ABA”), the federal government, and several states have implemented aspirational goals related to professionalism, civility, or behavior in the practice of law over the last twenty or so years. The problem, however, is that these aspirational goals lack any real effectiveness because, unlike laws or mandatory rules of professional conduct, there is no consequence for failure to comply above and beyond community reaction. So, while these goals help articulate clearer guidance for attorneys of what is expected, they do little to alleviate the tension between zealous advocacy and professionalism. However, the Florida Bar has proposed rules for enforcing professionalism based on its preexisting professionalism goals. Recent law review articles discussing the twin necessities of professionalism and civility offer studies,
suggestions, and salvos against the fall of standards within the legal profession. Like Florida, other state bars may consider taking aspirational goals for attorney conduct and turning them into actionable rules.

This is a “new professionalism” borne of a constant refrain that the newest generation of lawyers fails to uphold the standards of those who came before, the difference now is that this new professionalism will have teeth, and more closely resemble a marriage between mandatory legal ethical standards and what have been, for the most part, aspirational goals for professionalism.

But this shift to a more professional practice must be examined against the historical backdrop of advocacy, the role of a lawyer in litigation, and the attorney client relationship. It remains a tension between advocacy and ethics, client and court, and attorney and community. In some ways, it

35. See Nicola A. Boothe-Perry, Professionalism’s Triple E Query: Is Legal Academia Enhancing, Eluding, or Evading Professionalism?, 55 LOY. L. REV. 517, 556–57 (2009) [hereinafter Boothe-Perry, Professionalism’s Triple E Query] (asserting the importance of academia’s role in molding professionalism in the legal community); Gabriel, supra note 30, at 121–27, 146–47 (reviewing the newly adopted “Ideals of Professionalism” in Maryland and discussing the gaps within those ideals); Hoeflich & Badgerow, supra note 15, at 413 n.1, 415; Dennis A. Rendleman, Pogo Professionalism: A Call for a Commission on Truth and Professionalism, 2012 J. PROF. LAW. 181, 185, 199–200; Nicola A. Boothe-Perry, Professionalism and Academia, PROFESSIONAL, Summer 2010, at 6, 6–7, [hereinafter Boothe-Perry, Professionalism and Academia] (discussing professionalism and learned behavior in the law school setting). Hoeflich and Badgerow cite a two-fold crisis: “[T]he general public neither understands nor appreciates the skill, dedication, and public service exhibited by the vast majority of Kansas lawyers” and “it seems that civility, decency, and cooperation among Kansas lawyers is on the decline, based on personal experience, case reports, and anecdotal evidence.” Hoeflich & Badgerow, supra note 15, at 414; see also Hamilton, supra note 30, at 4.

36. See Proposed Rules for Resolving Professionalism Complaints, supra note 30. However, not everyone believes enforceable professionalism codes are necessary, positing that the current rules of professional conduct, the inherent powers of the court, and more education can be used effectively to cure what ails our profession. See Hoeflich & Badgerow, supra note 15, at 414–15 (advocating for using existing means to control objectionable behavior, “mandatory ‘professionalism’ education for law students, . . . and . . . annual continuing education for lawyers”); see also Gabriel, supra note 30, at 123, 136.


38. See Proposed Rules for Resolving Professionalism Complaints, supra note 30.

39. See Campbell, supra note 8, at 134.


41. MODEL RULES OF PROF’L CONDUCT pmbl. para. 2.

42. Compare Anenson, supra note 12, at 922–23 (advocacy), with RESTATEMENT (SECOND) OF TORTS § 586 cmt. a (ethics).

43. Compare MODEL RULES OF PROF’L CONDUCT pmbl. para. 9 (client), and id. R. 1.2 (client), with id. R. 3.3 (court).
seems that this move toward professionalism could be setting attorneys up for failure no matter what the context.

Regulating a certain level of behavior is problematic at best. Normally, this would be something left to an attorney’s community to regulate, but the constant refrain that professionalism is lacking seems to indicate otherwise. Lawyers are nothing more than their reputation. So, when a lawyer behaves badly, is rude, or is otherwise inappropriate on a professional level, the community reacts accordingly.

Judges and colleagues react differently depending on a person’s behavior.

“A lawyer who seriously offends against widely held professional norms faces unofficial but nonetheless powerful interdictions. Those include sanctions such as negative publicity and other expressions of peer disapproval, the cutting off of valuable practice opportunities . . . denial of access to centers of power and prestige . . . and [the] preclusion from judicial posts.”

The community, however, can also respect the difference between a good lawyer that may be difficult to deal with at times, and a nice lawyer that may not have the same skills. The problem with trying to require the prickly lawyer to hew to a “nicer” practice of law is that it may serve no purpose in the larger scheme of things, and may in fact harm the underlying principles of practice that have been indelibly inked on our profession.

In some instances, the tension between the common law and rules of professional conduct may also force an attorney to make difficult ethical or strategic choices in the name of advocacy. The shift to mandatory profes-

44. Compare Model Rules of Prof’l Conduct pmb. para. 9 (attorney), with id. pmb. para. 6 (community).
45. Model Rules of Prof’l Conduct pmb. para. 10.
47. See Professional Guidelines, supra note 31.
48. See Campbell, supra note 8, at 101.
49. Hamilton, supra note 30, at 12.
50. Id. (first and second alterations in original) (quoting Charles W. Wolfram, Modern Legal Ethics 22 (student ed., 1986)).
51. See Campbell, supra note 8, at 137; see also Model Rules of Prof’l Conduct R. 1.6 cmt. 12. For example, a lawyer must keep evidence of a past crime confidential if it is disclosed by his client. Model Rules of Prof’l Conduct R. 1.6 cmt. 8. It is the quintessential dilemma, not being able to tell someone where the body is buried. See id. The same can be said of permitting a criminal defendant to testify on his own behalf, thereby exercising his constitutional rights when the attorney suspects, but does not know for sure, that the defendant will lie on the witness stand. See id. R. 3.3 cmt. 8. Comment 9 “prohibits a lawyer from offering evidence the lawyer knows to be false, [but] permits the lawyer to refuse to offer
sionalism creates an additional tension between a lawyer’s need to represent a client professionally and to legitimately take advantage of those tools available to do so, even where they do not entirely embrace the ideals of professionalism.\textsuperscript{52} The backlash that a zealous lawyer may receive in the name of regulating civility and codifying professionalism will not sting any less simply because the lawyer may not face civil liability for her actions.\textsuperscript{53} As proposed in Florida, there is still an intake, review, and grievance process for professionalism complaints, just as there is for any other bar grievance.\textsuperscript{54}

The concern is how to reconcile a lawyer’s obligations: To create a meaningful relationship between a lawyer’s role as a practitioner, a lawyer’s role as a colleague, and a lawyer’s role as a member of the larger legal community. This must be done in the larger context of both ethics and mandatory professionalism. These concerns come into sharper focus when considering the lawyer’s litigation privilege, also known as absolute immunity.\textsuperscript{55} According to several courts, even though an attorney is not subject to civil liability for defamation or other related torts that bear some relation to a legal proceeding, an attorney is still subject to court sanctions or to disciplinary action for defamatory conduct.\textsuperscript{56} The problem is that it appears to be rare

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\textsuperscript{52} See Campbell, supra note 8, at 139; see also RESTATEMENT (SECOND) OF TORTS § 586 (1977). For example, attacking a witness’s credibility, or being permitted to make defamatory statements in a judicial proceeding. RESTATEMENT (SECOND) OF TORTS § 586 cmt. c.


\textsuperscript{54} Proposed Rules for Resolving Professionalism Complaints, supra note 30.

\textsuperscript{55} See Anenson, supra note 12, at 916.

\textsuperscript{56} Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole, 950 So. 2d 380, 384 (Fla. 2007) (noting “the trial court’s contempt power [and] the disciplinary measures of the state court system and bar association” address this type of misconduct); Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co., 639 So. 2d 606, 608–09 (Fla. 1994); O’Neil, 173 Cal. Rptr. at 428 (acknowledging that while the attorney could not be subject to civil liability for a breach of trust, it “may subject him to disciplinary action”); Higgs v. Dist. Court, 713 P.2d 840, 865 (Colo. 1985) (en banc) (Erickson, J., dissenting) (agreeing with the majority that alternate remedies are available in absolute immunity cases); Hawkins v. Harris, 661 A.2d 284, 288 (N.J. 1995) (citing Rubertson v. Gabage, 654 A.2d
that those sanctions are imposed, particularly with respect to disciplinary action. As professionalism becomes a subject of discipline, these newly enforceable “aspirations” could alter the balance struck between a person’s right to be free from harmful statements and acts such as defamation, and an attorney’s need to have wide latitude to protect his client and proceed with his case. The extent of this problem cannot be understated. Only two states do not recognize absolute immunity. Even the two states that do not recognize absolute immunity have simply adopted a qualified version of the same immunity. It is not that these contradictory concepts cannot coexist, but the crux of the problem is deciding how to strike a balance that properly acknowledges the value of each.

Part II of this article will discuss “professionalism” as a concept, and discuss how it has been defined by scholars and various bar associations. Part III will examine how there has been a shift from aspirational professionalism goals, to a move to enforceable standards of professionalism based on these goals in Florida. As an example of the tension that may be created by


57. See Debra Moss Curtis, Attorney Discipline Nationwide: A Comparative Analysis of Process and Statistics, 35 J. LEGAL PROF. 209, 235 (2011). The Seventh Circuit has even acknowledged that while disciplinary action and court sanctions have always been available remedies to redress an attorney’s improper conduct during litigation, “the likelihood of these sanctions being invoked is speculative at best.” Auriemma v. Montgomery, 860 F.2d 273, 278–79 (7th Cir. 1988) (discussing the balance between a person’s rights and the attorney’s need to be unfettered). It is curious why cases, where defamation or a related claim is made, do not make their way to disciplinary proceedings. Perhaps it is a two-fold problem. First, a defamation plaintiff seeks to be made whole—either by receiving some sort of retraction, apology, or money—and disciplinary proceedings may not accomplish that. Oral Argument at 26:30, DelMonico v. Traynor, No. SC10-1397, (Fla. June 9, 2011), available at http://wfsu.org/gavel2gavel/archives/flash/viewcase.php?case=10-1397. Second, disciplinary proceedings, and discipline itself, generally cannot be used as “a basis for civil liability.” MODEL RULES OF PROF'L CONDUCT scope para. 20 (2012). So maybe there is some unwritten corollary that it is unfair to discipline an attorney for strategic choices that are otherwise permissible and not subject to civil liability.

58. Anenson, supra note 12, at 920–21, 925–26; see also Campbell, supra note 8, at 100.

59. Anenson, supra note 12, at 917.

60. Id. at 917 n.6. Louisiana recognizes immunity, but qualifies it such that it is only available when “the statement [is] material, . . . made with probable cause, and without malice.” Freeman v. Cooper, 414 So. 2d 355, 359 (La. 1982) (citing Waldo v. Morrison, 58 So. 2d 210, 211 (La. 1952)); see also L.A. REV. STAT. ANN. § 14:49 (2012), declared unconstitutional by Garrison v. Louisiana, 379 U.S. 64 (1964); id. § 14:50. The Supreme Court of Louisiana, in rejecting the absolute nature of the immunity, observed that the immunity is “not a license to impugn the professional integrity of opposing counsel or the reputation of a litigant or witness;” it is designed to protect those “who are merely performing their duties.” Freeman, 414 So. 2d at 359.

https://nsuworks.nova.edu/nlr/vol37/iss1/1
these new rules, absolute immunity is reviewed and discussed in Part IV. In Part V, the author highlights how absolute immunity has been applied in a recent defamation case on writ of certiorari to the Supreme Court of Florida. Against this backdrop, the author then considers the contradictions inherent in protecting lawyers from what would otherwise be considered unprofessional conduct in the name of zealous representation of the client. Finally, Part VI considers how legal theories such as absolute immunity should be viewed within the context of a potential movement toward enforcing mandatory professionalism standards in the practice of law.

II. PROFESSIONALISM, A CONCEPT DEFINED

“‘[P]rofessionalism’ seems to encompass practically all concerns about what lawyers do and the way in which they do it.”61

A. Scholars Approach to Professionalism

There are as many definitions of “professionalism” as there are people who seek to define it.62 It has been defined by author and organization alike.63 Quite often, it is distinguished as a step above the professional rules, an ideal to aspire to and behavior that should be expected.64 However, some definitions have chosen to frame it as a minimum standard as well, just as the rules of professional conduct are framed.65 In that instance, professionalism is conceived as “the minimum level of civility in word and action that law-

61. Donald Hubert, *Competence, Ethics, and Civility as the Core of Professionalism: The Role of Bar Associations and the Special Problems of Small Firms and Solo Practitioners*, in *TEACHING AND LEARNING PROFESSIONALISM* 113, 115 (1996) (emphasis added).

62. See Hamilton, supra note 30, at 5. Neil Hamilton sought to classify these definitions, noting that there are three varieties of scholarship on professionalism. Id. The first makes “no attempt to affirmatively state [the] definition of the concept itself,” but rather presumes the definition is “self-evident or meant to be implicitly understood within the context of the article’s main focus.” Id. (footnote omitted). The second “focus[es] on one or more characteristics that are the ‘core’ of professionalism,” more specifically enumerating the requisite values, standards, and “commitment[s] to public service.” Id. Finally, a third “dismisses [it] as a misguided concept.” Id.


64. See Hoeflich & Badgerow, supra note 15, at 415–16.

65. Id. at 415.
yers believe every lawyer should show every other lawyer, the minimum level of cooperation expected among lawyers in adversarial and non-adversarial situations, and the minimum degree of courtesy one would expect lawyers to show each other.”66 Still, another posits that while “ethical obligations can be seen as the shall-nots of lawyering, . . . professionalism [should be seen] as creating affirmative obligations of the lawyer to the broader society.”67

Another author has distilled professionalism down to five principles—focusing on personal conscience, ethics of duty, ethics of aspiration, holding colleagues to the same standards, and reflective engagement, including contemplating income and wealth balanced by public obligation.68 Interestingly, at least one scholar has attempted to identify the core concepts of civility as distinct obligations separate from legal ethics and professionalism.69 Campbell identifies ten common concepts including “maintain[ing] honesty and personal integrity . . . avoid[ing] actions taken merely to delay or harass . . . act[ing] with dignity and cooperation in pre-trial proceedings, [and] act[ing] as a role model to the client and public.”70

B. Organizational Definitions of Professionalism

The Kansas Bar has conceived professionalism as a focus on actions that are grounded in “civility, respect, fairness, learning, and integrity” that encompass the lawyer’s role as an officer of the court “and as a public citizen with special responsibilities for the quality of justice.”71 The Florida Bar has defined professionalism, in its broadest terms, as a commitment to “ensure[] that concern for the desired result does not subvert fairness, honesty, respect and courtesy for others with whom one comes into contact . . . [including] opponents.”72 The ABA has defined a “professional lawyer” in the context of professionalism as “an expert in law pursuing a learned art in service to

66. Id.
67. Campbell, supra note 8, at 139. Campbell carries this notion of a larger societal obligation further positing that “morality represents a personal conscience, whereas professionalism represents a social conscience.” Id. at 141.
68. Hamilton, supra note 30, at 8.
69. Campbell, supra note 8, at 99, 128, 142.
70. Id. at 109.
72. Ideals and Goals of Professionalism, supra note 63. Maryland defines it as “the combination of the core values of personal integrity, competency, civility, independence, and public service that distinguish lawyers as the caretakers of the rule of law.” Md. R. app. Ideals of Professionalism.
clients and in the spirit of public service; and engaging in these pursuits as part of a common calling to promote justice and public good.  

C. A Working Definition

No matter what definition is used, professionalism is universally considered to be something separate from the rules themselves, even if it is also complementary to them.  

Perhaps professionalism is best captured as that intangible space between “shall” and “may,” and an understanding that society demands more than that which is required by “must.” Where a lawyer ends up on the spectrum between what you must do, what you can do, and what you should do, is going to be impacted by the definition of professionalism that is adopted in his community and potentially codified into enforceable standards. As legal communities continue to articulate and refine the new professionalism, norms will shift to raise the bar for desired behavior.

III. PROFESSIONALISM, A CONCEPT ENFORCED

“To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications.”

A. Florida

The Oath of the Florida Bar was changed in 2011 to add the language quoted above.  

73. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS’N, TEACHING AND LEARNING PROFESSIONALISM: REPORT OF THE PROFESSIONALISM COMMITTEE 6 (1996) (emphasis omitted). The ABA notes the following “[e]ssential characteristics of [a] professional lawyer . . . : 1) [l]earned knowledge; 2) [s]kill in applying the applicable law to the factual context; 3) [t]horoughness of preparation; 4) [p]ractical and prudential wisdom; 5) [e]thical conduct and integrity; [and] 6) [d]edication to justice and the public good.” Id. at 6–7. This Report is based on two earlier reports commissioned by the ABA: The 1986 Stanley Commission Report and the 1992 MacCrate Commission Report. Id. at 1.

74. See, e.g., AM. BD. OF TRIAL ADVOCATES, supra note 31, at pmbl.


76. In re Oath of Admission to The Florida Bar, 73 So. 3d 149, 150 (Fla. 2011) (per curiam); Jan Pudlow, Revised Admission Oath Now Emphasizes Civility, FLA. B. NEWS, Oct. 1, 2011, http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/8e9f13012b96736985256aa900624829/f0058f33ea1ffeefc8525791700476e57!OpenDocument; see also Oath of Admission to The Florida Bar, supra note 75.
ness from baseline legal ethics to a higher standard of conduct, particularly with respect to civility.\textsuperscript{77} At the same time, the Florida Board of Bar Examiners announced that professionalism would be tested as a separate subject on the Florida Bar beginning in 2013.\textsuperscript{78} Finally, recommendations were made to begin addressing professionalism complaints much in the same way ethics complaints are currently processed by the Florida Bar.\textsuperscript{79} At the most recent Florida Bar Convention, former Florida Bar President Scott Hawkins told an audience assembled to discuss the matter of enforcing professionalism standards in Florida that “this topic is ground zero for our . . . efforts of the next 10 years. . . . [I]t will not go away.”\textsuperscript{80} Indeed, the Supreme Court of Florida’s Commission on Professionalism tentatively adopted guidelines for disciplining substantial and repeated violations of the professionalism standards in Florida.\textsuperscript{81} These proposed guidelines are based on the professionalism standards set forth in Florida’s \textit{Creed of Professionalism, Ideals and Goals of Professionalism}, and the \textit{Oath of Attorney}.\textsuperscript{82}

\textsuperscript{77} Pudlow, \textit{supra} note 76.

\textsuperscript{78} \textit{In re} Amendments to Rules of the Supreme Court Relating to Admissions to the Bar, 51 So. 3d 1144, 1145 (Fla. 2010) (per curiam), \textit{reh’g granted}, 54 So. 3d 460 (Fla. 2011). The Bar has defined the subject matter for testing “professionalism” as that information mainly contained in three documents: Florida’s \textit{Creed of Professionalism, Guidelines for Professional Conduct} developed by the Trial Lawyers Section of the Florida Bar, and the \textit{Ideals and Goals of Professionalism}. Kirsten Davis, \textit{Assessing Aspiration: Florida Bar Exam to Test Professionalism Guidelines} (AALS Professional Responsibility Section Newsletter, D.C.), Spring 2011, at 28, 28–29. Davis noted that this is “a compliance first-step—requiring . . . that lawyers know the professionalism guidelines.” \textit{Id.} at 31. Another byproduct of such action, is a “de facto ‘codification’ [of] uniform, customary expectations of professional practice in Florida.” \textit{Id.} Finally, such action has elevated professionalism to the level of other subject matter and “branded” it with “intellectual and practical legitimacy.” \textit{Id.} at 32.


\textsuperscript{80} Blankenship, \textit{Disciplinary Sanctions}, \textit{supra} note 79 (first alteration in original).

\textsuperscript{81} \textit{Id.}

\textsuperscript{82} \textit{Id.}; \textit{Proposed Rules for Resolving Professionalism Complaints, supra} note 30.
1. Development of New Professionalism Standards

   a. Ideals and Goals

      In 1990, the Board of Governors of the Florida Bar adopted the *Ideals and Goals of Professionalism*. There are seven ideals and each one contains corresponding goals. Professionalism is broadly defined, and it includes a commitment to “ensur[e] that concern for the desired result does not subvert fairness, honesty, respect, and courtesy for others with whom one comes into contact . . . [including] opponents.” Ideal two provides that “[a] lawyer should at all times be guided by a fundamental sense of honor, integrity, and fair play, and should counsel his or her client to do likewise.” In furtherance of this ideal, a stated goal is that “[a] lawyer should abstain from conduct calculated to detract or divert the fact-finder’s attention from the relevant facts or otherwise cause it to reach a decision on an impermissible basis.”

   b. Florida’s Creed of Professionalism

      The *Creed of Professionalism* followed the *Ideals and Goals of Professionalism* and was adopted in 1989. Developed by the Florida Bar, the *Creed of Professionalism* sought to memorialize the professional obligations that underlie an attorney’s obligations to his client, the judiciary, and the administration of justice. It provides in part that an attorney

      will strictly adhere to the spirit as well as the letter of [the] profession’s code of ethics, . . . be guided by a fundamental sense of honor, integrity, and fair play, . . . [and] not knowingly misstate,
c. Guidelines for Professional Conduct

The Guidelines for Professional Conduct, first promulgated in 1994 and most recently revised in 2008, are more detailed and address administrative issues such as: Scheduling, continuances, and extensions of time; service of papers; written submissions to the court; as well as litigation matters including discovery, motions practice, and trial conduct.

2. Imposing Discipline for Issues Related to Professionalism Under the Rules of Professional Conduct

Florida’s move to regulate professionalism does not mean that an attorney could not previously be subjected to discipline for unprofessional conduct. Prior to the Florida Bar’s move to develop enforceable professionalism standards, attorneys were simply more likely to be disciplined under catch-all provisions of Rule 4-8.4(d), Rules Regulating the Florida Bar, which makes it a violation to engage in conduct that is prejudicial to the administration of justice. Because it is so broadly written, this rule has been applied to a variety of circumstances and has been used to address egregious breaches of professionalism that in and of themselves flirt with the “musts” of the rules of professional conduct.

90. Id.
92. Id.
93. See id.; R. REGULATING FLA. BAR 4-8.4(d) (2012).
94. See Fla. Bar re: Amendments to Rules Regulating the Fla. Bar, 621 So. 2d 1032, 1049 (Fla. 1993) (per curiam); R. REGULATING FLA. BAR 4-8.4(d). Rule 4-8.4(d) provides that:

A lawyer shall not . . . engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic.

Id.
In one instance, two attorneys, Kurt Mitchell and Nicholas Mooney, who could not even maintain a professional relationship with each other for more than the length of an e-mail, were disciplined for violating Rule 4-8.4(d). The e-mail exchanges between counsel were exceedingly unpleasant and on more than one occasion would escalate to outright name calling and other childish behavior. And although both attorneys were equally guilty of inappropriate, completely unprofessional remarks, Mooney finally reported Mitchell to the Florida Bar when Mitchell made disparaging remarks about his disabled child including the statement, "[w]hile I am sorry to hear about your disabled child; that sort of thing is to be expected when a retard reproduces . . . I would look at the bright side at least you definitely know the kid is yours." Mitchell received a ten-day suspension and was required to attend the Florida Bar’s Anger Management Workshop. Mooney received a public reprimand for his behavior and was required to attend a professionalism program.

More recently, an attorney was suspended for a year for, among other things, disparaging her client after she was fired. The attorney filed a Mo-
tion to Withdraw four days before an immigration hearing on the ground that the client had paid her with a check that bounced.\(^\text{102}\)

In her motion, the attorney also stated “that she regretted helping her client, who [was] right[fully] convicted [of] grand theft, and that [she] had received reports from the [client’s] community that [the] client had robbed them.”\(^\text{103}\) The motion was withdrawn when the attorney and client resolved the matter.\(^\text{104}\) Another motion was filed to withdraw after the client retained new counsel, and at the same time, the attorney advised an assistant state attorney that “she had reason to believe her client would lie to the Immigration Court at an upcoming hearing.”\(^\text{105}\)

The referee found the attorney violated Rule 4-8.4(d) of the Rules Regulating the Florida Bar, for “conduct prejudicial to the administration of justice.”\(^\text{106}\) The Supreme Court of Florida commented separately on this violation, addressing its egregious nature:

> Respondent filed two motions on separate occasions in which she disparaged her client’s character in a reprehensible fashion. Respondent attacked her client’s integrity with regard to her alleged failure to honor checks and fulfill contracts. Respondent further stated that she had heard reports that her client had robbed members of the Romanian community. Finally, and most egregiously, Respondent brazenly asserted that her client had been rightfully convicted for grand theft, and that Respondent actually regretted having helped her client. Such disparaging language is needless and has no place in a public court pleading, especially when the statements are made by an attorney and are directed at the attorney’s own client. Unbridled language of this sort harms the client and causes the public to lose faith in the legal profession. Respond-

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102. *Id.* at S508. In fact, counsel implied in her motion that the funds were for an immigration matter when in fact they were for another case in which she was representing the same client. *Id.*

103. *Id.*

104. *Id.*


106. *Id.* at S509; see also R. REGULATING FLA. BAR 4-8.4(d) (2012). The referee observed that:

> “regardless of intent, the very act of filing such a motion with such language is so prejudicial to the client so as to be actionable.” The referee stated that it was inconceivable that anyone knowing the rules of ethics would think such statements would be appropriate. Accordingly, the referee recommended that Respondent be found guilty of violating rule 4-8.4(d).

dent’s conduct was highly prejudicial to the administration of justice and cannot be tolerated. 107

b. Making the Crime Fit the Punishment

The attorneys’ unprofessional conduct in each of these cases was found to violate Rule 4-8.4(d) and these attorneys were subject to discipline as a result. 108 Discipline was appropriate in both circumstances and certainly keeps with the purposes of the Rules of Professional Conduct. 109 However, similar conduct could now be regulated under the proposed enforceable professionalism standards because although the new professionalism standards require substantial or repeated offenses, the same was likely true of the use of Rule 4-8.4(d). 110 For example, in Mitchell’s and Knowles’ respective cases, had the attorneys’ statements not been so extreme, or repeated, and had other factors not been present, it is unlikely that a disciplinary action would have been filed or punishment would have been imposed. 111

107. Id.
108. Id. at S509–10; Mitchell Report, supra note 95, at 2–3; Mooney Report, supra note 96, at 2; see also R. REGULATING FLA. BAR, 4-8.4(d).
109. See Mitchell Report, supra note 95, at 3; Mooney Report, supra note 96, at 2; see also MODEL RULES OF PROF’L CONDUCT scope para. 14 (2012). The Supreme Court of Florida has continuously acknowledged that the appropriate considerations for imposing discipline are threefold:

[(1)] the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty; [(2)] the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation; and [3] the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.


110. See Mitchell Report, supra note 95, at 1–2; Mooney Report, supra note 96, at 1–2 (supporting proposition that rule 4-8.4(d) implicitly requires substantial or repeated offenses); Proposed Rules for Resolving Professionalism Complaints, supra note 30; see also R. REGULATING FLA. BAR 4-8.4(d).

111. Mitchell Complaint, supra note 95, at 1–4; see Knowles, 37 Fla. L. Weekly at S508; Fla. Bar v. Mitchell, No. SC10-637, slip op. at 1 (Fla. Oct. 5, 2010). For example, Knowles’ punishment was actually enhanced from a ninety-day suspension because it was not her first offense. Knowles, 37 Fla. L. Weekly at S508. Also, in Knowles’ case, she was not attacking another attorney or a witness, but was disparaging her own client. Id. at S510. The Supreme
Under newly proposed rules for enforcement of professionalism, recourse to formal and informal sanctions may be much more readily available than before. Instead of relying on the catch-all provisions under the Model Rules of Professional Conduct or the Rules Regulating the Florida Bar, the proposed rules set additional, distinct standards that all attorneys must meet. Although these professionalism standards are only a step above the minimum requirements, it raises the bar for all practitioners. While heightened professionalism is commendable, as explained later, Florida—and other states like it—need to be mindful to promote and advance the cause of professionalism without compromising an attorney’s competing obligations to the client, the court, and the public.

3. A Proposed Florida Model for Resolving Complaints of Unprofessional Conduct

Florida is one step closer to enforcing its proposed professionalism guidelines and disciplining those lawyers who fail to comply. The Florida Bar’s Commission on Professionalism has approved proposed rules for resolving professionalism complaints. The Commission approved the Attorney Consumer Assistance and Intake Program Model (“ACAP Model”). The ACAP Model involves a very simple rule, which then relies upon previously adopted professionalism goals and decisions from the Supreme Court of Florida for definition and form. The Standard of Professionalism, as set forth in the proposal, is that “members of The Florida Bar shall not engage in unprofessional conduct,” defined as “substantial or repeated violations of the Oath of Admission to The Florida Bar, The Florida Bar Creed of Professionalism, The Florida Bar Ideals and Goals of Professionalism, The Rules of Professional Conduct, The Florida Bar Model Rules of Professional Conduct, and any other rules and regulations that govern the practice of law.”

Court of Florida justifiably took a very dim view of Knowles’ actions because her actions, offensive in and of themselves, were that much worse because her defamatory remarks were directed at her own client. See id. at 508, 510.


113. See Proposed Rules for Resolving Professionalism Complaints, supra note 30; see also R. REGULATING FLA. BAR 3-2.1; MODEL RULES OF PROF’L CONDUCT scope para. 19.

114. See SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS’N, supra note 73, at 6 & n.22, 7.


116. Id. The Commission on Professionalism approved this model at its February 16, 2012 meeting, and proposed these rules and regulations for public comment and approval by the Supreme Court of Florida, but they have not yet been formally adopted. Id.

117. Id.; Blankenship, Disciplinary Sanctions, supra note 79.

118. See Proposed Rules for Resolving Professionalism Complaints, supra note 30; Blankenship, Disciplinary Sanctions, supra note 79.
Regulating The Florida Bar, or the decisions of The Florida Supreme Court.” What is evident at first glance is that this standard does not contemplate violation by the commission of a single act, unless that act is “substantial or repeated.” The reliance on prior Supreme Court of Florida decisions, in addition to the professionalism guidelines that have been adopted by the Florida Bar, should assist in guiding the committees as these new rules evolve and are put into practice.

The proposal adopts existing bar grievance procedures to handle bar complaints and violations of The Rules Regulating the Florida Bar, which will make the rules easy to implement. Once a complaint is filed, the proposal uses the intake attorney as a gatekeeper with initial discretion to resolve matters informally, including referral of a respondent attorney to appropriate remedial professionalism programs. After an investigation, the complaint may be dismissed or forwarded “to the appropriate branch office of The Florida Bar’s Lawyer Regulation Department for further” review.

If a complaint is referred forward, the appropriate branch counsel has the discretion to “dismiss the [complaint] . . . , recommend Diversion . . . in accordance with Rule 3-5.3(d) of The Rules Regulating The Florida Bar, or refer to a Grievance Committee for further [consideration].” Rule 3-5.3(d)

120. Id.
122. See Proposed Rules for Resolving Professionalism Complaints, supra note 30; see also R. REGULATING FLA. BAR 3-5.3(d) (2012). There is also a local option that would permit judicial circuits to adopt Local Professionalism Panels to resolve some complaints of unprofessional conduct within that circuit’s own legal community. Proposed Rules for Resolving Professionalism Complaints, supra note 30. The idea was to permit circuits to decide how much involvement they wanted to have—and likely had the resources to support—with respect to dealing with professionalism complaints. See id. Under the current ACAP Model proposal, the Local Professionalism Panel would receive referrals of cases that the ACAP attorney determines could be handled informally. Id.
123. Id. In this context, remedial professionalism programs are identified as “Practice and Professionalism Enhancement Programs,” which are “[p]rograms operated either as a diversion from disciplinary action or as a part of a disciplinary sanction that are intended to provide educational opportunities to members of the bar for enhancing skills and avoiding misconduct allegations” either with no investigation or determination of whether an investigation is required where a potential violation of the Rules of Professional Conduct may exist. R. REGULATING FLA. BAR 3-2.1(i); see Proposed Rules for Resolving Professionalism Complaints, supra note 30.
125. Id.; R. REGULATING FLA. BAR 3-5.3(d).
provides that “[t]he bar shall not offer a respondent the opportunity to divert a disciplinary case that is pending at staff or grievance committee level investigations to a practice and professionalism enhancement program unless staff counsel, the grievance committee chair, and the designated reviewer concur.”126 Rule 3-5.3(b) contemplates “diversion to practice and professionalism enhancement programs” in cases where the case would be subject to a “finding of minor misconduct or by a finding of no probable cause with a letter of advice.”127 A lawyer may be referred to diversion only once every seven years.128

The Grievance Committee is the final stop in the review process.129 Upon review and consideration, the Grievance Committee makes one of five findings: 1) “No probable cause;” 2) “No probable cause [with] a letter of advice to the Respondent;” 3) “Recommendation of Diversion to [a] Practice and Professionalism Enhancement Program[;]” 4) “Recommendation of Admonishment for Minor Misconduct;” or 5) “Probable cause under Rule 3-2.1, [which] is a finding of guilt justifying disciplinary action.”130

B. Examples of Other States’ Approaches to Discipline and Enforcement with Respect to Professionalism Issues

Unlike Florida’s proposed rules for regulating professionalism, most states simply have aspirational goals for professionalism and civility.131 Most do not intend for those goals to be enforceable through disciplinary proceedings.132 For example, Minnesota’s aspirational professionalism stan-

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126. R. REGULATING FLA. BAR 3-5.3(d).
127. Id. R. 3-5.3(b).
128. Id. R. 3-5.3(c).
129. See Proposed Rules for Resolving Professionalism Complaints, supra note 30. These options track with the traditional role of the Grievance Committee in Bar Proceedings for other violations. See R. REGULATING FLA. BAR 3-7.4(j), (k), (m), (o). Rule 3-2.1(j) provides that probable cause is defined as “[a] finding by an authorized agency that there is cause to believe that a member of The Florida Bar is guilty of misconduct justifying disciplinary action.” Id. R. 3-2.1(j).
130. Proposed Rules for Resolving Professionalism Complaints, supra note 30; see R. REGULATING FLA. BAR 3-2.1(j), 3-7.4(j), (k), (m), (o).
RECONCILING ATTORNEY CONDUCT

standards specifically state that they “are not intended to be used as a basis for discipline.” Yet Minnesota has sanctioned attorneys for unprofessional conduct. Like Minnesota, Maryland has also addressed unprofessional conduct without the benefit of enforceable professionalism standards. But, as with similar cases in Florida, the courts tend to rely on the catch-all provision of behavior that “is prejudicial to the administration of justice,” rather than being able to point to specific standards of professionalism or civility. Often, the attorney disciplined has also violated a more specific rule of professional conduct as well.

The Court of Appeals in Maryland suspended an attorney from the practice of law for ninety days based on conduct that was related to marital difficulties, but resulted from him using vulgar language directed at colleagues and court staff, failing to cooperate with law enforcement in several situations, and otherwise behaving in a less than professional manner. On the one hand, the court acknowledged that an “[a]ttorney[] who cannot maintain [a] level of professional performance [that includes common courtesy and civility] must be disciplined,” but the court also acknowledged that “[a]ttorneys are not prohibited from using profane or vulgar language at all times and under all circumstances.” Instead, such language can be curbed when it “would be prejudicial to the administration of justice.”

A New Jersey court sanctioned an attorney for repeated instances of the use of vulgar name-calling, threatening, and abusive language toward opposing counsel, a New Jersey Transit investigator, and a trial judge’s law clerk. This was not Mr. Vincenti’s first appearance before the Disciplinary

134. See *In re* Graham, 453 N.W.2d 313, 314–15, 325 (Minn. 1990) (per curiam); *In re Williams*, 414 N.W.2d 394, 395 (Minn. 1987) (per curiam).
137. See Alison, 565 A.2d at 666.
138. See id. at 664.
139. *Id.* at 661–64, 668.
140. *Id.* at 666–67 (citing *In re Williams*, 414 N.W.2d at 397).
141. *Id.* at 667.
142. *In re Vincenti* (*In re Vincenti II*), 554 A.2d 470, 471 (N.J. 1989) (per curiam). Vincenti told the trial judge’s law clerk to “get real,” that she did not know what she was doing, and that he was “not taking this fucking shit.” *Id.* at 473. He apparently called the Deputy
Review Board, nor before the Supreme Court of New Jersey, as he had been suspended from practice for similar conduct several years earlier. The court found that Vincenti, again, had engaged in conduct that was prejudicial to the administration of justice and suspended him from the practice of law for three months. The court stated that “[c]onduct calculated to intimidate and distract those who, though in an adversarial position, have independent responsibilities and important roles in the effective administration of justice cannot be countenanced” and that such conduct would subject an attorney to discipline. The court explained that while “‘[u]nder some circumstances it might be difficult to determine precisely the point at which forceful, aggressive trial advocacy crosses the line into the forbidden territory of an ethical violation,’” Vincenti’s conduct, in both cases, clearly crossed that line.

Both of these cases involved extreme behavior issues, attorneys who were on some level “out of control.” And both reflect a desire to address professionalism issues that were underlying the designated offense of engaging in conduct prejudicial to the administration of justice. Clearly, these are attorneys who were unlikely to behave, no matter what rules were in place. But, in terms of helping attorneys whose unprofessional conduct does not rise to this level, it is worth considering whether enforceable standards, which would give clearer guidance as to the type of “civility” and “professionalism” required, would not be more beneficial and reach beyond cases with such extreme behavior. As Chief Justice Warren E. Burger observed:

Lawyers who know how to think but have not learned how to behave are a menace and a liability not an asset to the administration of justice. . . . I suggest the necessity for civility is relevant to lawyers because they are the living exemplars—and thus teachers—every day in every case and in every court; and their worst conduct will be emulated . . . more readily than their best.

143. Id. at 470–71; In re Vincenti (In re Vincenti I), 458 A.2d 1268, 1274–75 (N.J. 1983) (per curiam).
144. In re Vincenti II, 554 A.2d at 473, 476.
145. Id.
146. Id. at 475–76 (quoting In re Vincenti I, 458 A.2d at 1268).
147. See id. at 473; Attorney Grievance Comm’n v. Alison, 565 A.2d 660, 666–68 (Md. 1989).
148. See In re Vincenti II, 554 A.2d at 473–74; Alison, 565 A.2d at 668.
149. See Hubert, supra note 61, at 118–19, 121.
150. Id. at 113 (quoting Warren E. Burger).
C. A Parallel System Considered—the Military

Military attorneys, such as the Judge Advocate General Corps, are subject to the same type of Rules of Professional Conduct as civilian attorneys.\textsuperscript{151} In addition to the rules that guide the professional conduct of military attorneys, the Department of Defense has promulgated ethical requirements that apply to all service members, including attorneys.\textsuperscript{152} Thus, ethics and professionalism for the military community as a whole are addressed from the top down.\textsuperscript{153}

Military employees are directed to “carefully consider ethical values when making decisions as part of official duties.”\textsuperscript{154} “Primary Ethical Values” are enumerated: Truthfulness (which is required); straightforwardness; candor; integrity; loyalty; accountability (“includ[ing] avoiding even the appearance of impropriety”); fairness; caring; respect; promise keeping; responsible citizenship; and the pursuit of excellence.\textsuperscript{155} The Joint Ethics Regulation then provides that “job-related decisions . . . should be preceded by a consideration of ethical ramifications,”\textsuperscript{156} and a framework for an ethical decision-making plan is offered.\textsuperscript{157} Part of the ethical decision-making plan provides that a decision maker should “[b]e prepared to fall somewhat short of some goals for the sake of ethics and other considerations.”\textsuperscript{158} At the end of the day, The Joint Ethics Regulation indicates that unethical options should be eliminated.\textsuperscript{159} And, further, that the decision maker should commit to and implement the best ethical solution.\textsuperscript{160}

\textsuperscript{151} AIR FORCE RULES OF PROF’L CONDUCT introduction (2005).
\textsuperscript{153} See AIR FORCE RULES OF PROF’L CONDUCT introduction. Having said this, clearly attorneys and other divisions may have additional ethical and professional conduct rules, but the Department of Defense guidelines provide a baseline from which the entire military community must proceed. See DEP’T OF DEF., supra note 152, § 2-200, at 18. For example, the Air Force Rules of Professional Conduct are adapted from the ABA Model Rules and are, for the most part, simply modified to reflect the realities of practice before military courts. AIR FORCE RULES OF PROF’L CONDUCT introduction. The Introduction to the Air Force Rules indicates that: “Beyond establishing minimum standards, the Rules are designed to meet three important objectives. They provide workable guidance to Air Force lawyers, they are specific to the problems and needs of our practice, and they are accessible to Air Force lawyers assigned throughout the world.” \textit{Id.}
\textsuperscript{154} DEP’T OF DEF., supra note 152, § 12-400, at 118.
\textsuperscript{155} \textit{Id.} § 12-401, at 118–19.
\textsuperscript{156} \textit{Id.} § 12-500, at 119.
\textsuperscript{157} See \textit{id.} § 12-501, at 120–21.
\textsuperscript{158} \textit{Id.} § 12-501, at 120.
\textsuperscript{159} DEP’T OF DEF., supra note 152, § 12-501, at 120.
While a member of the Judge Advocate General Corps has familiar obligations under the Rules of Professional Conduct for that specific branch, the attorney also has ethical obligations as part of the larger military community. Those obligations stress the importance of ethics first. And, failure to comply with the requirements of The Joint Ethics Regulation can result in administrative, criminal and civil sanctions.

IV. DEFAMATION AND THE DOCTRINE OF ABSOLUTE IMMUNITY

Other than Louisiana and Georgia, every state has adopted a version of “absolute immunity for lawyers.” The Restatement of Torts Second provides that:

An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the

There may be solutions that seem to resolve the problem and reach the goal but which are clearly unethical. Remember that short term solutions are not worth sacrificing our commitment to ethics. The long term problems of unethical solutions will not be worth the short term advantages. Eliminate the unethical solutions.

Id.

160. See id. at 121.
161. AIR FORCE RULES OF PROF’L CONDUCT introduction (2005); DEPT OF DEF., supra note 152, § 1–406, at 10.
162. See AIR FORCE RULES OF PROF’L CONDUCT introduction.
163. DEPT OF DEF., supra note 152, § 1, at 105. Clearly, the military has an advantage over the ABA, the best comparator here, in that it has control over its employees. See About the American Bar Association, Am. B. Ass’n, http://www.americanbar.org/utility/about_the_aba.html (last visited Oct. 28, 2012). The ABA is a voluntary organization, so it would be impossible to adopt mandatory professionalism standards. See id. However, states could accomplish this much in the way Florida has chosen to do so. See R. REGULATING FLA. BAR 3-1.2 (2012).
164. This concept has been identified as the lawyer’s litigation privilege, the absolute litigation privilege, and absolute immunity. Anenson, supra note 12, at 917–18, 920, 928–29; Douglas R. Richmond, The Lawyer’s Litigation Privilege, 31 AM. J. TRIAL ADVOC. 281, 283 (2007). While there are underlying reasons why one term may be preferable to the other, those reasons are tangential to the discussion in this article. See id. Here, the author uses the terms absolute immunity and privilege interchangeably, referring to the doctrine as one of absolute immunity, but when necessary, discussing it in the appropriate context as a “privilege” as well. For a more complete discussion regarding the use of the terms of privilege and immunity as they relate to absolute immunity, see Douglas R. Richmond’s, The Lawyer’s Litigation Privilege.
165. Anenson, supra note 12, at 917 & n.6.
course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding. 166

“The privilege applies regardless of malice, bad faith, or any nefarious motives on the part of the lawyer, so long as the conduct complained of has some relation to the litigation.” 167 Generally, the immunity granted is absolute, but it may also be qualified under certain circumstances. 168

Such broad immunity from defamation is arguably necessary because there is a need to protect an attorney who is trying to protect his client’s interest—often under the most dire circumstances—from the specter of collateral litigation aimed at his own behavior during trial. 169 Imagine, for example, a criminal defense attorney is faced with a sympathetic victim, a dead toddler, and a defendant, the toddler’s mother, who has a history of telling

166. RESTATEMENT (SECOND) OF TORTS § 586 (1977); see also RESTATEMENT OF TORTS § 586 (1938) (“An attorney at law is absolutely privileged to publish false and defamatory matter of another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of a judicial proceeding in which he participates as counsel, if it has some relation thereto.”). Defamation is generally defined as a communication that “tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.” Paul T. Hayden, Reconsidering the Litigator’s Absolute Privilege to Defame, 54 OHIO ST. L.J. 985, 988 (1993). But see N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (requiring actual malice for public officials). Both Louisiana and Georgia offer qualified versions of absolute immunity. See GA. CODE ANN. § 51-5-7(7) (2012) (“Comments of counsel, fairly made, on circumstances of a case in which he or she is involved and on the conduct of parties in connection therewith” is deemed privileged.); Freeman v. Cooper, 414 So. 2d 355, 356, 359 (La. 1982) (citing Waldo v. Morrison, 58 So. 2d 210, 211 (La. 1952)) (proposing that “in order for privilege to apply, the statement must be material . . . with probable cause and without malice”).

167. Anenson, supra note 12, at 918. Louisiana has emphatically rejected the absolute nature of the privilege. Id. at 917 n.6; see also Freeman, 414 So. 2d at 359. The Supreme Court of Louisiana specifically held that such a policy of permitting malicious statements by counsel to be protected “‘has no place in the system of law prevailing in Louisiana.’” Freeman, 414 So. 2d at 359 (emphasis omitted) (quoting Sabine Tram Co. v. Jurgens, 79 So. 872, 873 (La. 1918)).

168. See Richmond, supra note 164, at 284; see also RESTATEMENT (SECOND) OF TORTS § 586 (1977). “A privilege is [considered] absolute when it cannot be [defeated] by a defendant’s malic[jous]” behavior but, if the privilege is qualified, then a plaintiff may defeat it and strip a defendant of immunity if the plaintiff can prove malicious conduct. Richmond, supra note 164, at 284.

lies; intricately involved lies.170 His client is accused of first-degree premeditated murder.171 She is portrayed in the media as cold and uncaring—a mother who “fail[ed] to report her daughter missing for [thirty-one] days.”172 There is no real physical evidence tying her to the death, it is mostly circumstantial, and there is no proof to show how the child died.173 The attorney needs to tell the jury something—needs to offer a theory of the case that explains the dead toddler, his client’s behavior, and his client’s innocence.174 These are significant obstacles in defending his client.175 Thus, the defense team crafts a theory of the case, and in doing so, draws others into the story accusing them of unspeakable crimes.176

In his opening statement, attorney Jose Baez offered the following explanation for Caylee Anthony’s death.177 Caylee disappeared on the morning of June 16, 2008, and was discovered by George Anthony, Casey Anthony’s father, in the family’s swimming pool.178 He yelled at Casey and told her she

171. Register of Actions, ORANGE COUNTY CLERK CTS., http://myclerk.orangeclerk.com/default.aspx (follow “Criminal and Traffic Case Records” hyperlink; then search “Last Name” for “Anthony” and “First Name” for “Casey” and “Middle Name” for “Marie;” then click “Search;” then follow “2008-CF-015606-A-O” hyperlink) (last visited October 28, 2012).
174. See The Detail That Could Doom Casey Anthony, supra note 172.
175. See id.
176. See Jessica Hopper & Ashleigh Banfield, Casey Anthony Trial: Defense Team Claims Caylee Anthony Drowned in Family Pool, ABC NEWS (May 24, 2011), http://abcnews.go.com/US/casey_anthony_trial/casey-anthony-trial-defense-claims-caylee-anthony-drowned/story?id=13674375#.UDvElaBQS7o. The author presumes that this is information provided to Baez by his client, and that he relied upon her information because confirming it would have been difficult under the circumstances if no documentation existed.
would be blamed. The problem, of course, was that Casey was a liar and George Anthony, while not without some suspicion, would deny this. Then Baez introduced his explanation for Casey’s behavior and why she was not culpable—she had been taught from an early age to lie. Baez told the jury, and the watching world, that “it all began when Casey was eight years old and her father came into her room and began to touch her inappropriately.” “She could be thirteen years old, have her father’s penis in her mouth, and then go to school and play with the other kids as if nothing ever happened.” Baez went so far as to accuse Casey’s brother of the same incestuous behavior, indicating that he was “follow[ing] in his father’s footsteps.” At no point did Baez have to prove the truth of these allegations, and at no point did he have to corroborate the story of Casey’s sexual abuse. The only response would come from George Anthony, who denied that Caylee drowned in the pool and denied that he sexually abused his daughter.

If Baez had been subject to civil liability, would he have taken the same approach? Could Baez risk making such allegations against a prosecution witness without being cloaked in the protection offered by absolute immunity? Perhaps not. But this scenario is the quintessential reason why such protection exists. At trial, at the moment when a lawyer must be unfettered in his ability to fully represent his client, this immunity cloaks his actions in order to realize complete, zealous representation. The argument is that the collateral damage it may cause is an acceptable byproduct that serves the

180. See id. at 7:48.
183. Id. at 5:00.
185. Id. at 3:00. Baez even dragged Cindy Anthony into the web of lies, claiming she deliberately lied to friends and family about Casey being pregnant. Id. at 0:47.
187. See Sunsentinelmobile, supra note 178, at 0:16, 1:10.
188. Hayden, supra note 166, at 1038.
larger purpose of administering justice. But, as was noted at the outset of this section, other jurisdictions have managed to tether this immunity in a manner that may strike a better balance between overzealous, disingenuous trial tactics and zealous advocacy that remains truthful to the best of its ability.

Those jurisdictions that recognize absolute immunity in its purest form will apply it to defamation claims and other tortious claims made against attorneys. In order to invoke absolute immunity, there must first be litigation or a proceeding pending, or the same must be “contemplated in good faith.” Second, the attorney needs to be participating as counsel. Third, the communication, or in some cases the conduct, needs to have “‘some relation to the proceeding’” or contemplated proceeding.

189. See id. at 1026, 1038.
190. See supra text accompanying notes 165–69. As a practical matter, requiring reasonable inquiry may not be a bad thing. Thinking through how to approach what may otherwise be defamatory statements while still preserving a client’s best interests is not impossible, as Louisiana has demonstrated.

191. Courts have extended this immunity beyond defamation to other types of torts, including tortious interference with business relationships, intentional infliction of emotional distress, negligence, conspiracy, and invasion of privacy. Richmond, supra note 164, at 296–97. Richmond notes that only malicious prosecution, fraud claims, and now potentially Fair Debt Collection Practices Act actions have been held to fall outside the privilege. Id. at 297. The Eleventh Circuit noted that the privilege, while initially developed to protect against liability for defamatory acts, has “been extended to cover all acts related to and occurring within judicial proceedings.” Jackson v. BellSouth Telecommunications, 372 F.3d 1250, 1274 (11th Cir. 2004) (citing Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co., 639 So. 2d 606, 607–08 (Fla. 1994)). Similarly, the court in Thornton v. Rhoden justified extending the privilege to other tortious acts, stating that “[t]he salutary purpose of the privilege should not be frustrated by putting a new label on the complaint.” Thornton v. Rhoden, 53 Cal. Rptr. 706, 719 (Ct. App. 1966). Hayden noted that the privilege has been applied to quasi-judicial proceedings as well, including “a board of funeral directors and embalmers . . . a school board [proceeding], . . . [and] a state labor commission.” Hayden, supra note 166, at 994.


193. Richmond, supra note 164, at 301.
194. Id. at 284.
195. Id. at 284, 301 (quoting RESTATEMENT (SECOND) OF TORTS § 586).
For the most part, the courts focus on a relevant nexus between the communication made and a pending or potential judicial or quasi-judicial proceeding. If the communication or conduct is too far removed from the official proceedings—either in time, content, or audience—then it may not be protected. For example, courts found that statements made by attorneys during a press conference are not protected by absolute immunity because “the news media [generally] lacks a sufficient relationship to [the] . . . proceeding[].” But, many courts permit statements made both pre-litigation and post-litigation to be immune, as long as the statements bear the requisite relation to the proceeding itself.


197. See Adams, 142 So. at 425; Green Acres Trust, 688 P.2d at 622, 624 (citing Asay v. Hallmark Cards, Inc., 594 F.2d 692, 697 (8th Cir. 1979)); Malmin, 864 P.2d at 182.


199. See Asay, 594 F.2d at 697; Bradley, 106 Cal. Rptr. at 724; Fridovich v. Fridovich, 598 So. 2d 65, 66 (Fla. 1992) (quoting Ange v. State, 123 So. 916, 917 (Fla. 1929)). Courts have limited immunity to some extent when dealing with pretrial investigations, such as the limitation placed upon private individuals who make statements to police or to a state attorney’s office before criminal charges are filed. Fridovich, 598 So. 2d at 69. But even in those instances, attorneys often still enjoy immunity, where it simply becomes qualified rather than absolute. See id. (noting immunity in the context of statements to police officers, and that the majority of states that have addressed this issue have embraced qualified immunity). But see Moore v. Bailey, 628 S.W.2d 431, 436 (Tenn. Ct. App. 1981) (quoting Spain v. Connolly, 606 S.W.2d 540, 543 (Tenn. Ct. App. 1980)). While it might seem that qualified immunity might limit protection, as a practical matter, “a plaintiff would [still] have to establish by a preponderance of the evidence that the defamatory statements were false and uttered with common
The touchstone for absolute immunity is the relationship between the communication, the audience to which it is made, and the proceeding to which it arguably attaches. In determining whether the “proceeding” requirement of the nexus is met, courts have often set the outer boundaries differently. For example, in Jackson v. Bellsouth Telecommunications, the Eleventh Circuit noted that both New Jersey and California would include settlement negotiations and agreements as part of a “proceeding,” but in at least one Florida case, the court only extended qualified immunity to pre-suit settlement discussions.

The problem with all of this, as courts have noted, is that, the further removed an immune statement is from the actual proceeding, the less protection is available to the party that is defamed or injured by tortious conduct. Jose Baez made statements about George Anthony in front of a judge, on the record, and Anthony was able to take the witness stand and respond to those allegations. The same cannot be said for statements made by an attorney in a pretrial investigation of a case, including interviews with potential witnesses. The harm identified is deemed acceptable because as many courts point out, the court still has the power to sanction attorneys, attorneys are still subject to disciplinary action, and criminal sanctions are also possi-
ble.\footnote{208} However, if the likelihood is minimal that these remedies will be invoked, how can a balance of rights be maintained? Once again, there is a gray zone—that intangible place between what can be done and what should be done—where the outer limits of absolute immunity intersect with the heightened standards of new professionalism requirements presenting a practical problem for lawyers as they try to discern how to reconcile these conflicting interests.

V. Absolute Immunity At Odds With New Professionalism—A Case Study

\textit{I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law.}

\textit{....}

\textit{I will abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged.}\footnote{209}

The protection of absolute immunity will likely always be available to protect attorneys from civil liability.\footnote{210} And it is unlikely that an attorney will be disciplined for the same conduct under the rules of professional responsibility for defamation alone.\footnote{211} The question becomes, however, how to

\begin{footnotesize}

\footnote{209. Oath of Admission to The Florida Bar, supra note 75 (emphasis added).}

\footnote{210. See Anenson, supra note 12, at 918–20.}

\footnote{211. See, e.g., DelMonico v. Traynor, 50 So. 3d 4, 7–8 (Fla. 4th Dist. Ct. App.) (citing Levin, 639 So. 2d at 608; Fernandez v. Haber & Ganguzza, LLP, 30 So. 3d 644, 647 (Fla. 3d

\end{footnotesize}
reconcile this common law protection, and the practices associated with it, with a focus shifting to enforcing professionalism. Will this shift mean that state bars and courts will begin to do what they have apparently been unwilling to do in this context: Impose disciplinary consequences for attorneys who go too far even if the law imposes no comparable consequence and instead affirmatively permits the behavior?

The Supreme Court of Florida recently heard a case, which serves as a perfect example of when an attorney’s otherwise permissible and immune conduct may exceed the standards of professionalism. The case of *DelMonico v. Traynor* offers a glimpse of how an attorney’s conduct went too far, but no mechanism was available to reach behind the cloak of immunity to correct clearly unprofessional actions.

Daniel DelMonico, the owner of MYD Marine Distributor, sued Donovan Marine and Tony Crespo, for defamation alleging that Crespo told others that DelMonico stole business from Donovan by supplying prostitutes to prospective clients. Arthur Traynor, an experienced litigator, was hired to defend Donovan Marine. During his pre-trial investigation, Traynor spoke to several potential witnesses about the suit, including two of DelMonico’s ex-wives, a former employee, and “principals of other marine services companies.”

According to DelMonico’s defamation complaint against Traynor, Traynor had advised the potential witnesses that DelMonico used prostitutes to get business.

Specifically, DelMonico alleged that Traynor did the following: 1) Traynor told one of DelMonico’s ex-wives that DelMonico took business “away from Donovan by enticing [Donovan’s] purchasing agent with prostitutes;” 2) Traynor told another ex-wife “that DelMonico was being prosecuted for using prostitution to get business;” 3) Traynor contacted one of DelMonico’s former employees and told “him that DelMonico’s method to take an account was to supply a prostitute to the owner.” Traynor then “encour-
aged the . . . employee to provide additional examples of DelMonico’s ‘un-
ethical business practices;’” 4) Traynor contacted a former business owner
and told him “that DelMonico was ‘being prosecuted for prostitution;’” and
5) Traynor “contacted principals of other marine services companies” and
conveyed to them that DelMonico was being prosecuted “for procuring pros-
titutes and illegal business dealings,” further representing to these potential
witnesses that he was part of the prosecution.220

Traynor sought summary judgment in the defamation case based on ab-
solute immunity because all of the communications with the potential wit-
nesses were in furtherance of his defense of his client during pending litiga-
tion.221 DelMonico argued that absolute immunity was inapplicable because
developing a witness for litigation was not encompassed with the concept of
“in the course of judicial proceedings.”222

The trial court found that absolute immunity attached to Traynor’s
statements and that DelMonico could not maintain a civil cause of action for
defamation or tortious interference based on those statements as a matter of
law.223 The trial court, relying on the Supreme Court of Florida’s decision in
Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire
Insurance Co.,224 held that absolute immunity reached interviews with poten-
tial witnesses in a pending case.225

The Fourth District Court of Appeal agreed with the trial court and held
that absolute immunity applied because the statements complained of “bore
’some relation’ to the proceeding” and were made “while [Traynor] was act-
ing as defense counsel.”226 And, as many courts before it have done, the

220. Id.
221. See id.
222. Oral Argument, supra note 57, at 9:54, 17:08 (discussing Levin, Middlebrooks, Ma-
223. See DelMonico, 50 So. 3d at 5–6.
224. 639 So. 2d 606 (Fla. 1994).
225. DelMonico, 50 So. 3d at 7 (citing Levin, 639 So. 2d at 608).
226. Id. at 7 (quoting Levin, 639 So. 2d at 608). The appellate court clarified that absolute
immunity extended to interviews of potential witnesses connected to pending litigation. Id.
(citing Stucchio v. Tincher, 726 So. 2d 372, 373–75 (Fla. 5th Dist. Ct. App. 1999)). The court
also noted that other jurisdictions had come to similar conclusions, and in some instances,
gone even further, finding that the doctrine applies to statements made before suit is even
initiated. Id. at 7–8 (citing Jackson v. Bellsouth Telecommns., 372 F.3d 1250, 1276 (11th Cir.
2004); Pettitt v. Levy, 104 Cal. Rptr. 650, 654 (Ct. App. 1972); Jones v. Coward, 666 S.E.2d
Pratt v. Nelson, 164 P.3d 366, 376 (Utah 2007)).
court noted that “‘[t]here could be ‘discipline of the courts, the bar association, and the state’ if there was misconduct.’”

The Supreme Court of Florida heard oral arguments in this matter on a Petition for Writ of Certiorari after the Fourth District Court of Appeals affirmed a grant of summary judgment in favor of Traynor. The case remains pending before the Supreme Court of Florida.

While the court in DelMonico focused on the application of the law and the reach of absolute immunity, there is another underlying question that remains, one that speaks directly to professionalism. Did Traynor need to employ these methods to appropriately represent his client? In other words, just because he could say these things and avoid civil liability, does that mean he should have or that there should be no consequences for his decision? If you accept the balancing test offered as a rationale for absolute immunity, there should nevertheless be some consequence for behavior that is unprofessional. Inasmuch as such behavior is rarely addressed through disciplinary proceedings, don’t the new professionalism standards present an opportunity to rectify that oversight? Indeed, there is a strong argument that the proposed professionalism standards in Florida will require action.

From Traynor’s perspective, is it fair to second guess his decisions and strategy in preparing for his client’s defense? Is it fair to subject him to discipline? The answer here has to be yes because the argument for permitting such far-reaching immunity is that the same behavior is kept in check by the...
consequences constantly enumerated by the courts, namely, inherent power of the trial courts, bar discipline, and even procedural rules, such as Federal Rule of Civil Procedure 11.232

VI. HOW CAN THE ATTORNEY’S OBLIGATIONS TO HIS CLIENT AND THE ENFORCEMENT OF NEW PROFESSIONALISM STANDARDS BE RECONCILED?

Enforcing professionalism is yet another way that improper conduct is addressed by the self-regulating legal profession. Inherently, these standards stand for the proposition that certain types of attorney conduct are subject to a heightened level of regulation and scrutiny—including honesty, fair dealing, and courtesy. In and of themselves, they are laudable goals that should be given form to move the entire legal community forward to a better place and better clarify expectations—professional and otherwise—for the legal community.

The problem, however, is that these same provisions create a tension between what a lawyer can do, and what a lawyer should do. Absolute immunity provides a perfect example of this tension.233 In effect, “the privilege’s . . . immunization [of] lawyer conduct is at odds with many other legal provisions that condemn the very same conduct.”234

In Traynor’s case, clearly he did not have to convey to any potential witnesses that DelMonico was being prosecuted for prostitution.235 If this were true, then Traynor would have independent verification of that fact from another source, such as a police investigation, a police report, or other

232. Hayden, supra note 166, at 1037–38; Ronald E. Mallen & James A. Roberts, The Liability of a Litigation Attorney to a Party Opponent, 14 WILIAMETTE L. REV. 387, 393 (1977–1978). Federal Rule of Civil Procedure 11(b) provides that “[b]y presenting . . . a pleading, written motion, or other paper [to the court]—whether by signing, filing, submitting, or later advocating it—an attorney . . . certifies that to the best of the person’s knowledge, information, and belief,” after reasonable inquiry, “it is not being presented for [an] improper purpose;” there are no frivolous legal claims and facts, contentions, or denials have evidentiary support. Fed. R. CIV. P. 11(b). This rule has been enforced in the federal courts when an attorney has filed a factually deficient pleading and it does not appear justice has ground to a halt. Robeson Def. Comm. v. Britt (In re Kunstler), 914 F.2d 505, 514–15, 525 (4th Cir. 1990); Coates v. United Parcel Servs., 933 F. Supp. 497, 499–500 (D. Md. 1996). Surely, an attorney could be held to a comparable standard of reasonable inquiry in matters where defamation may be a factor without significant repercussions to absolute immunity if the only sanctions were disciplinary in nature. See, e.g., In re Graham, 453 N.W.2d 313, 322 (Minn. 1990) (per curiam) (citing In re Terry, 394 N.E.2d 94, 95 (Ind. 1979) (per curiam)).

233. Hayden, supra note 166, at 1037.

234. Id.

235. See DelMonico v. Traynor, 50 So. 3d 4, 6 (Fla. 4th Dist. Ct. App.), review granted, 47 So. 3d 1287 (Fla. 2010).
official source. Traynor also should not have represented or permitted the impression that he was involved in the prosecution.236 Not only does this run afoul of the standards of professional conduct, but it arguably created a different dynamic when he was interviewing presumably unrepresented lay witnesses.237

It is easy to imagine that Traynor could have obtained similar results by simply telling each potential witness that DelMonico was suing Crespo and Donovan for telling others he was using prostitutes to gain business.238 Traynor could also have asked the witnesses if they were aware of DelMonico’s business practices.239 If Traynor determined the witnesses knew nothing, he need not have conveyed further information about the alleged use of prostitutes. And, if he was unsure, Traynor could have chosen to depose those witnesses affording DelMonico and his counsel an opportunity to participate in the process.240

Regardless of what Traynor could or should have done, the bigger question is whether Traynor should be subject to disciplinary sanctions for his unprofessional conduct even if what he did was otherwise protected by absolute immunity and, perhaps, not even in violation of the rules of professional conduct. Courts that are presented with these cases in the context of civil liability raise the issue of enforcement and balance,241 but it does not appear that they act even when directly confronted with an attorney’s unprofessional behavior. If professionalism becomes enforceable, then the new question will be whether an attorney’s behavior was sufficiently substantial or repeated to necessitate discipline, and how discipline should be imposed. There is a need for zealous representation, and there is a need to thoroughly vet potential witnesses in a pending case.242 But when does it cross the line, and how do you regulate those judgment calls? Such judgment calls are clearly made in the moment. While it would be difficult to fashion a bright line rule for this sort of conduct, clearer guidance would be helpful.

The treatment of another type of immunity—from defamation—in disciplinary cases may offer some insight into how to fashion a rule for discipli-

236.  See id.
237.  MODEL RULES OF PROF’L CONDUCT R. 8.4(c) (2012); see DelMonico, 50 So. 3d at 12 (Warner, J., dissenting).
238.  See DelMonico, 50 So. 3d at 6 (majority opinion).
239.  See id.
240.  Id. at 12 (Warner, J., dissenting).
242.  See Levin, 639 So. 2d at 608.
nary proceedings that will balance the current application of absolute immunity with newly enforceable professionalism standards.\textsuperscript{243}

In \textit{In re Graham},\textsuperscript{244} Graham filed an action for injunction in federal court alleging that the County Attorney, Rathke, filed a criminal action against his client as retaliation against Graham.\textsuperscript{245} The Federal Magistrate, McNulty, found in favor of the County Attorney.\textsuperscript{246} Graham then sent a letter to the United States Attorney alleging that Rathke, Rathke’s attorney, another Federal Judge, Spellacy, and McNulty conspired to fix the result of the criminal action.\textsuperscript{247} Graham made the accusations of judicial misconduct public, so the Chief Judge of the Eighth Circuit reviewed Graham’s complaint and found no evidence that even suggested judicial misconduct.\textsuperscript{248}

Ultimately, a referee concluded that Graham’s statements regarding the integrity of the federal judge, the magistrate, and the county attorney were made without basis and fact, and with reckless disregard for their truth or falsity.\textsuperscript{249} The Supreme Court of Minnesota considered Graham’s claims of absolute immunity under the First Amendment and the Petition Clause.\textsuperscript{250} The court apparently considered the matter in this context because the defamatory statements were made about public officials—a judge, a magistrate, and a county attorney—and Graham was charged with violating Rule 8.2(a), Minnesota Rules of Professional Conduct.\textsuperscript{251}

The court found that First Amendment protection for an attorney’s criticism of judges’ integrity or conduct was limited and subject to an application of an objective standard to determine actual malice when related to attorney disciplinary proceedings, rather than the subjective standard generally ap-

\begin{itemize}
\item \textsuperscript{243} See, e.g., \textit{In re Graham}, 453 N.W.2d 313, 322 (Minn. 1990) (per curiam) (quoting \textit{In re Terry}, 394 N.E.2d 94, 95 (Ind. 1979) (per curiam)).
\item \textsuperscript{244} \textit{Id.}
\item \textsuperscript{245} \textit{Id.}
\item \textsuperscript{246} \textit{Id.}
\item \textsuperscript{247} \textit{Id.}
\item \textsuperscript{248} \textit{Id.}
\item \textsuperscript{249} \textit{Id.}
\item \textsuperscript{250} \textit{Id.}
\item \textsuperscript{251} \textit{Id.}
\end{itemize}
plied to actual malice in criminal or civil defamation actions.\textsuperscript{252} Other courts have come to a similar conclusion, finding that an objective standard is applicable under these circumstances.\textsuperscript{253}

In \textit{In re Graham}, an attorney’s immunity under the First Amendment was limited based on the nature of a disciplinary proceeding because the interests protected by “regular” legal proceedings for defamation and attorney disciplinary proceedings are not the same.\textsuperscript{254} The Supreme Court of Minnesota cited the distinction made by the Supreme Court of Indiana:

Defamation is a wrong directed against an individual and the remedy is a personal redress of this wrong. On the other hand, the

\textsuperscript{252} \textit{In re Graham}, 453 N.W.2d at 322. Normally, the First Amendment provides limited immunity from civil or criminal defamation when public officials are criticized for their official conduct. \textit{Id.} at 320 (citing \textit{N.Y. Times Co. v. Sullivan}, 376 U.S. 254, 279–80, 282–83 (1964); \textit{Garrison v. Louisiana}, 379 U.S. 64, 74–75 (1964)); \textit{see also} U.S. CONST. amend. I. Even if the statements made are false, “the public official cannot recover unless the statements [are] made with ‘actual malice,’” requiring “knowledge that the statements were false or made with reckless disregard [for] their truth or falsity.” \textit{In re Graham}, 453 N.W.2d at 320 (quoting \textit{N.Y. Times}, 376 U.S. at 279–80). The court did not, however, address whether Graham’s statements were protected by absolute immunity. \textit{See id.} at 319–20. Given the specific nature of the disciplinary complaint, and the fact that it deals with a special population of public officials with a specific rule of professional conduct connected thereto, absolute immunity was likely not an appropriate consideration. \textit{See id.}

\textsuperscript{253} \textit{U.S. Dist. Court v. Sandlin}, 12 F.3d 861, 867 (9th Cir. 1993); \textit{In re Green}, 11 P.3d 1078, 1084, 1086 n.7 (Colo. 2000) (per curiam) (en banc) (stating “the inquiry focuses on whether the attorney had a reasonable factual basis for making the statements” that the “judge was ‘drunk on the bench’” (quoting Standing Comm. on Discipline v. Yagman, 55 F.3d 1430, 1437, 1441 (9th Cir. 1995))); \textit{In re Cobb}, 838 N.E.2d 1197, 1212 (Mass. 2005) (noting a majority of states that have considered this question have expressed “the standard [a]s whether the attorney had an objectively reasonable basis for making the statements”); \textit{see also} \textit{Gentile v. State Bar of Nev.}, 501 U.S. 1030, 1071 (1991) (“[L]awyers in pending cases [are] subject to ethical restrictions on speech to which an ordinary citizen would not be” (citing \textit{In re Sawyer}, 360 U.S. 622, 646–47 (1959) (Stewart, J., concurring))). The Supreme Court also stated that lawyers in these circumstances “may be regulated under a less demanding standard than that established for regulation of” other protected speech under the First Amendment. \textit{Gentile}, 501 U.S. at 1074; \textit{see also} U.S. CONST. amend. I. While \textit{In re Green} focused on the application of First Amendment protection to an attorney’s opinions about a judge, which were conveyed to that judge, including the fact that the attorney believed the judge to be racist, the court also stated that it “neither condone[d] the tone of . . . [the] letters nor agree[d] with the conclusions . . . he drew.” \textit{In re Green}, 11 P.3d at 1086–87; \textit{see also} U.S. CONST. amend. I. It bears considering whether Green’s actions may have been subject to different treatment under enforceable professionalism standards instead of First Amendment defamation protection when only the tone and nature of his conduct might be at issue. \textit{See In re Green}, 11 P.3d at 1086–87; \textit{see also} U.S. CONST. amend. I.

\textsuperscript{254} \textit{See In re Graham}, 453 N.W.2d at 321–22 (quoting \textit{In re Terry}, 394 N.E.2d 94, 95 (Ind. 1979) (per curiam)); \textit{see also} U.S. CONST. amend. I.
Code of Professional Responsibility encompasses a much broader spectrum of protection. Professional misconduct, although it may directly affect an individual, is not punished for the benefit of the affected person; the wrong is against society as a whole, the preservation of a fair, impartial judicial system, and the system of justice as it has evolved for generations.255

While recognizing that the regulation of professional conduct has different goals, creating a way to balance those goals is slightly different than the justification usually given for permitting absolute immunity for civil liability.256 This becomes increasingly relevant when the conduct at issue is not a direct violation of the rules of professional conduct as it was in In re Graham.257 Where professionalism itself is enforceable, the courts should consider adopting a qualification of absolute immunity and not permitting the use of immunity unless an attorney can satisfy an objective standard that considers what a reasonable attorney would have done in the same circumstance. Similar to Louisiana’s application of the privilege, it could require that an attorney demonstrate the “statement [was] material . . . , made with probable cause, and [that it was, in fact, made] without malice.”258

Absolute immunity is not going away. While some federal rules and qualifications imposed upon such immunity have created limits, the reality is that attorneys will always have unfettered discretion to act in a manner that

255. See In re Graham, 453 N.W.2d at 322 (quoting In re Terry, 394 N.E.2d at 95). Interestingly, the Supreme Judicial Court of Massachusetts, in adopting an objective standard, agreed with the logic that application of the subjective standard to actual malice “would immunize all accusations, however reckless or irresponsible, from censure as long as the attorney uttering them did not actually entertain serious doubts as to their truth” and that such a system, without the check of an objective standard, would “permit an attorney . . . to challenge the integrity, and thereby the authority, of a judge presiding over a case elevat[ing] brazen and irresponsible conduct above competence and diligence, hallmarks of professional conduct.” In re Cobb, 838 N.E.2d at 1213–14 (quoting In re Holtzman, 577 N.E.2d 30, 34 (N.Y. 1991) (per curiam)).


257. See In re Graham, 453 N.W.2d at 314–15, 320 (citing Minn. Rules of Prof’l Condn R. 3.1, 8.2(a), 8.4(d) (2011)). The criticism of public officials and judges raises different concerns than defamation that may affect a party to a legal proceeding. See id. at 322. The former has a direct impact on the administration of justice and depending on whether such statements are made public, can have a much more far-reaching effect. See id. However, in balance, absolute immunity is designed for the benefit of the attorney to protect him from needless litigation so that he may do his job, which also impacts the administration of justice. Anenson, supra note 12, at 920.

258. Freeman v. Cooper, 414 So. 2d 355, 359 (La. 1982) (citing Waldo v. Morrison, 58 So. 2d 210, 211 (La. 1952)).
may be dishonest and harmful to a third party under certain circumstances.\textsuperscript{259} This has always been an accepted part of the advocacy system.\textsuperscript{260} However, as more and more states may consider adopting enforceable professionalism standards, perhaps this is a perfect time to shift the balance away from the broadest reading of absolute immunity, or at least start truly imposing the balance that is supposed to be imposed by discipline as an available remedy.

Professionalism, and the bench and the Bar’s demand for more, may offer a perfect opportunity to finally put some teeth in the sanctions available to curb and correct attorney behavior under these circumstances.\textsuperscript{261} It also offers a relatively low threat alternative, with due process, a diversionary program (in the case of Florida), and a chance to change attorney attitudes and behavior without hampering an attorney’s obligation to zealously represent a client. Given these limitations, plus the protection of an educated audience, it may be the perfect way to shape up the profession itself, giving a new spin to an old problem and, more importantly, sending a clear message to new attorneys about where the limits are for acceptable behavior. It may also serve as guidance for similar situations where what a lawyer could do conflicts with what a lawyer should do.

\begin{itemize}
\item \textsuperscript{259} See Anenson, \textit{supra} note 12, at 918–20; see also U.S. CONST. amend. I.
\item \textsuperscript{260} See Anenson, \textit{supra} note 12, at 918–19.
\item \textsuperscript{261} See Fla. Bar v. Barrett, 897 So. 2d 1269, 1273, 1277 (Fla. 2005) (per curiam); Hubert, \textit{supra} note 61, at 117; Blankenship, \textit{Putting ‘Teeth’ in Professionalism, supra} note 79.
\end{itemize}
VENTURING WHERE OTHERS HAVE FAILED WITH ANTI-CUBA LAW: FLORIDA FIGHTS THE CONSTITUTIONAL BATTLE MASSACHUSETTS LOST

RYAN McGLYNN*

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I. INTRODUCTION

In 1996, Massachusetts enacted a law banning the state government from conducting business with companies associated with the country of Burma. The law took aim at Burma based on the country’s human rights

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violations and forced labor issues. Less than five years after its enactment, the Supreme Court of the United States found the law unconstitutional, as it violated the Supremacy Clause. Namely, the Court found the law unconstitutional because of congressional intent to grant the President “discretion . . . to develop a comprehensive, multilateral strategy” in dealing with the government of Burma.

In 2012, Governor of Florida, Rick Scott, signed a bill amending a law very similar to the Burma law in Massachusetts, but instead taking aim at the nation of Cuba. Florida’s Cuba Amendment (“Cuba Amendment”) remains very controversial and generated international scrutiny even before it was passed. The Cuba Amendment has similar provisions to the Massachusetts Burma Law (“Massachusetts law”) and “prohibits the State of Florida from awarding public contracts in excess of one million dollars to companies who have ‘business operations’ in Cuba.” “‘Business operations’ [are] defined as ‘engaging in commerce in any form . . . .”’ A Brazilian construction conglomerate with billions of dollars hinging on the legal fate of the Cuba Amendment has already filed suit in federal court. A federal judge has issued a preliminary injunction against the law being enforced, allowing Odebrecht Construction, Inc. (“Odebrecht”) to resume work on projects in Mi-

2. HARRISON INST. FOR PUB. LAW, GEORGETOWN UNIV. LAW CENTER, DEFENDING THE MASSACHUSETTS BURMA LAW 3 (2000).
4. Crosby, 530 U.S. at 388.
8. Odebrecht Constr., Inc., 2012 WL 2524261, at *2 (quoting FLA. STAT. § 287.135(b)).
ami. The Cuba Amendment implicates many of the same constitutional problems that afflicted the Massachusetts law, and the federal court issuing the injunction has expressed serious doubts as to the Florida law’s validity.\(^{11}\)

The Cuba Amendment is not universally opposed, however, seeing that the law was approved by an almost unanimous majority of Florida’s Legislature and also received support from many Cuban-American lawmakers in Miami-Dade County,\(^{12}\) perhaps a sign of the almost fifty-year strife between the many Cuban exiles in Florida and Communist Cuba. Florida has a history of antagonism toward the rogue island nation, and has tried to enforce legislation like the Cuba Amendment in the past.\(^{13}\) However, courts in Florida have refused to uphold many of the anti-Cuba laws regardless of the political sensitivity surrounding the issue in the Sunshine State.\(^{14}\) The Cuba Amendment seems to be headed in the same direction.

This article will first discuss the Massachusetts law, including an analysis of the constitutional issues raised and the Supreme Court’s ruling.\(^ {15}\) The second section will provide a brief history of Florida’s relationship with Cuba regarding various anti-Cuba laws and bills from Florida.\(^ {16}\) This section will also note several federal laws directed at the nation of Cuba.\(^ {17}\) The final section will focus on the recently signed Cuba Amendment and any constitutional issues that go with it.\(^ {18}\) This section will also discuss recent litigation in federal court concerning the Cuba Amendment, compare and contrast the Massachusetts law with the Cuba Amendment, as well as discuss the reasoning of the Supreme Court decision that found the Massachusetts law unconstitutional.\(^ {19}\) This discussion will be in an attempt to predict a result, should

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12. See Mazzei, Fla.’s Trading Partners Warn of Backlash if Gov. Scott Signs New Anti-Cuba Legislation, supra note 6; see also Caputo & Mazzei, supra note 5.
15. See infra Part II.
17. See infra Part III.A.2.
18. See infra Part III.B.
19. See infra Part III.B.
the Cuba Amendment ascend to the Eleventh Circuit Court of Appeals and ultimately to the Supreme Court.

II. MASSACHUSETTS AND BURMA (MYANMAR)

Massachusetts has a history of economic boycotts.20 During the American Revolution, the colony of Massachusetts played a key role in “support[ing] the boycott of British goods,”21 Burma—which also gained its independence from Great Britain—maintained a parliamentary democracy from 1948 until 1962.22 From 1962 to 1988, the Burma Socialist Programme Party controlled the country and violence against demonstrators in the late 1980s continued into the 1990s.23 Massachusetts, and about twenty-two other states, enacted similar legislation.24 Although the Massachusetts law was the only one to make it to the Supreme Court, its invalidation by the Court meant the same for all similar state laws relating to Burma at the time.25

A. The Massachusetts Law

1. History

Despite being found unconstitutional, the Massachusetts law was not without good cause, seeing that Burma’s violations of human rights and systematic political oppression were especially egregious during the late twentieth century.26 According to one study, “forced labor account[ed] for [seven percent] of [the country]’s economy” and almost six million people were forced to work against their will during the 1990s.27 Burma’s military also engaged in the practice of portering, whereby porters were required to advance ahead of soldiers in an attempt to detonate land mines or shield soldiers from enemy fire.28 Millions were also relocated against their will and put in concentration camps where conditions were abysmal.29

20. See HARRISON INST. FOR PUB. LAW, supra note 2, at 2.
21. Id.
23. Id. at 1298–1300.
24. Id. at 1295–96.
25. Id. at 1296.
26. See id. at 1296, 1299–1300.
27. HARRISON INST. FOR PUB. LAW, supra note 2, at 3.
28. Id.
29. Id.
The call for states and governments to take action came initially from within Burma when Daw Aung San Suu Kyi, a political activist and winner of the Nobel Peace Prize, encouraged bans on economic investment in the country.\textsuperscript{30} Suu Kyi famously said, in 1996, “[p]rofits from business enterprises will merely go towards enriching a small, already very privileged elite. Companies [that trade in Burma] only serve to prolong the agony of my country by encouraging the present military regime to persevere in its intrinsigence.”\textsuperscript{31} The Massachusetts Legislature decided to heed this calling.\textsuperscript{32}

2. Implementation and Federal Competition

Initially, the anti-Burma law was successful in that it seemed to effectively draw American companies away from the troubled country.\textsuperscript{33} Broadly stated, the Massachusetts law “generally bar[red] state entities from buying goods or services from any person—defined to include a business organization—identified on a ‘restricted purchase list’ of those doing business with Burma.”\textsuperscript{34} The restricted purchase list had about 346 companies by the time the initial lawsuit was filed.\textsuperscript{35} The law made exceptions for persons or businesses in Burma related to the press, suppliers of telecommunications goods, and medical or health suppliers.\textsuperscript{36} Under the law, all state contracts were void if entered into with a company listed as having contact with Burma.\textsuperscript{37} The law applied to “companies already in Burma” as well as “existing contracts or contracts that may be renewed.”\textsuperscript{38}

The same year the Massachusetts law was passed, Congress enacted a federal statute that looked very similar.\textsuperscript{39} The many overlaps between the two laws were largely responsible for the Massachusetts law being found

\textsuperscript{30} See Khorasanee, supra note 22, at 1299–1300.

\textsuperscript{31} HARRISON INST. FOR PUB. LAW, supra note 2, at 3.

\textsuperscript{32} Khorasanee, supra note 22, at 1300.

\textsuperscript{33} Id. at 1301.


\textsuperscript{35} Khorasanee, supra note 22, at 1301.

\textsuperscript{36} Crosby, 530 U.S. at 367 (citing Ch. 130, 1996 MASS. ACTS at 241–42).

\textsuperscript{37} Khorasanee, supra note 22, at 1301; see also Ch. 130, 1996 MASS. ACTS at 242.

\textsuperscript{38} Ch. 130, 1996 MASS. ACTS at 243; Khorasanee, supra note 22, at 1303.

\textsuperscript{39} Khorasanee, supra note 22, at 1302; see also Foreign Operations, Export Financing, and Related Programs Appropriations Act, Pub. L. No. 104-208, § 570(a)–(e), 110 Stat. 3009, 3009-166 to 3009-167 (1997); Ch. 130, 1996 MASS. ACTS at 243.
unconstitutional under the Supremacy Clause. The federal statute “restricted aid to the government of Burma, . . . required federal representatives of ‘international financial institutions’ to vote against proposed financial assistance to Burma, . . . prohibited the issuance of visas to Burmese government officials, . . . [and] gave discretion to the Executive Office in determining when the sanctions may be lifted.” The main difference between the federal statute and the Massachusetts law was that the federal statute primarily targeted new money going to Burma and not necessarily contracts in effect at the time. The federal statute took on “a more political [and] less economic” tone, directing the President to “develop ‘a comprehensive, multilateral strategy to . . . improve human rights . . . in Burma.’” The President was also to work with neighboring countries and groups such as the Association of Southeast Asian Nations (ASEAN) in order to work towards a solution. This federal law would become the topic of several lawsuits brought against Massachusetts on constitutional grounds.

B. Court Decisions

The Massachusetts state law resulted in a series of court opinions, starting in federal court in Massachusetts and ending in the Supreme Court. The following section will provide a general discussion of these cases.

1. United States District Court, District of Massachusetts

The legal action against the Massachusetts law occurred in the United States District Court for the District of Massachusetts. The suit started when the National Foreign Trade Council (NFTC) sued the two state offi-

40. Crosby, 530 U.S. at 388. Compare § 570(a)–(e), 110 Stat. at 3009-166 to 3009-167, with Ch. 130, 1996 MASS. ACTS at 239–43.
41. Khorasanee, supra note 22, at 1302; see also § 570(a)–(e), 110 Stat. at 3009-166 to 3009-167.
42. Khorasanee, supra note 22, at 1303. Compare § 570(a)–(e), 110 Stat. at 3009-166 to 3009-167, with Ch. 130, 1996 MASS. ACTS at 243.
43. Khorasanee, supra note 22, at 1303.
44. Crosby, 530 U.S. at 369 (quoting § 570(c), 110 Stat. at 3009-166).
45. Khorasanee, supra note 22, at 1303.
48. See Baker, 26 F. Supp. 2d at 289.
cials charged with administering the Massachusetts law at issue, however, this article will refer to the defendant as the State of Massachusetts. In its opinion, the court noted that there were amicus briefs filed in support of the NFTC that came from around the world.

Initially, Massachusetts defended the law on the basis that a state can intrude into foreign affairs, so long as the result is indirect. Massachusetts also argued that the law did not create a direct contact between the state and the Nation of Myanmar [and that] important state interests embodied in the First and Tenth Amendments justify the statute; and . . . the foreign affairs’ doctrine is itself “vague,” [and therefore] the court should leave to the legislative branch the issue of whether to invalidate the Massachusetts . . . [l]aw and similar state procurement statutes.

While trying to analogize the Massachusetts law with other state statutes that were sustained, the state cited case law from federal courts that held in that manner. However, the district court distinguished these cases in that the statutes involved, unlike the Massachusetts law, “did not single out a particular foreign country for particular treatment.” The district court also noted that not all “Buy American” statutes are necessarily constitutional. The court acknowledged that the Massachusetts law did not fashion any direct contact with Burma, but that this was irrelevant for purposes of the law’s constitutionality. Referring to the Supreme Court of the United

49. Id.
50. Id. at 291.
51. Id.
52. Id.
53. Baker, 26 F. Supp. 2d at 291. Massachusetts cited cases from several United States district courts upholding state statutes, such as one requiring that the state governments purchase products made in the United States for construction, another requiring a city to cease investing in South Africa, as well as other “Buy American” statutes. Id. at 291–92 (citing Trojan Techs., Inc. v. Pennsylvania, 742 F. Supp. 900, 901, 903 (M.D. Pa. 1990); Bd. of Trs. of Emps.’ Ret. Sys. v. Mayor & City Council of Balt., 562 A.2d 720, 723, 757 (Md. 1989); K.S.B. Technical Sales Corp. v. N. Jersey Dist. Water Supply Comm’n, 381 A.2d 774, 789 (N.J. 1977)).
54. Id. at 292.
55. Id. (citing Bethlehem Steel Corp. v. Bd. of Comm’rs of Dep’t of the Water & Power, 80 Cal. Rptr. 800, 802–03 (Ct. App. 1969)). “Buy American” statutes are laws usually requiring that states only purchase materials originating or produced in the United States or that states only contract with companies that purchase and use United States materials. See id.
States’ decision in Zschernig v. Miller—also cited in the most recent opinion regarding Florida’s Cuba Amendment mentioned later—the district court explained that only a substantive impact is necessary. The court also stated the principle that the nobility of the state law bears no effect on foreign affairs infringement analysis.

The NFTC also argued that the Massachusetts law was preempted and violated the Foreign Commerce Clause. However, the district court refused to address either of these issues directly, as neither would have any consequential effect on the court’s ultimate decision. The district court did note that in order for a state law to be preempted by federal legislation, there must be intent on behalf of Congress to regulate in the area that the state law affects. The court only stated that because the NFTC argued that Congress impliedly intended to exercise its authority in the area, the NFTC had a higher burden than if arguing express preemption. The court also refused to address the Foreign Commerce Clause issue and the possible market participant exception, and finally held that the law was unconstitutional because of its “infringement [on the] federal government’s . . . foreign affairs” authority.

2. First Circuit Court of Appeals Decision

In National Foreign Trade Council v. Natsios, the First Circuit Court of Appeals affirmed the district court’s decision to hold for the law’s challengers. The NFTC—the plaintiff nonprofit organization comprised of companies involved in international business—filed suit in the federal trial court of Massachusetts and was granted summary judgment in its initial suit against Massachusetts.

60. Id. (citing United States v. Pink, 315 U.S. 203, 233–34 (1942); United States v. Belmont, 301 U.S. 324, 331 (1937)).
61. Id. at 293; see also U.S. CONST. art. I, § 8, cl. 3; Japan Line, Ltd. v. Cnty. of L.A., 441 U.S. 434, 449 (1979).
63. Id. (citing Philip Morris Inc. v. Harshbarger, 122 F.3d 58, 67 (1st Cir. 1997)).
64. Id. at 293 (citing Philip Morris Inc., 122 F.3d at 79).
65. Id.
68. Natsios, 181 F.3d at 48–49.
Upon granting review, the First Circuit first analyzed the Massachusetts law and its constitutionality under the federal government’s foreign affairs power, which was the basis for the lower federal court finding for the NFTC. The court rejected many of the state’s arguments, including that the First and Tenth Amendments protected the law. Generally, the court found that foreign affairs are to be handled by the federal government and that the Massachusetts Burma law was in violation of this principle of federalism. Namely, that the state law crossed a line into what should be the federal government’s jurisdiction of power by passing a law dealing with a foreign country in that the state law had more than an “‘incidental or indirect effect in [that] foreign countr[y].”

The second area of the court’s focus was on Congress’s Commerce Clause power. The court rejected the state’s argument that the Burma law was a constitutional exercise of power under the market participant exception of the Commerce Clause. The First Circuit reasoned that the state was regulating because it was “imposing on companies with which it does business conditions that applied to activities not even remotely connected to such companies’ interactions with Massachusetts.” The court also refused to rule that the market participant exception even applied to the Foreign Commerce Clause, as the Supreme Court has not yet resolved this issue.

The third and final analysis dealt with whether the Massachusetts law was preempted by the federal statute. The court rejected the argument that the law was impliedly authorized and not preempted simply because Congress knew of the state law and never specifically preempted it. Instead, the court found that federal sanctions preempted the state law.

69. Id. at 50–52 (construing Zschernig v. Miller, 389 U.S. 429 (1968)).
70. Id. at 51 (quoting Baker, 26 F. Supp. 2d at 291); see also Zschernig, 389 U.S. at 434–35.
71. Natsios, 181 F.3d at 60–61.
72. Id. at 49, 77 (citing Missouri v. Holland, 252 U.S. 416, 434 (1920)).
73. Id. at 52 (quoting Clark v. Allen, 331 U.S. 503, 517 (1947)).
76. Natsios, 181 F.3d at 63.
77. Id. at 65.
78. See id. at 71.
79. Id.
80. Id. at 77.
Preemption will be more easily found where states legislate in areas traditionally reserved to the federal government, and in particular where state laws touch on foreign affairs. The test which should be applied is set forth in *Hines* . . . [holding] that “[n]o state can add to or take from the force and effect of [a] treaty or statute.”

Therefore, because Massachusetts enacted a law regulating trade with Burma at the same time that federal sanctions did the same, but to a lesser extent, the state law was preempted. Perhaps, what is most notable about the First Circuit’s decision is its breadth, when compared to the narrow district court and later Supreme Court decisions. Ultimately, the court refused to uphold the law under the principle that it was the federal government’s, and not Massachusetts’s job to dictate the nation’s foreign policy agenda.

3. Supreme Court of the United States Decision

In 2000, the Massachusetts law advanced to the Supreme Court in *Crosby v. National Foreign Trade Council*, where the Court unanimously held to strike it down. Massachusetts appealed the First Circuit’s decision on the three grounds the court considered. The Supreme Court granted certiorari to clarify legal issues afflicting several other states as well.

Justice David Souter began his opinion by stating a maxim of American constitutionalism: “Congress has the power to preempt state law. Even without an express provision for preemption, we have found that state law must yield to a congressional [a]ct . . . .” Justice Souter continued by noting that this primarily occurs when Congress intends to “occupy the field” or when it is impossible for actors to comply with a federal statute and a state

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81. *Natsios*, 181 F.3d at 73 (alterations in original) (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 63 (1941)).
82. *Id.* at 75.
84. *Natsios*, 181 F.3d at 77.
85. *Id.* at 77–72, 388.
86. *Id.* at 77–72.
87. *Id.* at 771–72.
88. *Id.* at 371–72.
89. *Id.* at 372 (citations omitted).
law concurrently.\footnote{Crosby, 530 U.S. at 372–73 (citing California v. Arc Am. Corp., 490 U.S. 93, 101 (1989); Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963)).} With the Massachusetts law in place, a barrier was placed before the federal government and its goals.\footnote{See Khorasanee, supra note 22, at 1307.} In fact, the Court’s decision to strike down the Massachusetts law rested solely on the basis that the state law was preempted.\footnote{Branch P. Denning & Jack H. McCall, International Decisions: Crosby v. National Foreign Trade Council, 94 AM. J. INT’L L. 750, 750–51 (2000).} Specifically, the Massachusetts law adversely affected the President’s discretion, went further in its terms than the federal law, and contrasted with Congress’s intent for the President to be diplomatic in dealing with Burma.\footnote{Crosby, 530 U.S. at 373–74; Denning & McCall, supra note 92, at 752.}

Justice Souter first analyzed the degree of discretion that the federal law afforded the President.\footnote{Crosby, 530 U.S. at 374; see Foreign Operations, Export Financing, and Related Programs Appropriations Act, Pub. L. No. 104-208, § 570(a), (e), 110 Stat. 3009, 3009-166 to 3009-167 (1997).} The federal law gave the President broad discretion to end any United States sanctions on Burma if and when human rights and political reforms took place there.\footnote{Crosby, 530 U.S. at 374; see § 570(a), (e), 110 Stat. at 3009-166 to 3009-167.} Most importantly in this regard, the Court noted Congress’s intent that the President may “waive, temporarily or permanently, any sanction.”\footnote{Id. at 375 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).} The principle that the President has the most latitude to maneuver when Congress explicitly authorizes his actions has been firmly established by the Court.\footnote{Id. at 376.} By way of the federal law, Congress gave the President the “authority not merely to make a political statement but to achieve a political result, and the fullness of his authority shows the importance in the congressional mind of reaching that result.”\footnote{See id. Compare Act of June 25, 1996, ch. 130, 1996 MASS. ACTS 239, 241 (codified at MASS. GEN. LAWS §§ 7:22G–7:22M, 40 F 1/2 (1997)), declared unconstitutional by Crosby v. Nat’l Foreign Trade Council, 530 U.S. 363 (2000), with § 570(c), 110 Stat. at 3009-166.} The Massachusetts law would act as a roadblock by implementing state sanctions against Burma, different from those imposed by the federal government.\footnote{Crosby, 530 U.S. at 376–77 (citing Ch. 130, 1996 MASS. ACTS at 242).} Perhaps most notably, the Massachusetts law did not provide for a termination provision unlike the federal law.\footnote{Id. at 377.} Therefore, enforcement of the Massachusetts law would effectively diminish the President’s discretion as intended by Congress.\footnote{Id. at 377.}
Next, the Court focused on the conflicting scopes of the two laws. Justice Souter noted that the federal law was limited to “United States persons, . . . immediate sanctions, . . . [only] ‘new investment’ . . . and [did not apply to] . . . contracts to sell or purchase goods, services, or technology.”

On the contrary, the Massachusetts law applied to “individuals and conduct that Congress . . . [specifically] exempted or excluded from sanctions.” However, it should be noted that the Massachusetts law operated by employing indirect economic sanctions through limiting business contracts while the federal law’s implementation was more direct by way of the executive. Justice Souter noted not only that the Massachusetts law was broader than the federal law, but also emphasized how broad in fact it was, seeing that foreign companies would be subjected to the Massachusetts law’s provisions. Because of the Massachusetts law’s broad provisions and the inability for many entities to comply with the federal law at the same time, the federal law preempted the Massachusetts law.

Lastly, the Court reasoned that the Massachusetts law was preempted by federal legislation because of its effect on “the President’s capacity . . . for effective diplomacy.” Congress not only intended that the President have discretion in dealing with Burma, but also that he act as the sole representative of the United States on the world stage in dealing with Burma. No where is there evidence that Congress intended that the President’s voice be “obscured by state or local action.” The President’s inability to work undisturbed with other countries was evidenced when many United States allies formally protested the Massachusetts law.

102. See id. at 377–78.
104. Id. at 378.
105. Crosby, 530 U.S. at 378; see Ch. 130, 1996 MASS. ACTS at 241.
106. Crosby, 530 U.S. at 379; Ch. 130, 1996 MASS. ACTS at 239–241; § 570(b), (f)(2), 110 Stat. at 3009-166 to 3009-167.
108. Id. at 381.
109. See id. at 380–81 (citing U.S. CONST. art. II, § 2, cl. 2; U.S. CONST. art. II, § 3; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952)).
110. Id. at 381.
The most notable of these were the European Union (EU), members of ASEAN, and Japan.\textsuperscript{112} Japan and the EU also filed formal complaints with the World Trade Organization, although these complaints were dropped after action in the United States District Court.\textsuperscript{113} Actions taken by these allies made it clear that the Massachusetts law could not exist side by side with the Federal Act.\textsuperscript{114} “In this case, repeated representations by the Executive Branch supported by formal diplomatic protests and concrete disputes are more than sufficient to demonstrate that the state Act stands in the way of Congress’s diplomatic objectives.”\textsuperscript{115} In his conclusion, Justice Souter noted that failure to expressly state that a federal law is preempting state law does not mean that preemption cannot be implied.\textsuperscript{116}

It has been noted that the Court’s opinion was very narrow, especially in comparison to the district court’s opinion.\textsuperscript{117} The fact that the opinion can be read so narrowly has led some to argue that states are free to enact legislation similar to the Massachusetts law so long as there is no congressional act imposing similar or competing sanctions.\textsuperscript{118} It has also been said that the Crosby decision is unlikely to prevent other states from passing similar laws,\textsuperscript{119} and the recent amendment in the State of Florida is evidence of this proposition.\textsuperscript{120}

### III. Florida

#### A. Florida and Cuba

Florida and the nation of Cuba have had a contentious relationship evidenced by the Florida Legislature’s zeal for enacting many laws affecting Cuba.

\begin{itemize}
\item \textsuperscript{112} Crosby, 530 U.S. at 382 (citing Nat’l Foreign Trade Council v. Natsios, 181 F.3d 38, 47 (1st Cir.), cert. granted, 528 U.S. 1018 (1999)).
\item \textsuperscript{113} Id. at 383 n.19; Natsios, 181 F.3d at 47.
\item \textsuperscript{114} See Crosby, 530 U.S. at 383 (citing Brief for the European Communities and Their Member States et al. as Amici Curiae in Support of Respondent, supra note 111, at *7).
\item \textsuperscript{115} Id. at 386.
\item \textsuperscript{116} Id. at 387–88 (citing Hines v. Davidowitz, 312 U.S. 52, 67–68 (1941)).
\item \textsuperscript{119} Denning & McCall, supra note 92, at 754; see also Crosby, 530 U.S. at 371–72.
\end{itemize}
travel and the use of taxpayer money.\footnote{121} Congress has also behaved similarly.\footnote{122} This section will focus on Florida and federal legislation related to Cuba.

1. State Action

Florida has consistently implemented legislation affecting Cuba, much of which has been upheld.\footnote{123} This becomes clear when one looks at the number of court opinions in federal courts over the past decade.\footnote{124} In *Faculty Senate of Florida International University v. Winn*,\footnote{125} the Eleventh Circuit held that a state law directing universities not to use state funds for travel to Cuba was constitutional and not preempted by federal law.\footnote{126} In *Faculty Senate of Florida International University*, the court distinguished the case from *Crosby* by reasoning that the Florida law at issue only placed restrictions on taxpayer dollars and not on individuals or companies trying to travel or trade.\footnote{127} The court concluded that states have a reasonable amount of discretion in deciding how to spend taxpayer money in education programs.\footnote{128}

In 2008, a federal judge for the United States District Court for the Southern District of Florida issued an order enjoining a state representative from enforcing a Florida law affecting businesses providing travel to Cuba.\footnote{129} The court reasoned that because the federal government had demonstrated intent to occupy the field, the Florida law was likely preempted.\footnote{130} Eight years earlier, the same court issued a preliminary injunction barring enforcement of a law very similar to the Cuba Amendment, which is a main
focus of this article. The law was signed by Governor Scott in 2012 and is the most recent anti-Cuba legislation from Florida.

2. Federal Action

The federal government has also been fairly active in enacting legislation imposing sanctions on Cuba. Many of these regulations are highly relevant to the recent litigation regarding the Cuba Amendment, and are discussed by the federal court in Florida, where litigation recently occurred. The Cuban Assets Control Regulations—passed in 1963—are a set of federal regulations that generally limit exports, imports, and travel by United States persons and entities to Cuba. Almost thirty years later, the federal government enacted the Cuban Democracy Act (CDA) as a reaction to Cuba’s “consistent disregard for internationally accepted standards of human rights and . . . democratic values.” The CDA provided significant discretion to the President, allowing him “to waive the sanctions imposed by the CDA should [he] determine that the Cuban government has taken action consistent with the promotion of democracy as specifically delineated by the CDA.”

In 1996, the federal government passed another act “after the Cuban government downed two private planes [with] anti-Castro Cuban-Americans [onboard].” The Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 contains four titles authorizing the President and others to take certain action. The first title authorizes “the President to oppose Cubal’s...
membership [in] various international organizations and institutions. The second title authorizes the President to consult with Congress and provide assistance in the event a democratic government is established in Cuba. The third title creates a right of action against people who traffic property confiscated from United States citizens or businesses by the Cuban government. The final title excludes from the United States . . . any alien who “traffics in confiscated property, a claim to which is owned by a United States national,” or any “corporate officer, principal, or shareholder with a controlling interest of an entity which has been involved in the confiscation of property or trafficking in confiscated property, a claim to which is owned by a United States national.”

The third section was initially controversial on the world stage because it affects foreign countries. However, this situation was diffused when President Clinton exercised the section’s waiver provision that is to be used whenever “the President determine[s] ‘the suspension is necessary to the national interests of the United States and will expedite a transition to democracy in Cuba.’” To date, every successive President has invoked the waiver provision meaning that section three has never legally been in effect.

The final piece of federal legislation at issue in recent litigation relating to Cuba, and that this article will briefly mention, is the Trade Sanctions Reform and Export Enhancement Act of 2000. This Act actually loosened sanctions on Cuba relating to agriculture, medicine, and medical devices. Specifically, this law makes exceptions so that agricultural products and medical devices may be free of sanctions limiting their “provision or use.” The Obama Administration has also lowered restrictions, allowing religious

140. Id. (citing 22 U.S.C. §§ 6021–46).
143. Id. (quoting 22 U.S.C. § 6091(a)(2)–(3)).
144. Id. (citing Clyde H. Farnsworth, Canada Warns U.S. on Law Penalizing Cuba Commerce, N.Y. Times, June 18, 1996, at D6).
145. Id. at *5 (quoting 22 U.S.C. § 6085(b)(1)).
146. Id.
148. Id. at *4; see also 22 U.S.C. §§ 7202, 7203(2)(A)–(C), 7204, 7205(a)(1)–(2), 7207(b)(1), 7208–09(a).
149. 22 U.S.C. § 7203(2).
individuals to travel to Cuba from the United States;\textsuperscript{150} perhaps an indication of sanctions becoming more and more lenient.

B. \textit{The Florida Law}

The next part of this article will proceed by discussing the Cuba Amendment in more specificity while focusing on the most recent federal court order barring its enforcement because of the law’s questionable constitutionality. This discussion will include comparisons and analogies to the Massachusetts law and relevant constitutional issues raised by the \textit{Crosby} decision. There will also be a brief analysis of the political aspect of the Cuba Amendment.

1. \textit{Odebrecht Construction, Inc. v. Prasad}

The plaintiff in this recent legal suit argued that the Cuba Amendment is unconstitutional for many of the same reasons the Massachusetts law was found unconstitutional.\textsuperscript{151} Odebrecht Construction, the plaintiff, is a contractor headquartered in Coral Gables with a parent company in Brazil.\textsuperscript{152} Odebrecht was founded in 1990 and has a close history with the State of Florida and local governments throughout.\textsuperscript{153} Perhaps the most recent relationship is the plaintiff’s contract with Broward County to refurbish Fort Lauderdale International Airport, a contract worth over two hundred million dollars.\textsuperscript{154}

The plaintiff’s parent company, Odebrecht S.A., is headquartered in Brazil and conducts business on almost every continent.\textsuperscript{155} It is actually another company owned by parent Odebrecht S.A., COI Overseas, that has given rise to the current controversy for the Coral Gables based subsidiary.\textsuperscript{156} COI Overseas Ltd. is currently contracting with Cuba and working on the Port of Mariel.\textsuperscript{157} As signs of the project’s significance to Brazil, a major

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\item \textsuperscript{150} \textit{Odebrecht Constr., Inc.}, 2012 WL 2524261, at *4 (citing \textsc{Mark P. Sullivan, Cong. Research Serv.}, RL 31139, Cuba: U.S. Restrictions on Travel and Remittances 4–6 (2011)).
\item \textsuperscript{152} \textit{Id.} at *1 (quoting Amended Complaint at 6, Odebrecht Constr., Inc. v. Prasad, No. 12-cv-22072-KMM, 2012 WL 2524261 (S.D. Fla. June 29, 2012), ECF No. 4).
\item \textsuperscript{153} \textit{Id.}
\item \textsuperscript{154} \textit{Id.}
\item \textsuperscript{155} \textit{Odebrecht Constr., Inc.}, 2012 WL 2524261, at *1 (citing Amended Complaint, \textit{supra} note 152, at 6).
\item \textsuperscript{156} \textit{Id.}
\item \textsuperscript{157} \textit{Id.}
\end{itemize}
bank in the country is providing financing and “President Dilma Rousseff recently traveled to the Port of Mariel to view [its] progress.”

The defendant in the suit was the Secretary of the Florida Department of Transportation, Ananth Prasad, as it is his duty to administer the Cuba Amendment. However, this discussion will refer generally to the State of Florida as the defendant.

In the opinion following the order granting a preliminary injunction, the court analyzed the plaintiff’s likelihood of success in its argument that the law is unconstitutional. Judge K. Michael Moore of the United States District Court for the Southern District of Florida discussed the Supremacy Clause and whether the Cuba Amendment is preempted by federal legislation. In the opinion following the order, Judge Moore noted the Massachusetts law, discussed earlier, and the reasons a unanimous Supreme Court found the law unconstitutional—namely, that the Massachusetts law interfered with the President’s discretion, was broader in scope than the federal law, and conflicted with a directive issued to the President by Congress. Judge Moore went on to state that “the Cuba Amendment suffers from the same shortcomings and . . . is likely unconstitutional.”

a. Preemption

The first reason Judge Moore doubted the constitutionality of the Cuba Amendment is it directly interferes with Presidential discretion under the CDA and is likely preempted. As the sole representative of the United States on the world stage, the President has the discretion to waive sanctions placed on Cuba by way of the CDA, should Cuba go through a political reform and construct a democratic government. Judge Moore also noted the controversial aspect of the Libertad Act and the fact that every President has waived enforcement of the right of action provision; thereby evidencing congressional intent not to punish foreign entities with business contracts in...
Cuba. Alternatively, the Cuba Amendment forces businesses “to choose between doing business with Florida [or] Cuba.”

Next, Judge Moore noted that the Cuba Amendment goes further than federal sanctions on Cuba because of the fact that companies located in the United States suffer merely because of the relationships maintained by their corporate owners. The Cuba Amendment also imposes greater penalties than federal legislation in that offenders may be required to pay civil fines and are banned from making a bid to the State of Florida for three years after violating the law.

Lastly, “the Cuba Amendment interferes with the President’s directive under the Libertad Act” to work at establishing a democratic government in Cuba. Judge Moore, quoting Justice Souter in *Crosby*, stated that the President should be able to work on the world stage and use his power to “bargain for the benefits of access to the entire national economy without exception for enclaves fenced off willy-nilly by inconsistent political tactics.” Judge Moore characterized this effect as a diminishment in the President’s bargaining power in the realm of foreign policy.

Judge Moore next criticized Florida’s counterarguments starting with the first that the Cuba Amendment is not preempted because federal law does not prohibit any of its terms. However, this is contrary to *Crosby* where Justice Souter noted that “[s]anctions are drawn not only to bar what they prohibit but to allow what they permit, and the inconsistency of sanctions here undermines the congressional calibration of force.” This is one of the reasons that the Massachusetts law was preempted. Florida’s argument that the President lacks broad discretion to adjust Cuba sanctions was re-

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166. Id. (citing Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, 22 U.S.C. § 6085 (2006)).
167. Id.
168. Id. at *8.
169. Id. at *6.
172. Id.
173. Id. at *6–7.
174. Id. at *6 (quoting *Crosby*, 530 U.S. at 380).
175. Id. at *5. “The federal sanctions imposed direct sanctions on Burma, vested the President with the power to impose further sanctions subject to certain conditions, and directed the President to develop a multilateral strategy to foster democracy and improve human rights in Burma.” *Odebrecht Constr., Inc.*, 2012 WL 2524261, at *5 (citing *Crosby*, 530 U.S. at 368–69).
jected as flatly wrong by Judge Moore, who noted that for years Presidents have exercised considerable discretion in this area.  

Finally, Judge Moore stated that Florida is wrong in arguing that the case is not ripe in that no complaint has been lodged with the World Trade Organization, because the court need not wait for such a complaint in order to invoke a preliminary injunction against a law that is likely preempted.

In his analysis, Judge Moore discussed the various ways in which the Cuba Amendment clashes with federal law. Responding to Florida’s argument that there is no conflict, Judge Moore clearly stated that “[f]ederal law regulates all aspects of commerce with Cuba, including but not limited to the importation and exportation of various goods and services, travel between the United States and Cuba, and private rights of action against the Cuban government.” This demonstrates a clear congressional intent to occupy the field, and therefore, casts serious doubt on the constitutionality of the Cuba Amendment.

In *Faculty Senate of Florida International University* mentioned earlier, the Eleventh Circuit found that a Florida law limiting state money from being used by state universities for travel to Cuba was not preempted. Judge Moore distinguished this case by noting that the law at issue in *Faculty Senate of Florida International University* did not prohibit trading by anyone, while the Cuba Amendment obviously is intended to reduce trade.

b. Federal Foreign Affairs Power

Judge Moore’s order next discussed the Cuba Amendment in light of the federal government’s foreign affairs power. The American system of governance necessitates that the federal government reign over all foreign affairs so that the states themselves do not become involved in foreign affairs potentially at the expense of other states. Judge Moore noted Zschernig,

178. Id. at *5–6.
179. Id. at *7 (citing ABC Charters, Inc. v. Bronson, 591 F. Supp. 2d 1272, 1304 (S.D. Fla. 2008)).
180. Id. at *7.
182. *Odebrecht Constr., Inc.*, 2012 WL 2524261, at *7 (quoting *Faculty Senate of Fla. Int’l Univ.*, 616 F.3d at 1210); see also FLA. STAT. § 287.135 (2012).
183. See *Odebrecht Constr., Inc.*, 2012 WL 2524261, at *7.
where the Supreme Court held that state laws that interfere with the federal government’s foreign affairs power may cause “‘disruption or embarrassment.’” The Zschernig court also noted that a state law must have more than an “‘incidental or indirect effect in foreign countries’” in order to cross the line into the federal government’s jurisdiction. The test a court must employ to determine whether a state law has this effect was formulated in the familiar Natsios opinion. These factors include the state law’s intent, effects on purchasing power, effects on other states’ decisions to implement similar legislation, international reaction, and the difference when compared to federal law.

However, Judge Moore declined to apply this test and instead merely stated that it was enough that the Cuba Amendment is probably unconstitutional in that it clashes with Zschernig because of the impact on foreign countries that trade with Cuba and Florida, such as Brazil and Canada. Thus far, several countries have already voiced concern over the Cuba Amendment because of how it affects them. It is for these reasons that Judge Moore believed the Cuba Amendment unconstitutionally delved into the federal government’s foreign affairs power. Although not addressed directly by the Supreme Court, the First Circuit employed similar reasoning when examining the Massachusetts law under the federal government’s foreign affairs power.

c. Commerce Clause

The final constitutional analysis undertaken by Judge Moore related to the Commerce Clause located in Article I of the Constitution. The federal government has the power “to ‘regulate Commerce with foreign [n]ations’” and the Supreme Court has acknowledged a negative implication, namely the

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188. Id.
189. See Odebrecht Constr., Inc., 2012 WL 2524261, at *8; see also Zschernig, 389 U.S. at 434–35; Natsios, 181 F.3d at 53.
190. Mazzei, Miami Federal Judge Blocks New Florida Anti-Cuba Law, supra note 10. Canada and Brazil are two of Florida’s largest trading partners. Id.
192. See Natsios, 181 F.3d at 49.
193. Odebrecht Constr., Inc., 2012 WL 2524261, at *9; see also U.S. CONST. art. I, § 8, cl. 3.
Dormant Commerce Clause. Judge Moore noted the importance of the Commerce Clause in that when conducting trade with foreign nations “‘the people of the United States act through a single government.’” Quoting Japan Line, Ltd. v. County of Los Angeles, Judge Moore stated “the Supreme Court held that a state law violates the Foreign Commerce Clause when it ‘impair[s] federal uniformity in an area where federal uniformity is essential,’ and ‘prevents this Nation from “speaking with one voice” in regulating foreign trade.’” Judge Moore stated this to express that the Foreign Commerce Clause is a greater power for the federal government than the Interstate Commerce Clause. The Court in Japan Line, Ltd. noted that a state law will violate the Foreign Commerce Clause if it clashes with a federal law and causes the United States to be heard speaking with more than “‘one voice’” in dealing with foreign policy.

Next, Judge Moore stated the reasons that the Cuba Amendment possibly violates the Foreign Commerce Clause. Describing the law as facially discriminatory because the law discriminates against entities doing business with Cuba by its very terms, Judge Moore noted how international companies and countries that conduct legitimate business with Cuba are prohibited by Florida from doing business with it. The effect on the federal government’s power to conduct foreign economic activity is obvious according to Judge Moore, who drew parallels between the Cuba Amendment and the Massachusetts law in that they both “impede[] the federal government’s ability to speak with one voice in regulating foreign trade.” Further, Judge Moore expressed that there is no justification for the Cuba Amendment because the regulatory mechanism of the federal government is already in effect.

198. See id. at *9–10 (citing Japan Line, Ltd., 441 U.S. at 448).
201. Id. at *9.
The State of Florida responded to the initial suit by arguing that the Cuba Amendment is a legitimate exercise of the state’s power under the market participant exception, relying on Supreme Court precedent.\textsuperscript{204} Florida argued that as an actor in the market, it could choose not to do business with companies linked to Cuba based on this exception.\textsuperscript{205} Judge Moore disagreed and explained that while the exception may be applicable, the Cuba Amendment would not be subject to it for the reason that it markedly affects companies outside of Florida’s market.\textsuperscript{206} Because the law has this effect on companies outside of Florida, namely those doing business with Cuba, the Cuba Amendment constitutes Florida regulating downstream activity, which it may not do under the market participant exception.\textsuperscript{207} Similarly, a federal court found that the Massachusetts law was unconstitutional under the market participant exception for comparable reasons.\textsuperscript{208}

d. **Political Facet**

Florida’s decision to pass the Cuba Amendment also entails a delicate political balancing act with the South Florida Cuban exile community on one hand, and foreign countries and companies with business interests in the state on the other.\textsuperscript{209} Odebrecht, the subsidiary of a large Brazilian corporation,\textsuperscript{210} could lose hundreds of millions of dollars in business if the courts ultimately uphold the law.\textsuperscript{211} The fact that the Cuba Amendment will essentially punish Brazilian company Odebrecht for its ties to Cuba is especially awkward considering the fact that tourists from that country make up one of the largest

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\textsuperscript{205} See Odebrecht Constr., Inc., 2012 WL 2524261, at *10 (citing Defendant’s Memorandum in Opposition to Plaintiff’s Motion for Preliminary Injunction, supra note 204, at 14–15); see also Mass. Council of Const. Emp’rs, Inc., 460 U.S. at 206–07.
\textsuperscript{206} Odebrecht Constr., Inc., 2012 WL 2524261, at *10.
\textsuperscript{207} Id.; see also Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 820–21 (1976) (Brennan, J., dissenting) (quoting S.C. State Highway Dep’t v. Barnwell Bros., Inc., 303 U.S. 177, 185 (1938)).
\textsuperscript{209} See Mazzei, Fla.’s Trading Partners Warn of Backlash, supra note 6.
\textsuperscript{210} Odebrecht Constr., Inc., 2012 WL 2524262, at *1 (citing Amended Complaint, supra note 152, at 6).
\textsuperscript{211} Doreen Hemlock, Congress Considers Ban on U.S. Military Contracts for Companies Doing Business in Cuba, MCCLATCHY-TRIB. BUS. NEWS (Wash.), July 11, 2012.
\end{flushright}
groups of Florida visitors. Florida Governor Scott even traveled to Brazil in early 2012 to encourage trade. Canada has also complained about the Cuba Amendment because of concerns for Canadian companies that operate in Florida and Cuba. However, the law has garnered considerable support in parts of Florida, such as heavily populated Cuban areas like Hialeah. When the legislation was still being considered, there was very little opposition to Miami lawmakers who favored it.

However, not everyone who is anti-Cuba approves of the law or believes that it will be effective. Generally, pro-business organizations, like the Florida Chamber of Commerce, have criticized the new law. Some believe that the law will help bolster the Cuban government by creating sympathy for a regime that many detest. Despite the law’s controversy, Florida expressed an intent not to retreat and has recently announced that it will be appealing Judge Moore’s order. The State of Florida has expressed interest in having the Eleventh Circuit overrule Judge Moore.

e. Other Concerns

It is worth briefly mentioning some other issues that are raised by the Cuba Amendment. Relating specifically to Odebrecht, but potentially affecting other entities, is the issue of injury. Because of the constitutional bar against states being sued for money damages, Odebrecht would have virtually no way of recovering its substantial losses caused by the law’s enforcement. In fact, the losses to Odebrecht alone would be almost four billion

214. Id.
215. See id.
216. See id.
217. See, e.g., Andres Oppenheimer, Florida Law Against Cuba May Help Cuba, MIAMI HERALD, May 2, 2012, http://www.miamiherald.com/2012/05/02/v-print/2780050/florida-law-against-cuba-may-help.html. The Dean of Saint Thomas University School of Business called the Cuba Amendment “a black eye on Florida” because of his belief that the law is unconstitutional. Id.
218. Id.
219. See id.
221. See id.
223. See id.
dollars.\textsuperscript{224} If the Cuba Amendment is fully enforced, companies doing business with Cuba—as well as the State of Florida—may lose a substantial sum, seeing that contracts that have already been negotiated will have to be abandoned and the state may be forced to contract with companies that cost more.\textsuperscript{225}

2. Lessons and Implications from \textit{Crosby}

One thing to be noted about the \textit{Crosby} opinion is that it was unanimous.\textsuperscript{226} While the members of the Court today are different than in 2000, five of the Justices are still serving.\textsuperscript{227} Provided the similarities between the two laws, it seems improbable that any of the five Justices would change their minds. However, it is not impossible that new members could be appointed before and if \textit{Odebrecht} advances that far.\textsuperscript{228}

IV. CONCLUSION

The Massachusetts law and the Florida Cuba Amendment have many common provisions.\textsuperscript{229} Both laws have targeted an unpopular regime and attempted to put pressure on that government by way of economic sanctions, whereby the state enacting the legislation refuses to contract with entities associated with the country targeted by the law.\textsuperscript{230} While the First Circuit did not hesitate to call the Massachusetts law unconstitutional for a variety of reasons,\textsuperscript{231} the Supreme Court was very specific that it was striking it down on the basis that federal law preempted it.\textsuperscript{232}

It is uncertain whether the Cuba Amendment will advance to the Supreme Court like the Massachusetts Law. However, if the law does advance

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\textsuperscript{224} \textit{Id.} at *11 n.13.  \\
\textsuperscript{225} \textit{See, e.g.,} \textit{id.} at *11.  \\
\textsuperscript{226} Denning & McCall, supra note 92, at 750–51.  \\
\textsuperscript{228} \textit{See Sheryl Gay Stolberg, An Aging Court Raises the Stakes of the Presidential Election, N.Y. Times, June 28, 2012, at A18.}  \\
\textsuperscript{229} \textit{See Odebrecht Constr., Inc., 2012 WL 2524261, at *5.}  \\
\textsuperscript{231} \textit{Nat’l Foreign Trade Council v. Natsios, 181 F.3d 38, 77 (1st Cir.), cert. granted, 528 U.S. 1018 (1999).}  \\
\textsuperscript{232} Denning & McCall, supra note 92, at 750–51.
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to the Supreme Court, the Court’s opinion in *Crosby* should be a strong indicator of the likely result.233

The future of Cuba’s government is also uncertain, given its aging leader. President Raul Castro recently announced that his government might even be willing to talk with the United States about plans for the future.234 If the two governments formally meet, it would be the first time in fifty years.235 However, given the Obama Administration’s less contentious attitude towards Cuba, it appears that the present time is about as good as any in the past fifty years for the two countries to make amends.236 Of course Florida’s Cuba Amendment has done little to help the two countries move forward, and the state government may pose an obstacle to this occurring.237

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235. Id.


IT’S ME OR YOUR FAMILY: HOW FLORIDA DOMA AND THE FLORIDA PROBATE CODE FORCE SAME-SEX COUPLES TO MAKE AN IMPOSSIBLE CHOICE IN ESTATE PLANNING

ELIZABETH G. LUTZ*

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I. INTRODUCTION

Recent developments in adoption rights for homosexuals in Florida have dramatically changed the legal landscape for same-sex couples hoping to secure property rights for each other after death. Prior to 2010, no homosexual person could adopt any child or adult in Florida, thus rendering adult adoption generally inapplicable to same-sex couples. With the Third District Court of Appeal’s (“Third District”) authorization of a homosexual adoption in *Florida Department of Children & Families v. Adoption of X.X.G. & N.R.G.*, came the possibility of adult adoption as a way to ensure the surviving partner would receive property and assets in accordance with the decedent’s intent.

While adult adoption provides same-sex couples with a safer way to plan their estates pursuant to their wishes, it comes with a rather steep price: The adoptee’s right to inherit his or her biological family’s intestate estate is severed. When an individual is legally adopted, he or she relinquishes his or her right to inherit from relatives through intestacy, therefore potentially los-
ing out on considerable assets in the future. Thus, Florida forces same-sex couples to choose, quite literally, between their partner and their family.

This article will first discuss the history of same-sex couples in regards to the legal obstacles they face in Florida. Specifically, this section will focus on the same-sex marriage controversy and the evolution of homosexual adoption rights in Florida. Second, this article will explore adult adoption generally. This section will address many different aspects of adult adoption, for instance, its statutory basis in Florida, other reasons behind it, and its key differences as compared to child adoption. The next section will discuss adult adoption as a legal tool for same-sex partners planning an estate in Florida. This section will weigh the benefits of adult adoption with regard to intestate succession, will contests, and rights to homestead against the irrevocable nature of adoption, and the resulting severance of the adoptee’s inheritance rights to his or her family’s intestate estate. The next section will consider a possible solution to the problems associated with same-sex couples and adult adoption in Florida: Trusts. This section will discuss Florida trusts generally, and which types would likely be the most beneficial to same-sex couples interested in long-term, financially stable futures together. Finally, this article will illustrate why trusts could provide a far more sensible method by which same-sex couples in Florida can confidently control their assets during life and after death.

II. SAME-SEX COUPLES IN FLORIDA

A. The Right to Marry

The fundamental right to marry has been a major focal point of gay rights activists both statewide and nationwide for many years. Same-sex couples fight for the right to marry and share equal marital benefits enjoyed...

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6. See id. at 515–16.
7. See Karibjianian, supra note 4, at 95; Foltz, supra note 5, at 515–16.
8. See discussion infra Part II.
9. See discussion infra Part II.A–B.
10. See discussion infra Part III.
11. See discussion infra Part III.A–C.
12. See discussion infra Part IV.
13. See discussion infra Part IV.A–C.
14. See discussion infra Part V.
15. See discussion infra Part V.A–B.
16. See discussion infra Part VI.
by heterosexual couples, while those in opposition fear this would taint the traditional definition of marriage. Florida is notorious for being one of the most hostile states toward same-sex couples from a legal standpoint. The controversy over same-sex marriage in Florida finally boiled over with the passage of the Florida Defense of Marriage Act (“Florida DOMA”).

The Florida Legislature passed Florida DOMA in 1997, thereby officially renouncing same-sex marriage throughout the state. Florida DOMA mirrors the Federal Defense of Marriage Act (“Federal DOMA”) in that Florida DOMA circumvents the Full Faith and Credit Clause of the United States Constitution. According to Florida DOMA: “Marriages between persons of the same sex entered into in any jurisdiction . . . either domestic or foreign . . . are not recognized for any purpose in this state.” Furthermore, Florida DOMA defines marriage as “only a legal union between one man and one woman as husband and wife.” Therefore, Florida DOMA not only prohibits same-sex couples from getting legally married in Florida, it also, and perhaps more importantly, refuses to recognize valid same-sex marriages from another state or country for purposes of, including but not limited to, divorce, child-rearing, and posthumous asset distribution. Florida DOMA is considered by many to be an enormous setback in the fight for homosexual equality within the state.

B. *The Right to Adopt*

A logical progression from the fundamental right to marry is the fundamental right to have and raise children. In Florida, same-sex couples have also experienced considerable hardship in their quest to legally adopt children because according to Florida law, same-sex couples are nothing...
more than two unrelated, single, homosexual individuals—and until recently, were outright prohibited from adopting statewide. The tables turned dramatically in 2008 with In re Adoption of Doe, and in 2010 with Adoption of X.X.G. & N.R.G.—landmark cases that resulted in the Third District’s authorization of Florida’s first homosexual adoption.

Pursuant to section 63.042(3) of the Florida Statutes: “No person eligible to adopt . . . may adopt if that person is a homosexual.” In other words, prior to 2008, even though an individual would otherwise be fully qualified and permitted to adopt, he or she would be prohibited based solely on his or her sexual orientation. Until 2008, Florida was the only state that banned homosexual adoptions outright, with no exceptions. The effect of this statute was likely devastating to many individuals and families in Florida. The inability to legally adopt means that the relationship between the parties lacks critical legal authority, for instance, with regard to posthumous asset distribution.

Gay rights activists statewide felt the sting of section 63.042(3) in 1995’s Cox v. Florida Department of Health & Rehabilitative Services (Cox II). In this case, a homosexual couple, while attending a voluntary parenting class, disclosed to the Florida Department of Health and Rehabilitative Services (“HRS”) their sexual orientation and desire to adopt a mentally-disabled foster child. The HRS promptly sent the couple a letter advising them that the HRS would not accept their application for adoption pursuant

28. See FLA. STAT. § 63.042(3).
31. FLA. STAT. § 63.042(3).
32. See id.
34. See Lindsay Ayn Warner, Note, Bending the Bow of Equity: Three Ways Florida Can Improve Its Equitable Adoption Policy, 38 STETSON L. REV. 577, 609–10 (2009) (describing the unfortunate consequences of the ban on homosexual adoption in Florida with regard to minor children and intestate succession).
35. See Karibjianian, supra note 4, at 92 (describing the numerous advantages to a legally recognized marriage).
36. 656 So. 2d 902, 903 (Fla. 1995) (per curiam); see also FLA. STAT. § 63.042(3).
37. Cox II, 656 So. 2d at 903; Fla. Dep’t of Health & Rehabilitative Servs. v. Cox (Cox I), 627 So. 2d 1210, 1212 (Fla. 2d Dist. Ct. App. 1993), review granted, 637 So. 2d 234 (Fla. 1994), and quashed in part, 656 So. 2d 902 (Fla. 1995).
to section 63.042(3). The couple filed suit in a Sarasota trial court seeking the statute declared unconstitutional. The trial court found for the couple, and held that section 63.042(3) was void. The HRS appealed to the Second District Court of Appeal (“Second District”), and the court reversed, declaring the statute constitutional. The court surmised that homosexual rights were, at that time, an issue for the Florida Legislature, and not the courts, to handle. The couple appealed to the Supreme Court of Florida in 1995. Unfortunately for homosexuals and gay rights supporters throughout the state, this outright prohibition lay dormant until 2010.

The tables finally turned on homosexual adoption laws in Florida, when the Third District affirmed the 2008 ruling of In re Adoption of Doe in its 2010 decision of Adoption of X.X.G. & N.R.G. In In re Adoption of Doe, a Miami trial court allowed a homosexual man to legally adopt two foster children that had been living with him for four years. The trial court determined, based on expert testimony, that because the children and the man had presumably developed strong and healthy parent-child relationships, legal adoption would certainly be in the best interests of the children. The only factor impeding the adoption was the man’s sexual orientation. As a homosexual man, he was outright prohibited from legally adopting the children in Florida. The trial court not only granted him the adoption, but it also determined that there was no rational basis for section 63.042(3) and declared it unconstitutional. The State of Florida appealed this decision but the Third

38. Cox I, 627 So. 2d at 1212; see also Fla. Stat. § 63.042(3).
39. Cox I, 627 So. 2d at 1212.
40. Id.; see also Fla. Stat. § 63.042(3).
41. See Cox I, 627 So. 2d at 1212, 1220.
42. Id. at 1220.
43. Cox v. Fla. Dep’t of Health & Rehabilitative Servs. (Cox II), 656 So. 2d. 902, 902 (Fla. 1995) (per curiam).
44. Id. at 903; see also Fla. Stat. § 63.042(3).
46. Id. at 92; In re Adoption of Doe, 2008 WL 5006172, at *29 (Fla. 11th Cir. Ct. Nov. 25, 2008), aff’d sub nom. Fla. Dep’t of Children & Families v. Adoption of X.X.G. & N.R.G., 45 So. 3d 79 (Fla. 3d Dist. Ct. App. 2010).
47. In re Adoption of Doe, 2008 WL 5006172, at *1, *29.
48. Id. at *4.
49. See id. at *1.
50. Id.
51. Id. at *29.
District affirmed in Adoption of X.X.G. & N.R.G. Florida has since said it will not appeal the Third District’s ruling, and that section 63.042(3) will not bar homosexual adoptions in the Third District. Gay rights activists across the country consider Adoption of X.X.G. & N.R.G. an enormous triumph for homosexual equality in Florida.

III. ADULT ADOPTION GENERALLY

A. The Florida Statutory Basis

While the idea of a capable, mature adult being adopted by a fellow adult seems somewhat unconventional, many people have chosen this method to, for instance, carry out their rather complicated financial plans. Section 63.042(1) of the Florida Statutes provides: “Any person, a minor or an adult, may be adopted.” Probably unbeknownst to many, Florida law unequivocally and expressly authorizes adult adoption. Furthermore, while the courts have not expressly forbidden older-younger same-sex partner adult adoption, the Third District’s decision to honor a homosexual adoption in Adoption of X.X.G. & N.R.G. is still just two years old, so only time will tell how courts will respond.

B. Other Reasons to Adopt an Adult

There are many reasons why one would choose to adopt an adult other than to protect someone from an unfortunate consequence of intestate suc-
Certain situations involving benefits that are restricted to specific classes of family members may call for adult adoption as the only feasible way to direct funds in accordance with one’s financial goals. Additionally, adult adoption can be a valid way to become a member of a designated class for class gift purposes.

1. Generation-Specific Benefits

Two interesting examples of cases in which adult adoption was used for generation-specific financial benefits are Florida’s *In re Adoption of Holland* and Tennessee’s *Coker v. Celebrezze*.

*In re Adoption of Holland* offers a look at a relatively unusual situation in which a Florida adult adoption was used for a purely financial purpose. In *In re Adoption of Holland*, a grandfather sought to adopt his consenting adult grandson. The grandfather, a disabled veteran, wished “to confer [to his grandson] financial aid available to the children (but not grandchildren) of disabled veterans.” The court approved the adoption, making the grandfather’s former grandchild his new legal child and allowing the financial aid benefits to pass to him. The court in *In re Adoption of Holland* seemed to have no problem authorizing the legal adult adoption, despite the fact that the grandfather had a strictly financial motive in the adoption.

*Coker* provides a look into an adult adoption in Tennessee that also took place solely for the financial benefit of the adopted party. In *Coker*, a grandfather attempted to adopt his twenty-three year old mentally-disabled grandson to confer to him the grandfather’s social security benefits as his lineal descendant. Tennessee’s adoption statute was vague with regard to whether adult adoptions were permissible. Due to the fact that the grandson lived with his grandfather since he was a toddler and that the grandson

59. See *Ratliff*, supra note 55, at 1778 (describing other reasons why an adult would adopt another adult).
60. See id. at 1782–83.
61. Id.
62. 965 So. 2d 1213, 1214 (Fla. 5th Dist. Ct. App. 2007).
64. See *In re Adoption of Holland*, 965 So. 2d at 1214.
65. Id.
66. Id.
67. Id.
68. See id.
70. Id. at 783–84.
71. See id. at 787 (citing TENN. CODE ANN. § 36-1-102(3)(A) (2012)).
was clearly incapable of taking care of himself financially, the court honored the adoption, and the benefits were passed to the grandson as the grandfather’s adopted son. The court also interpreted the Tennessee statute as not prohibiting adult adoption. In this case, one can see another example of a state court honoring an adult adoption with a purely financial motive.

2. Access to Class Gifts

Florida law defines a class gift as: “[A] gift of an aggregate sum to a group of persons whose exact identity and number are to be determined sometime after the execution of the will.” The class gift—often given to the decedent’s children—is designed to accommodate the potential change in identity and number. Florida recognizes children as all natural born and adopted children. Therefore, class gifts may include current natural born and adopted children as well as future natural born and adopted children. An individual may, as an adult, still be adopted and considered part of the group to be given the class gift upon the testator’s death. Courts seem to interpret adult adoptions, for purposes of class gifts, differently across the country. In re Estate of Fortney and Davis v. Neilson illustrate such contrasting interpretations.

In In re Estate of Fortney, married Kansas couple Asa and Adaline died, leaving their estate first to their children and then to their living and future grandchildren as a class gift. One of their children, John, legally adopted his wife’s sixty-five-year-old nephew, Amspacker. Therefore, Amspacker gained an interest in Asa and Adaline’s estate through the adoption, as he

72. See id. at 783–85, 787.
73. Id. at 787 (interpreting TENN. CODE ANN. § 36-1-102(3)(A)).
75. In re Estate of McCune, 214 So. 2d 56, 57 (Fla. 4th Dist. Ct. App. 1968).
76. See id. at 57–58; Ratliff, supra note 55, at 1790, 1796, 1798.
78. See Ratliff, supra note 55, at 1796.
79. Id. at 1782–83.
80. Compare In re Estate of Fortney, 611 P.2d 599, 605 (Kan. Ct. App. 1980) (stating that adult adoptees are heirs of their adopting parents under the plain meaning of the applicable statute), with Davis v. Neilson, 871 S.W.2d 35, 39 (Mo. Ct. App. 1993) (suggesting that certain factors should be considered by a court when determining whether familial ties are created by the adoption).
82. 871 S.W.2d 35 (Mo. Ct. App. 1993).
83. Compare In re Estate of Fortney, 611 P.2d at 605, with Davis, 871 S.W.2d at 39.
84. In re Estate of Fortney, 611 P.2d at 600–01.
85. Id. at 600.
became their legal grandchild.\textsuperscript{86} Asa and Adaline’s brothers’ and sisters’
descendants, the remaindernmen and would-be takers after John, were unsatis-
fixed with losing their share to Amspacker, and questioned the legitimacy of
the adoption.\textsuperscript{87} In its ruling, the court focused on “the intent of Asa . . . when
he executed [his] will.”\textsuperscript{88} The court first determined that Asa’s devise to his
son John and John’s children included John’s potentially adopted children, as
well as biological.\textsuperscript{89} The court then held that:

\begin{quote}
[A]nyone of any age can be a child of another as long as a blood or
legal relationship exists. One does not lose his or her status as a
child of its parents when the age of majority is reached. . . . [T]o
construe the adoption statutes to mean that adult adoptees have no
rights would make adopting an adult a meaningless ritual. Cer-
tainly the legislature would not have intended that result.\textsuperscript{90}
\end{quote}

Thus, the court honored the adult adoption and allowed Amspacker to
inherit from Asa and Adaline’s estate.\textsuperscript{91} \textit{Fortney} is a good example of a case
in which a court strictly interpreted its state’s adoption statutes to include
adult adoptees in class gift situations, regardless of age.\textsuperscript{92}

\textit{Davis}, a Missouri case, offers a somewhat contrasting view of adult
adoptees and class gifts.\textsuperscript{93} In this case, Neilson, a beneficiary of a trust,
adopted six adults—all of whom were essentially strangers—to take the re-
mainder of his share as a class gift when the trust terminated upon his forti-
eth birthday.\textsuperscript{94} Neilson also had two natural children with his ex-wife, who
were also entitled to a portion of the class-gifted trust.\textsuperscript{95} After the adoption,
Neilson’s natural children’s share under the trust estate was considerably
depleted by their six new siblings.\textsuperscript{96} The trustee of the estate refused to dis-
tribute the funds to the six adult adoptees, claiming the adoptions were a
sham.\textsuperscript{97} The appellate court reversed the trial court’s grant of summary
judgment to the six adult adoptees.\textsuperscript{98} The court explained that to determine

\begin{footnotes}
\footnotetext{86}{See id. at 601, 605.}
\footnotetext{87}{Id. at 600–01.}
\footnotetext{88}{Id. at 602.}
\footnotetext{89}{In re Estate of Fortney, 611 P.2d at 602.}
\footnotetext{90}{Id. at 604–05.}
\footnotetext{91}{Id. at 605.}
\footnotetext{92}{See id. at 604–05.}
\footnotetext{93}{See Davis v. Neilson, 871 S.W.2d 35, 39 (Mo. Ct. App. 1993).}
\footnotetext{94}{Id. at 36–37.}
\footnotetext{95}{Id. at 37.}
\footnotetext{96}{See id.}
\footnotetext{97}{Id. at 36.}
\footnotetext{98}{Davis, 871 S.W.2d at 36, 39.}
\end{footnotes}
whether the adoptions were valid, the trial court should look to the following factors:

[W]hether the adopter has assumed responsibility for the adoptee; whether the adoptee has taken the adopter’s surname; whether the adoptee entered the adopter’s home, and, if so, at what age; the length of time the adopter and adoptee lived together; and the nature and extent of [the] adopter’s and [the] adoptee’s parent-child relationship.99

Thus, Davis sets out factors that courts may use to determine the validity of an adult adoption for class gift purposes.100 In contrast to the Fortney court’s textual interpretation of the Kansas adoption statutes, the court in Davis seemed to employ a more liberal interpretation of the Missouri adoption statutes.101

C. Differences Between Adult & Child Adoption

Other than the discrepancy in age of the adoptee, adult and child adoptions have a few key differences that motivate courts to rule in very different ways.102 Virtual adoption—an equitable doctrine and exception to the formal legal adoption process—is one example of how courts distinguish between adult and child adoptions.103 Furthermore, beneficiaries to residuary trusts are sometimes thwarted in their efforts to reap the benefits of the heir-at-law status adult adoption provides.104

99. Id.
100. Id.
101. Compare In re Estate of Fortney, 611 P.2d 599, 604–05 (Kan. Ct. App. 1980) (holding that “anyone of any age can be a child of another as long as a blood or legal relationship exists,” and that adult adoptees have rights), with Davis, 871 S.W.2d at 39 (concluding that courts must “look to several factors” in “determin[ing] whether the persons adopted . . . have the familial ties” that are necessary to have rights).
102. See, e.g., Miller v. Paczier, 591 So. 2d 321, 322 ( Fla. 3d Dist. Ct. App. 1991) (per curiam) (denying a virtual adoption to an adoptee because he was an adult when the adoption took place, and therefore the equitable doctrine did not apply).
103. See id. at 323.
1. Virtual Adult Adoption

Virtual adoptions are thought of as an exception to the standard method by which one legally adopts another. A virtual adoption in Florida is defined as:

[A]n equitable doctrine designed to protect the interests of a person who was supposed to have been adopted as a child but whose adoptive parents failed to undertake the legal steps necessary to formally accomplish the adoption. . . . The doctrine is invoked in order to allow the supposed-to-have-been adopted child to take an intestate share.

One key difference in how courts treat child versus adult adoption is the way the courts treat virtual adoptions in each situation. Miller v. Paczier offers a look into how Florida courts treat virtual adult adoption.

In Miller, an adult man claimed that he had formed a relationship with his now-deceased aunt and uncle such that he should be considered virtually adopted for purposes of inheriting from their intestate estate. The Florida court held that declaring the nephew virtually adopted would offend the traditional purpose of virtual adoption. Specifically, the court explained that because the nephew was an able-bodied adult, perfectly capable of taking care of himself financially, imputing a virtual adoption would open up the floodgates to future fraudulent claims against other intestate estates. The court further stated that virtual adoption was meant “to protect the interests of minors, who . . . were given by their natural parents to adoptive parents based upon an oral agreement to allow the child to inherit from the adoptive parents, if they died intestate.” Miller illustrates how Florida courts seem to be reluctant to honor virtual adult adoptions as compared to virtual child adoptions.

105. Miller, 591 So. 2d at 323.
106. Id. at 322 (citations omitted).
107. See id. at 322–23.
108. 591 So. 2d 321 (Fla. 3d Dist. Ct. App. 1991) (per curiam).
109. See id. at 322–23.
110. Id. at 322.
111. Id. at 323.
112. Id. (citing Thompson v. Moseley, 125 S.W.2d 860, 862 (Mo. 1939)).
113. Miller, 591 So. 2d at 323.
114. See id.
2. Residuary Trust Beneficiaries

Another interesting example of a case in which an adopted adult was not afforded the same rights that a natural adult child would have been is *Armstrong v. Hixon*. Armstrong, a Texas case, addressed whether unrelated adopted adults can be possible beneficiaries to residuary trusts.

In *Armstrong*, a Texan decedent’s residuary trust was to pass to his brother’s children—John, Tobin, and Lucie—according to a codicil executed shortly before his death. Then, upon each child’s death, assuming the trust had yet to terminate, the remaining assets were to pass to that child’s own children. At the time the case was decided, John was deceased but had children of his own who were entitled to his share. Tobin was still living but also had children. Lucie never married and never had children. Lucie did, however, adopt an adult woman, Katherine. Tobin, individually, and John’s children—the entitled parties to the residuary trust—brought suit against Lucie to preclude Katherine from “tak[ing] as a descendant under the [w]ill.” The entitled parties were unhappy with the fact that they would have to share the residuary with Katherine, should Lucie die. Lucie argued that the Supreme Court of Texas had already decided, in a prior case, that an adopted adult was not precluded from inheriting from collateral relatives. After considering the legislative history, however, the court rejected this argument. The court explained that Texas law permits adopted children to inherit from adoptive parents in the same way biological children do, but it does not permit inheritance “‘through’ the adoptive parents.” Therefore, Katherine was not entitled to a share of the residuary trust after Lucie’s death. This case illustrates Texas’s contrasting interpretation of adult adoption versus child adoption with respect to residuary trust beneficiaries.
IV. SAME-SEX COUPLES, ADULT ADOPTION, & ESTATE PLANNING

Because the Third District deemed section 63.042(3) of the Florida Statutes unconstitutional, many same-sex couples, that still cannot enjoy the benefits of a legally recognized marriage under Florida DOMA, have begun to use adult adoption as a way to circumvent frustrations and uncertainties in estate planning. 130

A. The Good: Securing Assets & Homestead

The Uniform Probate Code was adopted by and became effective in Florida as the Florida Probate Code (the “FPC”) in 1976. 131 The FPC governs probate and intestacy rules throughout the state. 132 According to section 732.101(1) of the FPC: “Any part of the estate of a decedent not effectively disposed of by will passes to the decedent’s heirs . . . .” 133 If one fails to make a will, makes an invalid will, or makes a will that is later contested and invalidated, his or her assets will pass through intestacy. 134 In each of these scenarios, the surviving partner will inherit nothing, as he or she is not a protected class in Florida’s per stirpes distribution scheme for intestacy. 135 Adult adoption, however, may move the surviving partner from an unprotected class of heirs into a protected class of heirs, thus fulfilling the decedent’s wishes. 136 This is possible because the FPC affords the same legal status to adopted children and adults as natural children—lineal descendants—a protected class of heirs. 137

1. Intestate Succession

Under the FPC, if a same-sex couple fails to use a will to dispose of property upon death, everything wholly-owned by the decedent will pass through intestacy. 138 Florida uses a per stirpes distribution scheme, which

130. See Fla. Stat. § 741.212(1) (2012); Karibjanian, supra note 4, at 91, 95.
133. Id. § 732.101(1).
134. See id.
135. See id. §§ 732.103–.104.
136. Id. § 732.108(1) (stating that adopted children have the same legal rights as natural children for purposes of intestate succession).
138. See id. § 732.101(1).
determines the order of heirs that will inherit an intestate estate. The first taker under the per stirpes distribution scheme is the surviving spouse. Because same-sex couples in Florida may not legally marry pursuant to Florida DOMA, the surviving spouse status is unavailable. The second takers are the decedent’s lineal descendants. If a same-sex couple chooses adult adoption, the surviving partner and adoptee will be the technical lineal descendant and will inherit the entire estate.

2. Will Contests

Another situation that may arise after someone’s death is if his or her will is contested and later invalidated. This is different than the previous example in that the testator did make a will, presumably to show intent contrary to Florida’s per stirpes distribution system. The only parties who have standing to contest and invalidate a will are parties who stand to inherit from a decedent’s intestate estate should the will be invalidated. Adult adoption is the key here because if the surviving partner becomes the only lineal descendant, and therefore the only taker through intestacy, no other relative has standing to contest the will, as no other relative stands to inherit anything if the will is invalidated. Therefore, if a couple chooses adult adoption, the surviving partner will be safeguarded by not only the will itself, but also from will contests, as there would be no one available to contest and invalidate it.

139. Id. §§ 732.102–.104.
140. Id. § 732.102.
141. Id. § 741.212(1), (3).
142. FLA. STAT. § 732.102.
143. Id. § 732.103(1).
144. See id. § 732.108(1).
146. See id. at 78–79; see also supra Part IV.A.1.
147. Ratliff, supra note 55, at 1782.
148. See id.
149. See id.
3. Rights to Homestead

A surviving spouse’s right to inherit the decedent’s homestead is fundamental in Florida.\footnote{150. See generally FLA. CONST. art. X, § 4 (the homestead provision of the Florida Constitution).} According to Article X, section 4 of the Florida Constitution, real property owned by the decedent, upon which the decedent or decedent’s family lived, is passed to the decedent’s surviving spouse and descendants and is “exempt[ed] from forced sale” by most creditors.\footnote{151. Id. § 4(a)–(b).} Because Florida DOMA makes the surviving spouse’s status unavailable to same-sex couples, homestead cannot be passed to the decedent’s partner in a traditional manner.\footnote{152. See id. § 4(b)–(c); FLA. STAT. § 741.212(1) (2012).} Adult adoption offers an elementary way for homestead to be passed to the decedent’s partner as his or her lineal descendant.\footnote{153. See FLA. CONST. art. X, § 4(a)(1); Foltz, supra note 5, at 513.} If the decedent dies without a will, homestead will pass through intestacy first to his or her surviving spouse, and then to his or her lineal descendants.\footnote{154. FLA. CONST. art. X, § 4(b); FLA. STAT. §§ 732.101(1), .103(1).} Therefore, if the same-sex couple chooses adult adoption, homestead will pass through intestacy to the surviving partner as the decedent’s lineal descendant.\footnote{155. See FLA. CONST. art. X, § 4(b); FLA. STAT. § 732.101(1).} Without adult adoption, the surviving partner will not receive homestead if the decedent dies intestate.\footnote{156. Foltz, supra note 5, at 513; see FLA. STAT. § 732.103.}

B. The Bad: Irrevocability & Severed Inheritance

While on its face adult adoption seems like a foolproof option for same-sex couples who wish to secure their assets, there are several major drawbacks.\footnote{157. Foltz, supra note 5, at 514–16.} The irrevocable nature of adoptions and severed familial inheritance rights are the two most pressing issues that may plague same-sex couples that choose adult adoption.\footnote{158. Id.}

1. Adoption Is Irrevocable

As with child adoptions, adult adoptions are generally protected from annulment.\footnote{159. Id. at 514.} Courts honor adult adoption annulments only in extreme situa-
tions; for example, when there is evidence of fraud or undue influence. Therefore, if a same-sex couple chooses adult adoption to secure assets and then ends their relationship, probably much to their chagrin, their legal relationship remains valid and intact.

2. Extinguished Familial Inheritance Rights

The second major drawback to adult adoption is the severance of the adoptee’s inheritance rights to his or her natural family’s intestate estate. Section 732.108(1) of the Florida Statutes maintains:

For the purpose of intestate succession by or from an adopted person, the adopted person is a descendant of the adopting parent and is one of the natural kindred of all members of the adopting parent’s family, and is not a descendant of his or her natural parents, nor is he or she one of the kindred of any member of the natural parent’s family ...

Unfortunately, none of the three exceptions to this rule apply to save familial inheritances in cases of adult adoption between same-sex partners. Put simply, the future adoptee must choose to inherit from either his or her partner, or his or her natural family’s intestate estate, because once adopted, he or she is not legally entitled to both in Florida.

C. The Ugly: Post-Adoption Trouble in Paradise

The worst-case scenario for same-sex couples that choose adult adoption would begin with a relationship going south, post-adoption. A bad breakup, coupled with the adoptee’s parents dying intestate and a bitter ex-partner with a valid will, could possibly result in the adoptee being effectively disinherited from both parties.
1. Double Disinheritance?

In a situation involving a difficult split between same-sex partners who have chosen adult adoption, the adoptee has agreed to relinquish his or her rights to his familial intestate inheritance due to the adoption itself.\textsuperscript{168} Therefore, if his or her parents die intestate, he or she will inherit nothing from them.\textsuperscript{169} Furthermore, if the couple does not split amicably, the adoptive partner may disinherit the adoptee in a will.\textsuperscript{170} In summary: If the adoptee’s parents die intestate, and the scorned adoptive partner dies with a will that disinherits the adoptee, he or she may inherit nothing from either party.\textsuperscript{171} This situation seems to put considerable pressure on same-sex couples to decide well before the adoption whether they will stay together long-term, and if things do not work out, to stay amicable.\textsuperscript{172} This may, perhaps, call for a written agreement that after the adoption, the adoptive partner vows not to disinherit the adoptee in a will, regardless of the circumstances underlying the breakup.\textsuperscript{173}

V. The Better Option: Trusts

It may be that the best option same-sex couples have to secure assets for posthumous distribution in Florida does not actually lie with adult adoption.\textsuperscript{174} With adult adoption, there are far too many pitfalls, and from a legal standpoint, the benefits generally do not seem to outweigh the drawbacks.\textsuperscript{175} Most significantly, adult adoption forces same-sex couples to choose whether to inherit from their partner or their family through intestacy.\textsuperscript{176} Most people would probably not be able to make the choice, depending on the size of each party’s respective estate. Instead, same-sex couples might be better off using a different legal tool to plan their estates: Trusts.\textsuperscript{177}

\begin{itemize}
  \item \textsuperscript{168} Id. at 515.
  \item \textsuperscript{169} Id.
  \item \textsuperscript{170} Id.
  \item \textsuperscript{171} See Foltz, supra note 5, at 515–16.
  \item \textsuperscript{172} See id.
  \item \textsuperscript{173} See id. at 508–09, 515–16.
  \item \textsuperscript{174} See Karibjianian, supra note 4, at 94–95; Foltz, supra note 5, at 517.
  \item \textsuperscript{175} See Foltz, supra note 5, at 514–17.
  \item \textsuperscript{176} See id. at 515–16.
  \item \textsuperscript{177} See Karibjianian, supra note 4, at 94.
\end{itemize}
A. Florida Trusts Generally

Trusts offer a far more workable tool for planning estates for same-sex couples than wills.178 Where wills are strict and rigid in Florida, trusts are flexible with regard to issues like execution formalities and amendments.179

The Florida Trust Code (“FTC”)180 governs trust laws throughout the state.181 Pursuant to section 736.0401(1) of the FTC, a trust may be created in Florida by “[t]ransfer[ring] . . . property to another person as trustee during the settlor’s lifetime or by will or other disposition taking effect on the settlor’s death.”182 In other words, unlike wills, trusts may be created to take effect while the settlor is still alive, and the beneficiary’s interest is not necessarily restricted to vest only after the settlor dies.183

The general requirements to create a trust in Florida are that “[t]he settlor has [the] capacity to create a trust; [t]he settlor [has the] intent to create [a] trust; [and] [t]he trust has a definite beneficiary.”184 Trusts in Florida also must have a trustee with duties to perform.185 Trustees are assigned to manage the trust in the interest of the beneficiary or beneficiaries.186 The property—or res—being transferred into the trust must be presently identifiable.187 Finally, the trust must have a valid trust purpose that is both lawful and feasible.188 A key restriction on trusts in Florida is that one “person [may] not [be both] the sole trustee and sole beneficiary.”189

1. Inter Vivos v. Testamentary Trusts

Trusts in Florida come in two basic forms: Inter vivos and testamentary.190 Inter vivos trusts are the types of trusts formed and made effective

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178. See id. (describing the different types of trusts that may be used to help same-sex couple clients confidently plan their estates).
180. FLA. STAT. §§ 736.0101–1303.
181. Id. § 736.0102.
182. Id. § 736.0401(1).
183. Id.; see Karibjianian, supra note 4, at 94.
184. FLA. STAT. § 736.0402(1)(a)–(c).
185. Id. § 736.0402(1)(d).
186. Id. § 736.0801.
187. Id. § 736.0401(2); BLACK'S LAW DICTIONARY 1420 (9th ed. 2009).
188. FLA. STAT. § 736.0404.
189. Id. § 736.0402(1)(e).
190. See id. § 689.075(1) (explaining that a validly executed inter vivos trust shall not be considered a failed attempt at a testamentary disposition for several reasons; revealing the clear distinction between Florida inter vivos and testamentary trusts); Donna Litman, Revocable Trusts Under the Florida Trust Code, 34 NOVA L. REV. 1, 4 (2009).
during a settlor’s lifetime. In contrast, testamentary trusts are more like wills in that the beneficiary’s interest does not vest until the death of the settlor. Because inter vivos trusts avoid probate altogether, inter vivos trusts seem to be the better option for same-sex couples over testamentary trusts.

Additionally, inter vivos trusts may include testamentary aspects that dispose of the remaining estate to the surviving partner upon the settlor’s death in the same way a will or purely testamentary trust would. Using an inter vivos trust, the settlor may retain an interest in the trust for himself or herself, and also tailor the inter vivos trust throughout the course of the relationship to meet the couple’s eventual posthumous asset distribution goals. Purely testamentary trusts, on the other hand, lay dormant until the settlor’s death. Inter vivos trusts are therefore perhaps the best of both worlds for same-sex couples that choose to utilize a trust because they offer a way to control assets both during life and secure them after death.

2. Revocable v. Irrevocable Trusts

Inter vivos trusts in Florida may be either revocable or irrevocable. Revocable trusts leave the settlor with room to amend and/or terminate the trust at any time during his or her lifetime. In contrast, irrevocable trusts leave the settlor essentially powerless—he or she has relinquished his or her right to amend or terminate the trust and the trust itself is solely in the hands of the trustee and/or beneficiaries. Therefore, if a same-sex couple chooses to use an inter vivos trust to control assets during life and after death, it would certainly be more beneficial to select a revocable trust rather than an irrevocable trust. This way, the couple may decide over the span of their relationship whether they need to change anything in the trust to accommodate changing income and expenses, acquiring new assets, adopting children, etc.

192. FLA. STAT. § 736.0403(2)(b); Litman, supra note 190, at 4.
194. FLA. STAT. § 736.0403(2)(b).
195. Karibjanian, supra note 4, at 94.
196. FLA. STAT. § 736.0403(2)(b); Litman, supra note 190, at 4.
197. See Karibjanian, supra note 4, at 94.
198. FLA. STAT. § 736.0602(1).
199. Foltz, supra note 5, at 508.
200. Id. at 508–09.
201. See id.
202. See id. at 508.
Furthermore, if the relationship ends, the couple may terminate the revocable inter vivos trust and be freed from the relationship altogether. This is in direct contrast to irrevocable inter vivos trusts and adult adoption, in which the legal relationships are far more certain to remain forever intact in the eyes of the law.

B. “Silver Lining” Trusts

While it is clear that both Federal DOMA and Florida DOMA continue to impede the efforts of same-sex couples trying to plan their estates, there remains a specific group of estate planning rules that ironically works in direct favor of same-sex couples, thanks to Congress. These rules are a group of limitations passed by Congress in 1990 and imposed by the Internal Revenue Service. These limitations are sometimes referred to as the related-parties rules. Generally, these rules prevent related individuals from taking advantage of certain federal tax planning techniques. Related individuals refer to those who are bound by blood or marriage in the eyes of federal law. Since the related-parties rules govern federal tax laws, and same-sex couples may not legally marry pursuant to Federal DOMA, same-sex couples are therefore unrelated parties by definition and may enjoy exemption from this type of estate planning limitation. This benefit is a rarity within federal law, and could be considered the “silver lining” in estate planning for same-sex couples. Two specific estate planning techniques that are likely more attractive to homosexual couples than heterosexual couples due to this convenient exemption are the Grantor Retained Income Trust (GRIT) and the Grantor Retained Annuity Trust (GRAT).

203. See FLA. STAT. § 736.0602(1).
204. See Foltz, supra note 5, at 508–09, 514–15.
206. Karibjanian, supra note 4, at 94; Scott E. Squillace, GRITs for Gays and Other Unique Planning Opportunities for Same-Sex Couples, J. PRAC. EST. PLAN., Oct.–Nov. 2009, at 23–24.
207. See Squillace, supra note 206, at 24.
208. See id.
211. Squillace, supra note 206, at 24.
212. Karibjanian, supra note 4, at 94.
1. GRITs

GRITs have been considered a type of trust that appear almost perfectly tailored to the same-sex couple living in a DOMA state. While statutorily cut off from use by a heterosexual married couple, same-sex couples are free to utilize GRITs to develop and secure their estate plans. A GRIT is an irrevocable trust into which the grantor, or adoptive partner, deposits an initial gift of property. This property is presumably a slowly and modestly appreciating asset, or something that will earn interest over time due to sheer market forces. Throughout the trust term, the grantor receives payment for any interest accrued on this property. Then, upon termination of the trust term, or death of the grantor who has pre-appointed a trustee, the remaining property vests to a named beneficiary, the adoptee.

2. GRATs

GRATs are very similar to GRITs, with the exception of an income requirement and the inevitable failure of the trust should the grantor die prior to the end of the trust term. Unlike GRITs, which expect and embrace minimal interest and payments to the grantor, GRATs require the initial gifted property to produce steady income for the grantor in the form of a fixed annuity. Furthermore, if the grantor of a GRAT dies before the trust term expires, the trust automatically fails, whereas in a GRIT, the failing trust may be saved by granting certain powers to a trustee.

VI. Conclusion

Adult adoption for same-sex couples is a relatively new and perhaps underused legal mechanism in Florida. While Florida DOMA still prohibits same-sex couples from enjoying the benefits of the all-powerful surviving spouse status in probate court, the Third District’s authorization of a homosexual adoption in Adoption of X.X.G. & N.R.G. opened the door for same-
sex couples to adopt each other as a way to secure assets after death.\(^{223}\) While the Florida Legislature has not stricken section 63.042(3) from the *Florida Statutes*, the State’s affirmative decision not to appeal *Adoption of X.X.G. & N.R.G.*\(^{224}\) could reflect a statewide trend toward officially and permanently legalizing homosexual adoptions.

With adult adoption, same-sex couples can enjoy a degree of security in probate court, regardless of situations involving intestacy.\(^{225}\) They are also protected against will contests and later will invalidation.\(^{226}\) Finally, adult adoption can guarantee the adoptee’s rights to the adopter-decedent’s homestead, a critical and fundamental principle in Florida.\(^{227}\)

Unfortunately, adult adoption is irrevocable, leaving emotionally broken same-sex relationships still legally valid and intact.\(^{228}\) Perhaps more significantly, adult adoption severs the adoptee’s right to inherit from his or her family’s intestate estate.\(^{229}\)

Therefore, Florida DOMA and the FPC force adoptees to choose between a guaranteed inheritance from his or her adoptive partner and his or her family through intestacy.\(^{230}\) Heterosexual couples would never be faced with such a difficult choice, but unfortunately, Florida’s legally hostile environment toward same-sex couples compels it.\(^{231}\)

It may be that, instead of adult adoption, trusts are a far better way for same-sex couples to securely plan their estates for the future.\(^{232}\) An inter vivos revocable trust would be a much more sensible tool for same-sex couples, as it comes into effect during the settlor’s lifetime, may be amended to fit the couple’s changing financial and familial status, and is terminable at

\(^{223}\) See id. at 95; see also Fla. Dep’t of Children & Families v. Adoption of X.X.G. & N.R.G., 45 So. 3d 79, 92 (Fla. 3d Dist. Ct. App. 2010), aff’g In re Adoption of Doe, 2008 WL 5006172 (Fla. 11th Cir. Ct. Nov. 25, 2008).

\(^{224}\) See Karibjanian, supra note 4, at 95; see also FLA. STAT. § 63.042(3) (2012), declared unconstitutional by Fla. Dep’t of Children & Families v. Adoption of X.X.G. & N.R.G., 45 So. 3d 79 (Fla. 3d Dist. Ct. App. 2010).

\(^{225}\) See FLA. STAT. § 732.103(1) (declaring that without a surviving spouse, assets will pass through intestacy to the decedent’s lineal descendants; in adult adoption, the adopted partner becomes the lineal descendant and will receive the assets through intestacy); Ratliff, supra note 55, at 1781.

\(^{226}\) Ratliff, supra note 55, at 1782.

\(^{227}\) See FLA. CONST. art. X, § 4(a)(1), (b).

\(^{228}\) Foltz, supra note 5, at 515.

\(^{229}\) Id. at 515–16.

\(^{230}\) See id.; FLA. STAT. §§ 732.101, 103, 741.212.

\(^{231}\) See Foltz, supra note 5, at 495; About Equality Florida, supra note 19 (describing the legally hostile environment in Florida toward homosexuals and homosexual relationships).

\(^{232}\) See Karibjanian, supra note 4, at 94 (suggesting different types of trusts that may benefit same-sex couples that live in states that refuse to recognize same-sex marriage).
any time should things between the couple go awry. Additionally, testamentary aspects may be incorporated into an inter vivos revocable trust to dispose of residual property upon the death of the settlor, in the same way a will or purely testamentary trust would. Finally, GRITs and GRATs provide specific types of trusts that seem perfectly tailored to the same-sex Floridian couple plagued by Federal and Florida DOMA.

While most of the attention—media and otherwise—is currently on equality in homosexuals’ ability to enter into a marriage and ability to adopt children in Florida, posthumous asset distribution for same-sex couples that choose adult adoption is an issue that will certainly rear its head in the courts in only a matter of decades. It is important to flesh out issues that will arise involving same-sex couples that adopt each other before Florida probate courts are left with complicated and speculative adult adoption situations in the near future.

233. Id.; see Fla. Stat. § 736.0602.
235. Squillace, supra note 206, at 24, 27.
236. Nolin, supra note 17 (describing gay rights activists’ focus on homosexual couples’ right to enter into a legally recognized marriage in Florida).
237. See Ratliff, supra note 55, at 1805 (suggesting that the legislature take into account the fact that same-sex couples now use adult adoption to secure assets posthumously in states where same-sex adoption is not legally recognized, and tailoring laws to avoid unintended and unfortunate circumstances in probate courts).
IT’S MY PARTY AND I’LL ARBITRATE IF I WANT TO: ARE WE SIGNING AWAY OUR RIGHT TO LITIGATE TORT CLAIMS?

DAVID M. SHOLL*

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I. INTRODUCTION

Court congestion in the United States has long been a prominent issue in the lion’s share of judicial branches at various levels of government.1 However, as America develops into a more litigious society, courts are bu-

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1. See S. 2027, 101st Cong. § 2 (1990) (enacted). Additionally, the author interned with Judge Robert W. Lee, a County Court Judge of the Seventeenth Judicial Circuit of Florida, in Fort Lauderdale, Florida, who regularly expressed concern over the dire state of the judicial docket.
ried by a deluge of complaints that reach near cataclysmic levels. Congestion is the root of enduring legal conflicts and hence skyrocketing legal fees. Fortunately, disputes which cannot be resolved by the parties have means of alternative legal resolution.

Arbitration is a technique of alternative dispute resolution outside the standard judicial process, whereby legal disputes—situations requiring a binding decision—are taken before neutral third parties, either an arbiter or panel of arbitrators, whose decision will be binding upon the parties. The intent of arbitration is to have a more efficient and simpler, thus cheaper, process relative to traditional litigation. Arbitration can be either voluntary or mandatory. Mandatory arbitration can arise from state statute, as well as freely be entered via valid contract, where parties agree to resolve prospective confrontations with arbitrative proceedings.

Generally, arbitration is utilized in commercial transactions both international and domestic, yet nothing limits arbitration use to a specific area of law. Unfortunately, as arbitration becomes more popular, courts are chal-

2. Marc Galanter, Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) About Our Allegedly Contentious and Litigious Society, 31 UCLA L. REV. 4, 7–8 (1983). While it may be hyperbole to say that courts are prone to suffer disaster from a tidal wave of cases being litigated, the increased workload of courts has made a seemingly slow bureaucratic process move at a snail’s pace. See JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT at x, 317–18 (1989).


7. Id.


9. FLA. STAT. § 682.02 (2012); Arbitration Defined, supra note 6.

10. FLA. STAT. § 682.02; Arbitration Defined, supra note 6.


12. What Types of Disputes Can Be Arbitrated?, ARB. FAQ, http://www.arbitrationfaq.com/disputesandarbitration.html (last visited Oct. 28, 2012). Under the common law, no area of law was prohibited from using arbitration. MASSEY, supra note 11, para. 3; What Types of Disputes Can Be Arbitrated?, supra. However, bills that would limit arbitration of family law
lenged by the legality of such arrangements. Particularly, in Florida, there is currently a split among the district courts of appeal regarding the extent of applicability of arbitration clauses in contracts between parties regarding tort claims. In other words, does a broad and general arbitration clause apply to a complaint in a tort which may have arisen from a contract but only tenuously touches it? The Supreme Court of Florida recently heard oral arguments in Jackson v. Shakespeare Foundation, Inc. (Jackson II) on this exact issue. The Shakespeare Foundation, a Florida company, and its real estate developer complained in a lawsuit that George Jackson and Kerry Jackson, along with their real estate company, committed fraud in a property deal between the parties. The complaint alleged the Jacksons misrepresented the presence of wetlands on the property. The Jacksons argued that the case must be dismissed because the sales contracts contained an arbitration provision. Although the trial court agreed, the First District Court of Appeal reversed the trial court’s ruling. Furthermore, the First District Court of Appeal certified that its opinion was in direct conflict with an opinion issued in a substantially similar case from the Fifth District Court of Appeal.

Florida courts have struggled with the application of the Florida Arbitration Code to arbitration provisions in commercial contracts since it was enacted by the Florida Legislature in 1957. Unfortunately, the assembly of matters have recently been proposed in Florida. Fla. CS for SB 963 (2012) (Dispute Resolution), available at http://www.flsenate.gov/Session/Bill/2012/0963 (last visited Oct. 28, 2012); see also Fla. STAT. § 44.104(14).

See, e.g., Shakespeare Found., Inc. v. Jackson (Jackson I), 61 So. 3d 1194, 1196 (Fla. 1st Dist. Ct. App.), review granted, 74 So. 3d 1083 (Fla. 2011). This argument reached the court via an arbitration clause in a boiler-plate Florida contract for the purchase and sale of real property. Id. at 1197.

See id. at 1200–01 (citing Maguire v. King, 917 So. 2d 263, 266–67 (Fla. 5th Dist. Ct. App. 2005)). Compare id. at 1204, with Maguire, 917 So. 2d at 268.

74 So. 3d 1083 (Fla. 2011) (unpublished table decision).


Respondents’ Answer Brief on the Merits at 1–2, Jackson v. Shakespeare Found., Inc., No. SC11-1196 (Fla. Feb. 8, 2012); see also Complaint at 1, Shakespeare Found., Inc. v. Jackson, No. 09-1399CA, 2010 WL 8747760 (Fla. 14th Cir. Ct. Jan. 27, 2010).

Complaint, supra note 17, at 3–4.

Respondents’ Answer Brief on the Merits, supra note 17, at 2.

Jackson I, 61 So. 3d 1194, 1196 (Fla. 1st Dist. Ct. App.), review granted, 74 So. 3d 1083 (Fla. 2011); Respondents’ Answer Brief on the Merits, supra note 17, at 2.

Jackson I, 61 So. 3d at 1200–01; see also Maguire v. King, 917 So. 2d 263, 268 (Fla. 5th Dist. Ct. App. 2005).

Florida lawmakers failed to provide much, if any, guidance to the courts in defining how to appropriately find boundaries as to the scope of arbitration clauses. As a result, it has been left up to the courts to formulate a test that can accurately interpret the essence of the law. Generally, the courts struggled with whether to interpret the arbitration clauses broadly or narrowly because it is unclear if the legislature intended for the alternative dispute provisions to be applicable to claims generally or specifically.

“The size, vitality, and importance of Florida as a center of commercial activity and a unique legal jurisdiction explains why a large quantity of disputes over arbitrability each year require a Florida Arbitration Code-based analysis and occur outside of interstate commerce.” Therefore, the following discussion regarding arbitration and the complexity of the conceptual scope of arbitration agreement provisions is strictly limited to Florida law.

This article will narrowly focus on the examination of arbitrational issues that arise between contracting parties when they have an agreement with a broad arbitration clause and one party wants to sue the other party in tort. Particularly, this article reviews the major conflicts among the Florida appellate level courts regarding the enforcement of arbitration clauses and the analysis of their applicability to civil tort claims.

Part II of this paper will describe the current state of arbitration in Florida, including a description of what legal rules apply to arbitration, and how arbitration is compelled by the courts of Florida. Part II will also include a
brief discussion on the history of arbitration in the Sunshine State, illustrated by reference to highlights of pertinent jurisprudence on alternative dispute resolution. Next, Part III will tackle the judiciary’s biggest issue—determining the arbitrability of a given dispute. This issue will be explained and examined through the prism of the case sub judice—Shakespeare Foundation, Inc. v. Jackson (Jackson I). Part III will discuss the threshold issues the court must determine. It will diagram, with scrutiny, the pros and cons of both the petitioners' and respondents' arguments. Part IV examines the potential fallout from the decision in Jackson I, continuing with a discussion of how that decision will shape future arbitration provisions. Finally, this article concludes that the current test under Florida law is unsatisfactory to determine arbitrability with consistent results and that the courts in Florida should craft a new test based on what they deem to be the most controlling factor—the parties’ intent.

II. CURRENT STATE OF ARBITRATION LAW IN FLORIDA

Otis B. Driftwood: It’s all right, that’s in every contract. That’s what they call a sanity clause.

Fiorello: You can’t fool me! There ain’t no Sanity Claus!

Arbitration clauses are almost always utilized in commercial contracts or other types of arrangements, which can be catalysts for complex litigation. The right to arbitrate cases within the purview of the Florida Arbitration Code—similar to the Federal Arbitration Act upon which the Florida Statutes are based—generally turns on a “seemingly simple question: ‘Is this...

29. 61 So. 3d 1194 (Fla. 1st Dist. Ct. App.), review granted, 74 So. 3d 1083 (Fla. 2011).
31. See Respondents’ Answer Brief on the Merits, supra note 17, at 7–28.
32. See Cavendish, supra note 26, at 20.
34. See Massey, supra note 11, para. 2.
In the United States unionized sector, studies have shown that the number of collective bargaining agreements that contain arbitration clauses as a means of dispute resolution (grievance arbitration) has been on the rise. In fact, by 1944 the Bureau of Labor Statistics showed that 73% of all labor contracts in America contained arbitration clauses and by the early 1980’s that figure had grown to 95%. Today, 98% of all collective bargaining agreements in the United States contain arbitration clauses.
Id. (citations omitted).
claim arbitrable?". The answer to this question often requires the intricate dissection of multifaceted legal rationale, which has the ability to lead to unpredictable results. A clear understanding of “the concept of arbitrability under the Florida Arbitration Code” is a mandatory qualification for adjudicators in contemporary courts to resolve the deft question posed above in one of their most hotly litigated subject matters—arbitration concerning tort claims.

Though there are instances in which a particular controversy is within the scope of an arbitration agreement between contracting parties, it is also quite regular that disputes fall into a grey area of whether or not they are within the scope of the arbitration clause. In Florida, this is usually called into question “in the context of a motion to compel arbitration, when the court is required to determine, inter alia, whether” a claim is subject to arbitration. When adjudicating the issue of whether a claim falls within the scope of an arbitration clause, the court must glean the intent of the contracting parties through careful examination of the language of the agreement. Presumably, the question arises most when the quarrel under review is whether a civil complaint in tort falls within the defined boundaries of an agreement to arbitrate or whether such a claim lies solely within the jurisdiction of the courts.

The preeminent Florida case devoted to this controversy is Seifert v. U.S. Home Corp., where the court held the suitable test to determine if an

36. Id. at 25.
37. Id.
41. See The Scope of Arbitration Clauses in Florida, supra note 39. Arbitration provisions must have defined boundaries, even if they are vague, because it is illegal for such provisions to oust the jurisdiction of the courts. See id.; 17A C.J.S. Contracts § 315 (2012). Additionally, “arbitration agreements and provisions are contractual in nature [and] construction of such provisions... remains a matter of contract interpretation.” Seifert, 750 So. 2d at 636 (citing Seaboard Coast Line R.R. Co., 690 F.2d at 1352; R.W. Roberts Constr. Co. v. St. Johns River Water Mgmt. Dist. ex rel. McDonald Electric & Repair Serv., Inc., 423 So. 2d 630, 632 (Fla. 5th Dist. Ct. App. 1982)).
42. 750 So. 2d 633 (Fla. 1999).
issue falls within the scope of an arbitration provision is “whether the tort claim, as alleged in the complaint, arises from and bears such a significant relationship to the contract between the parties as to mandate application of the arbitration clause.” 43 Simply speaking, the court has to balance the contract incorporating the arbitration provision against the allegations set forth in the complaint to determine if “a ‘sufficient nexus’ [exists] between the two.” 44 The Supreme Court of Florida, in Seifert, “concluded that the tort claim in that case” failed to connect via a significant relationship to the contract to merit “submission of the cause to arbitration;” the rationale being that all of the allegations by the plaintiff failed to assert that any of “the defendant’s duties or obligations arose from or were governed by the contract.” 45 Conversely, not too long ago, the Third District Court of Appeal “held that a claim for breach of fiduciary duty” against a CEO by his former company was within the arbitration provision of the employment contract “because it was necessary to examine the contract to ascertain exactly what the CEO’s duties [were] to the company.” 46

A. A Brief History of Arbitration in Florida

It is impossible to pinpoint the exact genesis of arbitration but scholars believe alternative dispute resolution is from time immemorial. 47 The British Kingdom had arbitrations dating back before the installation of the common law system upon which our American courts are based. 48 Domestically, Native Americans used arbitration as a means of solving intra and inter tribe disputes. 49 Moreover, even George Washington included a proviso in his will that “if any dispute [arose] over the [language] of the document that a panel of three arbitrators [must be utilized] to render a final and binding decision to resolve the dispute.” 50

43. Id. at 640.
44. The Scope of Arbitration Clauses in Florida, supra note 39; see also Seifert, 750 So. 2d at 638.
45. The Scope of Arbitration Clauses in Florida, supra note 39; see also Seifert, 750 So. 2d at 640, 642.
47. MASSEY, supra note 11, para. 3.
48. Id.
49. Id.
50. Id.
The first inclusive laws about arbitration in Florida were enacted in 1828. The propagation of arbitration law in Florida was put forth by the unicameral Legislative Council. These laws were exceptionally analogous in many ways to English arbitration law from 1697, which authorized “parties [to] file an agreement to arbitrate with the court that would have jurisdiction over the controversy.” Originally, agreements providing for the arbitration of future disputes were unenforceable as executory contracts, which were voidable by either party. Furthermore, it was common for courts to merely renounce enforcement of arbitration clauses over future disputes as a matter of public policy against “oust[ing] the jurisdiction of the courts.” Judicial hostility combined with the general “reticence of lawyers to venture into unfamiliar territory” meant arbitration was a rarely utilized process in Florida. In fact, a 1954 study found that only a handful of Florida lawyers had considerable experience with arbitration and that most lawyers preferred litigation over arbitration.

The impetus for the modern era of arbitration was the New York Legislature’s amendment of the Civil Practice Act in 1920. This new law supported the enforceability of agreements to arbitrate for the first time. New York’s legislative actions created a buzz about arbitration, which compelled “the Conference of Commissioners on Uniform State Laws to release a draft...
Uniform Arbitration Statute ("UAS") in 1924. The UAS was unfortunately rejected by a majority of states, but it set the stage for the passage of the United States Arbitration Act, more commonly known as the Federal Arbitration Act ("FAA"). Following the lead of the New York law, the FAA "similarly made agreements to arbitrate future disputes enforceable." The scope of the FAA was limited to maritime transactions, interstate commerce, and foreign commerce. However, the Supreme Court of the United States' support of the Act, combined with the Act's nationwide coverage, served to intensify sponsorship "for the enactment of modern state arbitration laws." Shortly after the end of World War II, a University of Miami School of Law professor, David S. Stern, undertook crafting a contemporary arbitration statute for Florida for use with commercial arbitration. After facing intense opposition, Professor Stern's draft was adopted into Florida law in 1957.

"Following the lead of Congress, many states, including Florida, have also legislated the field of arbitration." Section 682.02 of the Florida Statutes, which falls within the Florida Arbitration Code, expressly affords that written contractual provisions calling for settlements of any disputes via arbitration "shall be valid, enforceable, and irrevocable without regard to the justiciable character of the controversy." However, the Florida Arbitration Code will not apply if the contracting parties exercise the option to specifically stipulate as such in their agreement. For example, in Wickes Corp. v.
Industrial Financial Corp.,\textsuperscript{72} where the parties clearly expressed their desire to not have the Florida Arbitration Code apply, the court held that “their rights and duties will be decided according to common law principles.”\textsuperscript{73} Courts in Florida have reluctantly acknowledged that the goal of the Florida Arbitration Code is to bypass protracted litigation and its accompanying costs.\textsuperscript{74} Thus, Florida courts strictly construe arbitration agreements under the Florida Arbitration Code, and “only matters expressly covered by the arbitration agreement may be arbitrated.”\textsuperscript{75}

Finally, the “general hostility” of the Florida courts plus the inherent restrictions of the Florida Arbitration Code handicapped the acceptance of arbitration in Florida.\textsuperscript{76} Thus, twenty years after the passage of the Florida Arbitration Code, “it was [plausible] for one commentator to write that ‘it is clear that in Florida arbitration of disputes, other than these [sic] in the labor area, are fairly rare.’”\textsuperscript{77} Despite this, the Florida judiciary eventually softened its stance and arbitration is now looked upon favorably in the Sunshine State.\textsuperscript{78}

B. What is Arbitration?

Arbitration is one of several modes of alternative dispute resolution.\textsuperscript{79} Contrary to standard litigation, the adversaries do not resolve their problems “in a civil courtroom with a judge and jury making the decision.”\textsuperscript{80} Instead, the parties sanction their controversy to the authority of a single arbitrator or a panel of arbiters outside traditional jurisprudential settings—\textit{i.e.}, the courtroom or chambers.\textsuperscript{81} The arbitrator is not technically “a judge, [but] has quasi-judicial power[s] to investigate, weigh the evidence presented, and to
render a final decision to resolve the matter, which is enforceable by a court judgment.”

To start “[t]he arbitration process . . . opposing sides select[] a neutral third party” to adjudicate their dispute. Generally, once an arbitrator is selected, the opposing counsels and judges will meet to “discuss the issues in dispute and decide on a time frame for their resolution.” Next, the individuals on either side of the dispute will mutually create a formal Arbitration Agreement. These formal agreements integrate the controversies in their entirety and the arbitration proceedings are restricted to resolving only those issues raised in the Arbitration Agreement.

After these initial deeds are accomplished, the parties each make their presentations to the arbitrator. “The proceedings may or may not be recorded and often do not abide by the rules of evidence used in traditional litigation.” Once the parties have completed presenting their respective sides of the case, the arbitrator is capable of, and “will, render a final decision.”

The benefits of arbitration are numerous. Proponents of the method allege the process to be more efficient, and thus quicker at resolving disputes than the courts. Arbitration is a private proceeding, which means that “the timing of the matter is contingent upon the preparation of the parties” as opposed to being subject to the mercy of the court’s caseload. An arbitrator can swiftly reach a decision, potentially within a few months, as opposed to years of litigation. “By limiting discovery and the time it takes to resolve an issue, the parties often expend less money preparing for and arbitrating a matter than litigating in court.” Additionally, those who choose to arbitrate

82. Greene, supra note 79.
83. Id.
84. Though not officially judges, during arbitration proceedings, the arbitrators are usually referred to directly as judges, and sometimes even “your honor.” See Tell, supra note 81, at 59. This is due to the lack of better title for the arbitrator within the process of arbitration. Id. However, in some cases, usually involving construction contracts, arbitrators are known as umpires. Id.
85. Greene, supra note 79.
86. Id.
87. Id.
88. Id.
89. Id.
90. Greene, supra note 79.
91. See id.
92. Id.
93. Id.
94. Id.; see, e.g., Tell, supra note 81, at 112–14.
95. Greene, supra note 79.
have the luxury of selecting an arbitrator. The freedom to choose an arbitrator is especially beneficial to highly technical disputes.

Most parties believe it is to their advantage to employ an arbitrator who maintains a high level of knowledge or expertise within the field that is the subject of the dispute “because the arbitrator is familiar with the normal course of [business] and terms [within] the trade.”

However, arbitration is not without its disadvantages. One of the disadvantages of arbitration is the majority of proceedings are based on limited discovery. Limitations on discovery mean that “both sides may never be able to acquire the facts necessary to accurately evaluate the controversy.”

Ergo, arbitrators potentially could be issuing fallible decisions based on spurious logic resultant from inadequate information. Additionally, most ventures forego the rules of evidence, and “while this [may] allow for the free flow of information, the protections [from] the rules . . . are essentially waived.” Finally, it is seen as a large cost by many that most arbitration decisions are not appealable.

1. Playing by the Rules

Through statutory legislation and traditional common law jurisprudence, Florida has evinced an extensive set of rules applicable to understanding the arbitrability of disputes. No doubt, the most important of these rules is in the Florida Arbitration Code.

96. Id.
97. Id.
98. Id.
99. See id.
100. Greene, supra note 79.
101. Id.
102. Id.; see Hauser et al., supra note 78, at 16.
103. Greene, supra note 79.
105. See FLA. STAT. § 682.01 (2012) (stating Chapter 682 of the Florida Statutes encompasses the entire Florida Arbitration Code); Seifert v. U.S. Home Corp., 750 So. 2d 633, 636 (Fla. 1999) (providing the three elements to determine arbitrability in Florida); Maguire v. King, 917 So. 2d 263, 266 (Fla. 5th Dist. Ct. App. 2005) (stating that torts based in common law may sometimes fall within or outside of an arbitration clause while contractually-created duties are normally subject to broad arbitration clauses (citing Seifert, 750 So. 2d at 639–41; Stacy David Inc. v. Consuegra, 845 So. 2d 303, 306 (Fla. 2d Dist. Ct. App. 2003))).
Arbitration agreements made valid, irrevocable, and enforceable; scope.—Two or more parties may agree in writing to submit to arbitration any controversy existing between them at the time of the agreement, or they may include in a written contract a provision for the settlement by arbitration of any controversy thereafter arising between them relating to such contract or the failure or refusal to perform the whole or any part thereof. This section also applies to written interlocal agreements under ss. 163.01 and 373.713 in which two or more parties agree to submit to arbitration any controversy between them concerning water use permit applications and other matters, regardless of whether or not the water management district having jurisdiction over the subject application is a party to the interlocal agreement or a participant in the arbitration. Such agreement or provision shall be valid, enforceable, and irrevocable without regard to the justiciable character of the controversy; provided that this act shall not apply to any such agreement or provision to arbitrate in which it is stipulated that this law shall not apply or to any arbitration or award thereunder.¹⁰⁶

Courts are required to compel arbitration when an agreement to arbitrate and an issue within the scope of the agreement co-exist, plus neither of the parties has waived their right to arbitration.¹⁰⁷ Though courts now generally favor compelling arbitration, they can only do so when the provisions in question comply with the Florida Arbitration Code.¹⁰⁸ “[P]arties [who] resort to the statutory mode of arbitration” must substantially comply with statutory requirements.¹⁰⁹ Thus, if an agreement fails to comply with the Florida Arbitration Code, the courts are unable to enforce or compel specific performance.¹¹⁰ For the Florida Arbitration Code to apply, the parties must either: (1) “agree in writing to submit to arbitration any controversy existing between them at the time of the agreement” or (2) include a provision for the settlement of controversies thereafter arising between the parties relative to the contract or failure to perform or refusal to perform the contract partially or wholly.¹¹¹ The second type of agreement does not controvert the constitu-

¹⁰⁶. FLA. STAT. § 682.02.
¹⁰⁸. Avid Eng’g, Inc. v. Orlando Marketplace Ltd., 809 So. 2d 1, 3 (Fla. 5th Dist. Ct. App. 2001) (citing Knight v. H.S. Equities, Inc., 280 So. 2d 456, 459 (Fla. 4th Dist. Ct. App. 1973)).
¹¹⁰. Knight, 280 So. 2d at 459.
¹¹¹. FLA. STAT. § 682.02.
tional rights of Floridians because parties waive their rights to access the courts upon “agreeing to arbitration in lieu of litigation.” Interestingly, the arbitration provisions in contracts do not need to be titled as such. The Florida courts prefer to stick to an if it quacks like a duck and walks like a duck, then it must be a duck analysis. The only judicial guidance proffered is “[t]he provisions in a contract providing for arbitration must sufficiently identify what particular matters are to be submitted to arbitration, and set forth some procedures by which arbitration is to be effected.” Additionally, the Florida Arbitration Code does not apply retroactively. Accordingly, “only . . . agreements and provisions for arbitration made subsequent to the effective date of the [Florida Arbitration] Code” are subject to it.

For example, the Fifth District Court of Appeal reviewed the dismissal of the complaint of a licensee brought against a licensor and the licensor’s president that asserted tort and statutory claims in Marine Environmental Partners, Inc. v. Johnson. Despite the fact that the licensing agreement provided that Colorado law was controlling, the parties failed to argue the applicability of Colorado law at any judicial level and predominantly relied on Florida law. The court held that Florida law was applicable since the issue of choice of law was waived by the parties, and Florida was the forum state.

Jurisdiction over arbitration is conferred to the Florida courts when an agreement is made subject to the Florida Arbitration Code and provides for arbitration in the state, regardless of the province in which the accord was made. Among other things, once a court has jurisdiction over a claim the courts have the authority to enforce arbitration agreements or arbitration

112. See Fla. Const. art. I, § 21 (“Access to [C]ourts” states that “[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay.”). For further discussion see John F. Cooper & Thomas C. Marks Jr., Florida Constitutional Law: Cases and Materials (4th ed. 2006).
115. See id.
116. Id. at 164.
118. Id.
120. Id. at 426.
121. Id. (citing Waner v. Ford Motor Co., 331 F.3d 851, 856 n.2 (Fed. Cir. 2003); Neely v. Club Med Mgmt. Servs., Inc., 63 F.3d 166, 180 (3d Cir. 1995); Terminix Int’l Co. v. Ponzio, 693 So. 2d 104, 106 (Fla. 5th Dist. Ct. App. 1997)).
clauses in contracts. Though parties are free to contract that laws of any jurisdiction will be controlling in the result of arbitration, Florida courts will not enforce such provisions due to the Florida Arbitration Code.

When making determinations about whether a claim falls within the potential scope of arbitration courts are required to “look beyond the [mere] legal cause of action and examine the factual allegations of the complaint.” The wide gaze of the fact-finder is necessary to ensure that only the claims the parties intended to arbitrate are compelled. Because arbitration agreements are contractual in nature, a trial court’s denial of a motion to compel arbitration is an issue of contractual interpretation and thus, subject to the appellate court’s de novo review.

Arbitration is strictly limited to only the disputes “which the parties have expressly agreed” to resolve through arbitration. Judges shall not compel arbitration if there is an “absence of express language [mandating such] in the . . . contract” before the court. Any questions about the

123. FLA. STAT. § 682.18 (2012).
124. See id. (referencing provisions for arbitration in another state).
125. Singer v. Gaines, 896 So. 2d 851, 854 (Fla. 3d Dist. Ct. App. 2005) (citing In re Scott, 100 S.W.3d 575, 581 (Tex. App. 2003)). The financial advisors’ claim that the employer and its principals “fraudulently induced him into entering into an employment contract,” arose out of the employment, and thus, the claim was subject to arbitration under the National Association of Securities Dealers (NASD) Code of Arbitration. Id. at 852–53. The advisors’ claims that the defendants “falsely represented that they would provide him with ample support staff, significant marketing programs, and guidance from producers who had made more than $2.7 million in revenue in the prior year,” id. at 852, “necessarily require[d] evaluation of . . . performance of the defendants as an employer of [a] broker[].” Id. at 855.

Finally, appellee argues that the trial court was correct to deny the motion to compel arbitration because there was no agreement that tort claims would be subject to arbitration. We find the instant case clearly distinguishable. Here, the agreement containing the arbitration clause obligated appellant to provide appropriate care to the decedent, and the dispute alleges that appellant failed to provide appropriate care. It certainly appears to us that there is a strong nexus between the dispute giving rise to the lawsuit and the contract containing the arbitration clause. That the claim sounds in negligence (failure to exercise reasonable care) rather than breach of
scope—or questions regarding waiver—should be resolved in favor of arbitration rather than against it. \(^{130}\) In addition, Florida courts should conclude any and all doubts about the reach of arbitration agreements with favoritism towards arbitration. \(^{131}\) Remarkably, the courts in Florida fail to mention how to balance the public policy of favoring arbitration when weighed against the presumption of mistakes in contractual drafting being held against the drafter. \(^{132}\)

Public policy in Florida is partial to arbitration “as an efficient means of [dispute settlement]” since it generally “avoids the delays and expenses of litigation.” \(^{133}\) It is important to remember the essential purpose of these quasi-judicial proceedings is “freedom from the formality of ordinary judicial procedure.” \(^{134}\) Nevertheless, even though courts look upon arbitration agreements with favor, parties who seek to exercise their arbitral rights must safeguard them. \(^{135}\) The appellate court in the Second District reversed a contract (failure to fulfill a contractual obligation) does not ipso facto sever an otherwise significant relationship between the contractual obligation and the matter in dispute. The trial court found the dispute to be arbitrable and we do as well.


131. Ronbeck Constr. Co., 592 So. 2d at 346–47 (property “owner’s claim for rescission of [construction] contract [was] subject to arbitration” where property owner's fraud claims that formed the basis of rescission were “predicated on events dealing with performance [of] the . . . contract, rather than its making” or inducement).

132. See, e.g., Engle Homes, Inc., 870 So. 2d at 910–11 (holding that an arbitration provision in a purchase agreement did compel arbitration but remained silent on the presumption of mistakes in contractual drafting being held against the drafter); Avid Eng’g, Inc. v. Orlando Marketplace Ltd., 809 So. 2d 1, 5 (Fla. 5th Dist. Ct. App. 2001) (involving no mention of the presumption of mistakes in contractual drafting being held against the drafter in their decision); Intracoastal Ventures Corp. v. Safeco Ins. Co. of Am., 540 So. 2d 162, 164–65 (Fla. 4th Dist. Ct. App. 1989) (holding that an appraisal clause was not an arbitration clause by its plain language, but not mentioning the presumption of mistakes in contractual drafting being held against the drafter).

133. KFC Nat’l Mgmt. Co. v. Beauregard, 739 So. 2d 630, 631 (Fla. 5th Dist. Ct. App. 1999) (citing Gale Grp., Inc. v. Westinghouse Electric Corp., 683 So. 2d 661, 663 (Fla. 5th Dist. Ct. App. 1996)); see also Johnson v. Wells, 73 So. 188, 190–91 (Fla. 1916) (acknowledging that arbitration expedites and facilitates the settlement of disputes, thereby avoiding the formalities, delay, and expense of ordinary litigation). \textit{But see} Hauser et al., \textit{supra} note 78, at 14.

134. Cassara v. Wofford, 55 So. 2d 102, 106 (Fla. 1951) (quoting Sapp v. Barenfeld, 212 P.2d 233, 237 (Cal. 1949) (in bank)).

trial court’s finding that there was no waiver of the right when the appellee—
defendant below—failed to answer the complaint in a manner consistent with
those rights. Therefore, one can either expressly waive their right to arbi-
trate or implicitly do so by acting in a manner inconsistent with the right to
arbitrate.

The Florida Jurisprudence, Second Edition does provide a stern word
of caution regarding Florida’s public policy favoring arbitration by reminding
attorneys that every rule has exceptions.

Caution: Where legislation clearly mandates that a particular issue
or type of dispute be resolved in a judicial forum, the policy favor-
ing arbitration will yield. Other exceptions to the policy favoring
the enforcement of agreements to arbitrate arise where public poli-
cy is said to require that a matter in issue be determined by a court.
There is a narrow class of cases that have been excepted from arbit-
tration on public policy grounds, but an incidental effect on the
public policy of the state is insufficient to remove a claim from ar-
bitration where there is an agreement to arbitrate.

Arbitration is an alternative to the court system and limited review
is necessary to prevent arbitration from becoming merely an added
preliminary step to judicial resolution rather than a true alterna-
tive.

Above all else, attorneys facing motions to compel arbitration should
always remember that these agreements and provisions are contractual in
nature, thus Floridian benches will view them matter-of-factly: “Like all
contracts, each arbitration agreement is unique. Although it may employ
some standard terms, the contract must be construed and understood in light
of its whole text, context, structure and purpose . . . [and] the entire undertak-
ing must be considered.”

2. How is Arbitration Compelled?

Because this article focuses on the test to determine the arbitrability of
tort claims only slightly touching contracts, it is not necessary to dive into a

136. Id. at 617.
137. Cassara, 55 So. 2d at 106; Williams ex rel. Estate of Williams, 923 So. 2d at 617.
139. Id. (footnotes omitted).
140. Aberdeen Golf & Country Club v. Bliss Constr., Inc., 932 So. 2d 235, 236 (Fla. 4th
detailed discussion on how to compel such claims. It is important to note that the issue being covered below—save for when parties expressly opt to use common law—generally arises when the parties follow the procedures set forth in the Florida Arbitration Code.\textsuperscript{141} Thus, this section is only intended as a rudimentary primer to further the understanding of the reader.

Below is the practical procedure, as stated in the \textit{Florida Statutes}, that an attorney must follow in Florida to initiate and have proceedings that can compel arbitration.\textsuperscript{142}

\textbf{682.03 Proceedings to compel and to stay arbitration.--}

\begin{enumerate}
\item A party to an agreement or provision for arbitration subject to this law claiming the neglect or refusal of another party thereto to comply therewith may make application to the court for an order directing the parties to proceed with arbitration in accordance with the terms thereof. If the court is satisfied that no substantial issue exists as to the making of the agreement or provision, it shall grant the application. If the court shall find that a substantial issue is raised as to the making of the agreement or provision, it shall summarily hear and determine the issue and, according to its determination, shall grant or deny the application.
\item If an issue referable to arbitration under an agreement or provision for arbitration subject to this law becomes involved in an action or proceeding pending in a court having jurisdiction to hear an application under subsection (1), such application shall be made in said court. Otherwise and subject to \textsection{} 682.19, such application may be made in any court of competent jurisdiction.
\item Any action or proceeding involving an issue subject to arbitration under this law shall be stayed if an order for arbitration or an application therefor [sic] has been made under this section or, if the issue is severable, the stay may be with respect thereto only. When the application is made in such action or proceeding, the order for arbitration shall include such stay.
\item On application the court may stay an arbitration proceeding commenced or about to be commenced, if it shall find that no agreement or provision for arbitration subject to this law exists between the party making the application and the party causing the arbitration to be had. The court shall summarily hear and deter-
\end{enumerate}

\begin{footnotes}
\item 141. \textit{Fla. Stat.} \textsection{} 682.03 (2012).
\item 142. \textit{See id.}
\end{footnotes}
mine the issue of the making of the agreement or provision and, according to its determination, shall grant or deny the application.

(5) An order for arbitration shall not be refused on the ground that the claim in issue lacks merit or bona fides or because any fault or grounds for the claim sought to be arbitrated have not been shown.143

Basically, when a court is hearing a motion to compel arbitration under the Florida Arbitration Code, it must decide whether or not to compel arbitration based on three elements.144 First, the court must determine that a valid written arbitration agreement exists.145 If the court finds that an agreement to arbitrate exists, then it must determine whether an arbitrable issue exists; and finally, if either party waived its right to arbitration.146

III. THE CASE AT HAND: JACKSON V. THE SHAKESPEARE FOUNDATION, INC.

A. How Did We Get Here?

The case sub judice arose when the Supreme Court of Florida entered an order accepting jurisdiction, resulting from the First District Court of Appeal certifying conflict with the Fifth District Court of Appeal.147 The proceeding before the court began when the respondent, Shakespeare Foundation (“Shakespeare”), along with its development team, Herd Community Development Corporation (“Herd”), filed a complaint against the petitioners, George Jackson, Kerry Jackson, and Jackson Realty Team, Inc. (“Jackson(s)”) in March of 2009.148 The complaint alleged “that the Jacksons had fraudulently misrepresented, [among other things], the existence of wetlands on certain real property in Bay County, Florida, that had been purchased by Shakespeare and Herd from the Jacksons.”149 Specifically, the respondents

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143. Id.
145. Id.
146. Id. For a more in-depth discussion on the issues related to compelling arbitration, the reader should consult Compelling Arbitration of Disputes—The Florida v. Federal Law Quagmire. Id.
147. Jackson II, 74 So. 3d 1083, 1083 (Fla. 2011) (unpublished table decision); Jackson I, 61 So. 3d 1194, 1200–01 (Fla. 1st Dist. Ct. App.) (discussing Maguire v. King, 917 So. 2d 263, 266 (Fla. 5th Dist. Ct. App. 2005)), review granted, 74 So. 3d 1083 (Fla. 2011).
148. Respondents’ Answer Brief on the Merits, supra note 17, at 1.
149. Petitioners’ Brief on Jurisdiction at 2, Jackson v. Shakespeare Found., Inc., 74 So. 3d 1083 (Fla. 2011) (No. SC11-1196).
complained that the petitioners “fraudulently misrepresented . . . the . . . property . . . [as] ‘a great affordable housing project’ and that [a] ‘wetland study verifies no wetlands.’”**150 Furthermore, Shakespeare and Herd claim that the damages suffered were a direct result of the fraudulent misrepresentation**151 since Florida law could prevent development of the portion of property containing wetlands.**152

In their responsive pleading, “[t]he Jacksons filed a motion to dismiss [established upon] the existence of an arbitration clause contained within the contract,”**153 requiring the parties “to resolve the[ir] dispute through neutral binding arbitration.”**154 The lower court granted the Jacksons’ motion, causing Shakespeare and Herd to timely file an appeal.**155 The First District Court of Appeal held in favor of the appellant-plaintiffs, thereby reversing the order of the trial court.**156 Lastly, “[t]he Jacksons . . . filed their Notice to Invoke Discretionary Jurisdiction.”**157

1. The Facts of the Case

Mr. and Mrs. Jackson owned property at 915 Everett Avenue, Panama City, Florida, which Shakespeare and Herd agreed to purchase for $253,000.**158 Shakespeare and Herd did so with the intent to develop twenty-seven affordable housing units upon that tract of land.**159 The Jacksons ad-

**150. Respondents’ Answer Brief on the Merits, supra note 17, at 2.
151. Petitioners’ Initial Brief on the Merits, supra note 30, at 2.
152. Id. at 2–3.

The controversy regarding the preservation of wetlands involves two diametrically opposed and equally important interests: [T]he maintenance of Florida’s sensitive ecology and the continued increase in Florida’s population. As Florida’s population increases, the need for land development proportionately increases. Since a large portion of Florida’s undeveloped landmass is comprised of wetlands, and wetlands are relatively easy and inexpensive to develop, wetlands have been targeted by many developers as the construction site of choice. However, given the important role that wetlands play in Florida’s ecology, the State protects wetlands by regulating their development.

153. Petitioners’ Initial Brief on the Merits, supra note 30, at 3.
154. Respondents’ Answer Brief on the Merits, supra note 17, at 2.
155. Id.
156. Jackson I, 61 So. 3d 1194, 1196, 1201 (Fla. 1st Dist. Ct. App.), review granted, 74 So. 3d 1083 (Fla. 2011); Respondents’ Answer Brief on the Merits, supra note 17, at 2.
157. Respondents’ Answer Brief on the Merits, supra note 17, at 2–3.
158. Id. at 3, 5.
159. Id. at 5.
advertised the parcel of land on the Bay County Multiple Listing Service.\textsuperscript{160} The real estate advertisement posted by the petitioners contained a long paragraph about the prospective parcel, and the petitioners stated, among other things, that the parcel was an "'affordable housing project' and that [the] 'wetland study verifies no wetlands.'"\textsuperscript{161} The respondents argued that this claim was a fraudulent misrepresentation, forcing them to suffer damages "because the presence of . . . wetlands prevented them from developing a portion of the property."\textsuperscript{162}

Once the property was purchased by Shakespeare and Herd, the developer began preparations to move into the construction phases of his plan.\textsuperscript{163} The initial step was "an onsite meeting . . . with their builder and engineer,"\textsuperscript{164} During the meeting, the builder observed "the foliage and the general lay of the land [causing him to opine] . . . that the subject property might contain some wetlands."\textsuperscript{165} Upon contacting the surveyor used by the petitioners,\textsuperscript{166} the respondents learned that according to the surveyor, someone was hired to "'walk the property,'" and from that stroll, the plot was declared wetland free.\textsuperscript{167} Subsequent to this revelation, Shakespeare and Herd hired their own team to conduct an in-depth wetlands survey, which revealed the real estate to be twenty-six percent wetlands, and thus twenty-six percent unbuildable.\textsuperscript{168}

The purchase and sale agreement ("Contract") for the parcel at 915 Everett Avenue contained an arbitration agreement clause in the Dispute Resolu-
tion section that “survive[d] the closing of the property . . . [and] state[d], in pertinent part:”

**14. DISPUTE RESOLUTION:** This Contract will be construed under Florida law. All controversies, claims, and other matters in question arising out of or relating to this transaction or this Contract or its breach will be settled as follows:

. . .

(b) **All other disputes:** Buyer and Seller will have 30 days from the date a dispute arises between them to attempt to resolve the matter through mediation, failing which the parties will resolve the dispute through neutral binding arbitration in the county where the Property is located. The arbitration may not alter the Contract terms or award any remedy not provided for in this Contract . . .

“The award will be based on the greater eight [sic] of the evidence and will state findings of fact and the contractual authority on which it is based.”

“This clause shall survive closing.”

Because the above contract language does not specifically name the causes of action that are subject to arbitration and the parties remain divided on the issue, it is up to the court to determine whether the respondents’ fraud in the inducement claim falls within the arbitrable realm.

**B. Threshold Issues for the Court to Determine**

In deciding *Jackson II*, the court must not forget that in Florida, arbitration is the “preferred mechanism of dispute resolution, and . . . any doubt[s] regarding the arbitrability of a claim should be resolved in favor of allowing arbitration.” The Supreme Court of Florida has even gone so far as to dec-

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169. Petitioners’ Brief on Jurisdiction, *supra* note 149, at 2; see also Respondents’ Answer Brief on the Merits, *supra* note 17, at 2.

170. Respondents’ Amended Brief on Jurisdiction at 1, *Jackson v. Shakespeare Found., Inc.*, 74 So. 3d 1083 (Fla. 2011) (No. SC11-1196) (alteration in original); see also Petitioners’ Brief on Jurisdiction, *supra* note 149, at 2–3.


173. See id.; Maguire v. King, 917 So. 2d 263, 266–67 (Fla. 5th Dist. Ct. App. 2005); see also Petitioner’s Brief on Jurisdiction, *supra* note 149, at 5 (citing Maguire, 917 So. 2d at 264–66).

lare that when agreements are subject to the Florida Arbitration Code, “‘courts [will] indulge every reasonable presumption to uphold proceedings resulting in an award.’”175 As a result, it is not a stretch for one to claim Florida has a very pro-arbitration policy.176 “This gloss of public policy gives rise to a judicially employed rule of construction for arbitration language in a valid contract—the rule of maximum breadth.”177 Under the instructions of this rule, judges are to consider arbitration clauses giving the “‘broadest possible interpretation to accomplish the salutary purpose of resolving controversies out of court.’”178

To the uninitiated, reading the preceding rules governing arbitration along with the overlay of strong policy, it may appear as if questions regarding arbitrability consistently return the same unyielding answer—this is an understandable misconception.179 What appears as a “monolith” of Florida law is in reality a hollow shell.180 This is because Florida courts have yet another important rule which commands “that, under the Florida Arbitration Code, no party may be forced into arbitrating something they did not agree to arbitrate, notwithstanding the general rule favoring arbitration.”181 In other words, Florida courts adhere to contractual ideals, whereby contracts containing arbitration provisions “are to be carefully construed so as not to force a nonarbitrable issue into arbitration.”182

This leads us to a crossroads at which formidable judicial ideals steadily impede marked pro-arbitration preference ingrained in Florida law and public policy.183 Clearly, the courts are referring to the basic notion of intent;184 intent meaning that “part[ies] cannot be [forced] to submit to arbitration” where a party neither intended nor agreed to arbitration.185 Hence, in spite of conventional wisdom favoring arbitration, Florida courts will only allow arbitration of a particular dispute based on contractual proviso if the four

175. Id. (alteration in original) (quoting Roe v. Amica Mut. Ins. Co., 533 So. 2d 279, 281 (Fla. 1988)).
176. Id.
177. Id. at 20.
179. Cavendish, supra note 26, at 20.
180. Id.
181. Id.
182. Id.
183. Id.
184. Cavendish, supra note 26, at 20.
corners of the document evince the “parties’ intent to submit that particular dispute to arbitration.” Conversely conceptualized, the judicial corollary instruct that when arbitration clause language unmistakably constructs arbitral blockades—precluding certain types of claims by a party—the interpreting bench can positively conclude the intent of the parties was to exclude any “extra-contractual or extra-textual claim[s]” from arbitration. The maintenance of this ideal of requiring contractual intent provides balance to the rule of maximum breadth stemming from public policy favoring arbitration. Though both axioms find plenty of support in decisional reporters, one must note that contract law wins the battle against arbitration-based law.

Finally, the main threshold question must be answered: How do we determine which disputes are appropriate for arbitration? According to the Supreme Court of Florida, there must be “some nexus [linking] the dispute [with] the contract containing the arbitration clause.”

1. The Intent of the Parties

With clear regard to the public policy and judicial ideal, the Supreme Court of Florida has instructed that the first hurdle to clear when considering arbitrability is the intent of the parties to arbitrate appropriate disputes. The intention to arbitrate can be express or actual.

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186. Cavendish, supra note 26, at 20.
187. Id.
188. Id.
189. Id.; see, e.g., Hirshenson v. Spaccio, 800 So. 2d 670, 675–76 (Fla. 5th Dist. Ct. App. 2001).
190. See Seifert, 750 So. 2d at 638.
191. Id.
192. Id. at 636 (quoting Seaboard Coast Line R.R. Co. v. Trailer Train Co., 690 F.2d 1343, 1348, 1352 (11th Cir. 1982)); see Maguire v. King, 917 So. 2d 263, 266 (Fla. 5th Dist. Ct. App. 2005) (citing Seifert, 750 So. 2d 636).
In determining the intent of the parties, consideration is only given to the language of the contract, and the "‘after-the-fact testimony of the parties’" is summarily disregarded. Where questioned transactions involving matters not covered by an arbitration clause are inextricably interwoven with a subject which is expressly subject to the clause, an order requiring that the issues be submitted to arbitration is proper.\footnote{Maguire, 917 So. 2d at 266 (quoting Bill Heard Chevrolet Corp., Orlando v. Wilson, 877 So. 2d 15, 18 (Fla. 5th Dist. Ct. App. 2004)). This step is always part of the analysis, but not necessarily always the second part. See Gendzier v. Bielecki, 97 So. 2d 604, 608–09 (Fla. 1957); Wilson, 877 So. 2d at 18.}

The second hurdle in the preliminary step of determining the ambit of an arbitration clause is classifying the clause as either broad or narrow.\footnote{See Seifert, 750 So. 2d at 636–38. The court makes this determination by examining the wording of the arbitration clause. See id.} The Supreme Court of Florida has distinguished between broad and narrow arbitration provisions.\footnote{Id. at 19–20, 22.} Narrow arbitration clauses are those that require disputes ‘arising out of’ or ‘under’ a contract to arbitration.\footnote{Jackson I, 61 So. 3d 1194, 1198 (Fla. 1st Dist. Ct. App.) (citing Seifert, 750 So. 2d at 636–37), review granted, 74 So. 3d 1083 (Fla. 2011).} On the other hand, “[b]road arbitration provisions are those that require claims ‘arising out of or relating to’ a contract to be arbitrated.”\footnote{Id. (citing Seifert, 750 So. 2d at 636–37).} Florida courts have also stated that the “language providing for . . . arbitration of ‘any and all’ [claims] . . . [i]s broad,” and includes all controversies or disputes arising from the contract.\footnote{Cavendish, supra note 26, at 22.}

When a provision is found to be broad, the presumption in favor of arbitration can only be rebutted by “the most forceful evidence of an intent to exclude a particular claim from arbitration.”\footnote{See id. at 19–20, 22.} Therefore, when an arbitration provision is found to be broad, it plays right to the strength of Florida’s public policy favoring arbitration. But all coins have two sides, and the contra positive is that when a provision is found to be narrow—such as when
the parties use special purpose maxims—the balance shifts in favor of the judicial ideals respecting the parties’ intent.\textsuperscript{204} In \textit{Jackson I}, the First District Court of Appeal held that the arbitration provision in the sale and purchase agreement between Jackson and Shakespeare to be broad under Florida precedent.\textsuperscript{205} This is because the language in the clause within the contract states that “‘[a]ll controversies, claims, and other matters in question \textbf{arising out of or relating} to this transaction or this Contract or its breach’ to be arbitrated,” places it within the broad category promulgated by the Supreme Court of Florida.\textsuperscript{206}

\section*{2. The \textit{Seifert} Test for Arbitrability}

The Supreme Court of Florida describes how to undertake finding “some nexus between the dispute and the contract containing the arbitration clause.”\textsuperscript{207} The court evinced a three element test to properly determine if a given dispute is arbitrable: “(1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived.”\textsuperscript{208}

This three-prong test and its aimed-at findings (for the existence of arbitrability) of “valid agreement/yes, arbitrable issue/yes, waiver/no” has a jurisprudential gloss of its own. While applying this test, Florida courts will instruct that arbitrability depends upon the relationship between the claim and the agreement, not the legal label attached to the dispute. What this means is that the heart of this three-prong test is the second prong, “arbitrable issue.”\textsuperscript{209}

Therefore, once a contractual arbitration provision is deemed broad by the court, the test for determining the arbitrability of the claim is the presence of

\begin{itemize}
\item \textsuperscript{204} See \textit{id.} at 22.
\item \textsuperscript{205} \textit{Jackson I}, 61 So. 3d at 1198.
\item \textsuperscript{206} \textit{id.}
\item \textsuperscript{207} \textit{Seifert v. U.S. Home Corp.}, 750 So. 2d 633, 636, 638 (Fla. 1999).
\item \textsuperscript{208} \textit{id.} at 636 (citing Terminix Int’l Co. v. Ponzio, 693 So. 2d 104, 106 (Fla. 5th Dist. Ct. App. 1997)).
\item \textsuperscript{209} Cavendish, \textit{supra} note 26, at 22.
\end{itemize}
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a “‘significant relationship’” between the contract containing the broad clause and the cause of action.210

The First District Court of Appeal concluded that Shakespeare and Herd’s claim failed the contractual nexus test despite the fact that the parties would not have been adversaries but for the existence of the real estate contract.211 The appellate court reasoned that “the claim at the center of the dispute arose from a general duty owed under common law.”212 Continuing further, the majority declared that torts must at least instigate some question that can only be resolved by “reference to or construction of [or interpretation of] some portion of the contract itself.”213 The rationale behind this decision is that the claim of fraud in the inducement rests solely on Jackson’s Multiple Listing Service (MLS) advertisements, therefore not requiring any reference to or construction of the contract. 214 Further bolstering this point, the bench contended that “[t]he contract here is incidental to the dispute, because [Shakespeare and Herd] . . . could have raised their . . . claim even before the contract was signed if [they] detrimentally relied on [Jackson’s] advertisement.”215

C. The Petitioners’ Arguments

The petitioners raise two arguments in their brief to the Supreme Court of Florida.216 First, the Jacksons’ claim that the respondent-plaintiffs’ “action for fraudulent inducement . . . requires [both] reference . . . and interpretation of the contract . . . [and therefore] is significantly related to the contract.”217 The second argument the petitioners raise is the undisputed nature of the arbitration provision as broad means it is all encompassing as to dis-

210. Seifert, 750 So. 2d at 637–38 (citing Am. Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88, 93 (4th Cir. 1996)).
211. Jackson I, 61 So. 3d at 1198–99 (citing Seifert, 750 So. 2d at 638).
212. Id. at 1198. This seems to be the crux of the issue of the certified conflict between the First District Court of Appeal and the Fifth District Court of Appeal, though it is not evidently clear from the opinion. See id. at 1198, 1201; Maguire v. King, 917 So. 2d 263, 268 (Fla. 5th Dist. Ct. App. 2005).
213. Jackson I, 61 So. 3d at 1198 (quoting Seifert, 750 So. 2d at 638).
214. See id. at 1199.
215. Id.
216. Appellees rely on Beazer Homes Corp. v. Bailey, 940 So. 2d 453, 455 (Fla. 5th Dist. Ct. App. 2006), in support of their argument that the fraud claim here bore a significant relationship to the contract. Beazer Homes, however, did not result in an opinion of the Fifth District, as two judges on the panel concurred in result only.
217. Id. at 5, 8–10.
putes between the parties.\textsuperscript{218} Thus, an action for fraud in the inducement falls squarely within the provision.\textsuperscript{219}

Addressing the first issue, the petitioners give a brief dissertation on the history of \textit{Seifert}, whereby they attempt to factually distinguish their case from that hallmark decision, while urging the court to adopt the reasoning of \textit{Maguire v. King}.\textsuperscript{220} Howbeit, the true crux of the Jacksons’ argument is that the respondents had a contractually imposed duty to perform a feasibility study.\textsuperscript{221} This is based on a land use provision in the contract.\textsuperscript{222}

\section*{6. LAND USE:} Seller will deliver the Property to Buyer at the time agreed in its present “as is” condition, with conditions resulting from Buyer’s inspections and casualty damage, if any, excepted.

\subsection*{(c) Inspections:} (check (1) or (2) below)

(1) Feasibility Study: Buyer will, at Buyer's expense and within 30 days from Effective Date (“Feasibility Study Period”), determine whether the Property is suitable, in Buyer's sole and absolute discretion, for use. During the Feasibility Study Period, Buyer may conduct a Phase 1 environmental assessment and any other tests, analyses, surveys and investigations (“inspections”) that Buyer deems necessary to determine to Buyer’s satisfaction the Property's engineering, architectural and environmental properties . . . to determine the Property's suitability for the Buyer's intended use.

Buyer will deliver written notice to Seller prior to the expiration of the Feasibility Study Period of Buyer's determination of whether or not the Property is acceptable. Buyer’s failure to comply with this notice requirement will constitute acceptance of the Property as suitable for Buyer's intended use in its “as is” condition. If the Property is unacceptable to the Buyer and written no-

\begin{thebibliography}{9}
\bibitem{218} Id. at 12.
\bibitem{219} Id.
\bibitem{220} Id. at 5–8, 10–11 (citing Seifert v. U.S. Home Corp., 750 So. 2d 633, 635–38, 640, 642–43 (Fla. 1999); Maguire v. King, 917 So. 2d 263, 266 (Fla. 5th Dist. Ct. App. 2005)).
\bibitem{221} Petitioners' Initial Brief on the Merits, supra note 30, at 8–9.
\bibitem{222} Id.
\end{thebibliography}
tice of this fact is timely delivered to Seller, this Contract will be deemed terminated as of the day after the Feasibility Study period ends and Buyer's deposit(s) will be returned after Escrow Agent receives proper authorization from all interested parties.

(2) No Feasibility Study: Buyer is satisfied that the property is suitable for Buyer's purposes . . . [t]his Contract is not contingent on Buyer conducting any further investigations.223

The respondents checked option one in favor of a feasibility study.224 In their complaint, Shakespeare and Herd allege that had they been aware of the presence of wetlands—a fact misrepresented by the sellers in their advertisement—"they would not have purchased the property."225 The petitioners rely on the above clause to show that Shakespeare had a contractually-imposed duty to perform a study on the property.226 This is a specious argument since the clause above actually imposes no duty.227 The clause provides the procedure taken, and the time available for the buyer to refuse the property.228 The clause is in essence a sophisticated return policy.229 This is indicated by the fact that under Option One the buyers are taking the property "as is" with the option to terminate within thirty days to perform a study.230 The will provisions for the buyer under this clause are for the buyer to determine, at his discretion, if the property is suitable for use.231 However, if the buyer does not find the property up to par, the remaining will provisions guide the acceptable method for rejecting the property.232 If the buyer fails to comply with the will provisions the buyer is accepting the property as suitable in its "as is" condition.233 The remainder of the terminology in the clause includes may provisions—"may conduct a Phase [one] . . . assessment"—which means the buyer is not under a duty to do so.234 The buyer has the option to let the thirty days lapse and accept the property in its current condition.235 The duties under this provision only arise in the event that the buyer

223. Id. at 8–9.
224. Id. at 9.
225. Id. at 8; see Complaint, supra note 17, at 4.
227. Respondents’ Answer Brief on the Merits, supra note 17, at 29.
228. Petitioners’ Initial Brief on the Merits, supra note 30, at 8–9.
229. See id.
230. Id.
231. Id.
232. Id.
233. Petitioners’ Initial Brief on the Merits, supra note 30, at 8–9.
234. See id. at 9.
235. Id.
chooses Option One, performs a study, and then decides to reject the property as suitable. 236 In this case, the seller-petitioners allegedly fraudulently misrepresented the property as wetland-free in their MLS advertisement, and the buyers relied on that advertisement in purchasing the property. 237 In doing so, they failed to exercise the option that would have created a contractual duty. 238 Whether intentional, or accidental, the petitioner, by including this clause—which clearly requires substantial interpretation—may have actually won the battle to include the fraud in the inducement claim within the scope of arbitration, but not in the manner originally designed. 239

The second issue raised by the Jacksons is all about intent. 240 Most of the discussion put forth by the petitioners surrounds the respondents’ knowledge. 241 The petitioner claims that because the buyers are sophisticated within the area of real estate, and because they stated their intent to build on the property, then they clearly intended to arbitrate these types of claims. 242 Unfortunately, this argument is faulty since intent and knowledge, though closely tied, are not analogous. 243 Intent—in the vacuum of contract legalese—can only be derived from the language contained within the four corners of the contract. 244 It is defined as “[t]he state of mind accompanying an act, esp[ecially] a forbidden act. While motive is the inducement to do some act, intent is the mental resolution or determination to do it.” 245 On the other hand, knowledge is generally accepted as being earned through experience. 246 The accepted legal definition of knowledge is “[a]n awareness or understanding of a fact or circumstance; a state of mind in which a person has no substantial doubt about the existence of a fact.” 247 The petitioner correctly and thoroughly explains that the broad nature of the arbitration provision within

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236. See id. at 8–9.
237. Id. at 8; Complaint, supra note 17, at 3–4.
239. See Petitioners’ Initial Brief on the Merits, supra note 30, at 8–10.
240. Id. at 12–13.
241. Id. at 13.
242. Id. at 10, 13.
243. Compare BLACK’S LAW DICTIONARY 881 (9th ed. 2009) (defining intent), with id. at 950 (defining knowledge).
244. See Cavendish, supra note 26, at 20. In several opinions, judges have written that depending on the language of the contract, intent can also be inferred from the conduct of the parties. See, e.g., Rosenhaus v. Star Sports, Inc., 929 So. 2d 40, 42–43 (Fla. 3d Dist. Ct. App. 2006).
245. BLACK’S LAW DICTIONARY 881 (9th ed. 2009) (emphasis added).
246. See id. at 950–51.
247. Id. at 950.
the contract clearly indicates the intent to include a tort for fraud in the inducement as within its scope. The remaining question for the court to decide is whether the remainder of the contract continues this reasoning or limits the intent of the parties.

Additionally, what the petitioner should have argued here, but only do so impliedly, is that the facts underlying the complaint for fraud in the inducement are the same facts, which would support a breach of contract claim. Therefore, the court should follow the reasoning of the Fifth District Court of Appeal in Maguire.

D. The Respondents’ Arguments

The respondent also raises the same two issues, but in the negative; thus, the fraud claim bears no significant relationship to the contract and the clear intent of the parties is to exclude these types of claims from arbitration.

The first argument addressed by the respondent centers on a lengthy discussion of the complaint. This is because Florida law requires the court to look at the allegations set forth in the complaint to determine whether the dispute arises from or relates to the subject of the contract. Out of more than twenty paragraphs, the contract in question is only mentioned thrice.

As set forth above, the only reference to the Contract relate to the fact that it exists, the price paid, and the prayer for attorney’s fees. Shakespeare and Herd’s common-law fraud claim does not require reference to or construction of the Contract for its resolution, nor does it invoke any contractual provision.

Therefore this shows that the contract slightly touches the complaint but does not bear a significant relation. Next, Shakespeare and Herd go through the entire process of proving fraud in the inducement without relation to the contract. However, this argument is subject to criticism because a buyer find-

248. See Petitioners’ Initial Brief on the Merits, supra note 30, at 12; see also Maguire v. King, 917 So. 2d 263, 266 (Fla. 5th Dist. Ct. App. 2005) (citing Seifert v. U.S. Home Corp., 750 So. 2d 633, 640–41 (Fla. 1999)).
249. See Petitioners’ Initial Brief on the Merits, supra note 30, at 12.
250. Respondents’ Answer Brief on the Merits, supra note 17, at 11, 22.
251. Id. at 12; see also Complaint, supra note 17, at 3–6.
252. See Respondents’ Answer Brief on the Merits, supra note 17, at 13–14.
253. See id. at 17; see also Complaint, supra note 17, at 4, 6.
254. Respondents’ Answer Brief on the Merits, supra note 17, at 18.
255. See id.
256. See id. at 18–20.
ing a property unsuitable—based on the Feasibility Study Period—springs forth particular contractual duties supported by the “Buyer Provision” discussed above. It is at this point the respondent should have pointed to the complaint, which does not allege the desire to return the property, but states that the harm inflicted by the Jacksons caused Shakespeare and Herd to miss a favorable housing market, thus losing profits and additional expenses on the property. This indicates that the relief sought is not based on the contract, but in common law principles. This is important because an essential component of this conflict among the district courts is how the causes of action averred in pleadings relate to the contractual provision.

The second issue argued by the respondent is related to the intent of the parties. The central theme of this argument is that because the contract failed to provide any remedy for the fraud allegations, it indicates that the intent of the parties was to exclude this from arbitration. The argument rests on the theory that the remedies provision of the contract limits the extent of the arbitration award, thus limiting the scope of claims subject to arbitration.

The remedies provided in the Contract are:

1. A remedy for the Buyer in the event the “Seller fails, refuses or neglects to perform this Contract,” in which case the Buyer may choose to receive a return of the Buyer’s deposit without waiving the right to seek damages or to seek specific performance as per paragraph 14.

2. A remedy for the Seller if the Buyer defaults, in which case the Seller may choose to retain and collect all deposits paid and agreed to be paid as liquidated damages or to seek specific performance as per paragraph 14.

257. See Petitioners’ Initial Brief on the Merits, supra note 30, at 9. Shakespeare in fact did undertake a feasibility study of the parcel of land upon which this dispute is grounded. See Complaint, supra note 17, at 5.

258. See Jackson I, 61 So. 3d 1194, 1197 (Fla. 1st Dist. Ct. App.), review granted, 74 So. 3d 1083 (Fla. 2011); see also Respondents’ Amended Brief on Jurisdiction, supra note 170, at 2; Complaint, supra note 17, at 5–6.

259. Jackson I, 61 So. 3d at 1198.


261. Respondents’ Answer Brief on the Merits, supra note 17, at 22.

262. Id. at 22, 24–25, 27.

263. See id. at 27.
(3) A remedy in the event of disputes concerning entitlements to deposits, failing resolution through mediation, in which case the Escrow Agent may choose to elect to have the issue resolved by arbitration, a Florida Court, or the Florida Real Estate Commission.

(4) All other disputes, failing resolution in mediation, must be determined through mutual binding arbitration in the county where the Property is located, however, "the Arbitrator may not alter the contract terms or award any remedy not provided for in this Contract."264

However, this argument fails on two points.265 First, from the logical means-ends analysis, one can point to the simple fact that the ends here of limiting awards to those provided for in the contract do not bear a rational relationship to the means/cause of action.266 More likely, this provision is set forth in the contract as a necessary way to limit the liability of the parties in the event that either defaults. The respondent does a notable job of reciting Florida constitutional law in an effort to rebut this argument.267 This brings us to the second point, whereby the right to redress can be limited by the parties to the contract, a point rightly asserted by the dissent in the court below.268 In fact, the court in *Maguire* dismissed the same exact argument.269 Moreover, award-limiting provisions are more accurately viewed as an analogue to guidelines or rules promulgated by the contracting parties for the arbitrator.270

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264. *Id.* at 24.
265. See *Jackson I*, 61 So. 3d 1194, 1198–99 (Fla. 1st Dist. Ct. App.), review granted, 74 So. 3d 1083 (Fla. 2011).
266. See id.; see also Respondents’ Answer Brief on the Merits, *supra* note 17, at 24.
267. Respondents’ Answer Brief on the Merits, *supra* note 17, at 26 (noting that a basic right in Florida requires that the courts remain open for redress of all injuries); see also Fla. Const. art I, § 21.
270. *Id.* (citing Pacificare Health Sys., Inc. v. Book, 538 U.S. 401, 405–07 & n.2 (2003); see Rollins, Inc. v. Lighthouse Bay Holdings, Ltd., 898 So. 2d 86, 88–89 (Fla. 2d Dist. Ct. App. 2005)).
IV. Fallout From the Decision

The discussion above reveals that regardless of which way the Supreme Court of Florida ultimately decides on the issues raised in Jackson, the future of arbitration provisions is a slippery slope.271 If the court sees fit to side with the arguments of the petitioner, it has the potential to exponentially expand the public policy in Florida to the point where almost all tort claims even remotely connected to a contract will be subject to arbitration provisions within any contract between the litigants.272 Agreeing with the petitioner would almost assuredly create precedent such that arbitration provisions containing “any and all dispute” language would be construed so broadly that only those disputes clearly unrelated to the contract could be litigated.273

Conversely, if the court agrees with the respondent’s arguments stating how the claim can be resolved without reference or interpretation of the contract,274 the potential fallout could change how future lawyers draft arbitration provisions. Future drafters would surely react by carefully crafting contract language that is simultaneously more descriptive yet remains vague—for example, “this arbitration provision contemplates torts, contractual provisions, employment, and all other disputes which may arise from this contract.” The blowback from this type of language means that courts will ulti-

271. See discussion infra Part III.D.
272. Compare Jackson I, 61 So. 3d at 1198, with Maguire, 917 So. 2d at 266–67; see also Petitioners’ Initial Brief on the Merits, supra note 30, at 12.
273. See Jackson I, 61 So. 3d at 1198; Petitioners’ Initial Brief on the Merits, supra note 30, at 12. For example, assume Buyer and Seller enter into a real estate agreement to construct and furnish a single-family home in Fort Lauderdale, Florida, which goes off without a hitch. This real estate agreement includes an arbitration provision, which assuming arguendo, is broad within Florida law. Sadly, ten years later Buyer is severely beaten by Seller because Buyer slept with Seller’s wife, Desi. Now, Buyer wants to bring a civil suit for battery against Seller. It would seem that the two events bear no relation and Buyer can litigate his claim. However, what if we learn that Desi is short for Designer, and the entire genesis of the affair between Buyer and Designer began a decade earlier when Designer and Buyer worked together to furnish the home, a duty imposed upon Designer only because of the real estate contract? If the Florida courts continue on the path outlined above, it is plausible that Buyer’s battery claim against Seller would be precluded from going to court because the past contract required that the claim be arbitrated. See Maguire, 917 So. 2d at 266. Furthermore, it is disheartening to ponder a legal climate where the gravamen of a decision can swing on such minutiae.
274. Respondents’ Answer Brief on the Merits, supra note 17, at 18 (quoting Petitioners’ Initial Brief on the Merits, supra note 30, at 8).
mately be forced to construct or interpret contracts for the sheer fact of their complexity.275

The result, as this author sees it, is the emergence of a new judicial rule—that ultimately courts will be forced to create a new test based in equity and focused more on the intent of the parties as discerned through the language chosen and their actions.276 In other words, the test would force the courts to ask, “was it foreseeable that this dispute would arise and litigation would occur?” If the answer is yes, then the claim must be compelled to arbitration. Conversely, if the answer is no, this is an unforeseeable cause of action. Unforeseeable claims shall remain within the jurisdiction of the courts.277

This test is essentially contractual intent distilled by traditional tort law, and for the purposes of this article, it will be known as the “Shakespeare Test.”278 The standard of review for the Shakespeare Test is that of an objectively reasonable person in the same circumstances as the party seeking to enforce the arbitration clauses.279 The reason that a test based on foreseeabil-

275. See Jackson I, 61 So. 3d at 1199 (citing HTP, Ltd. v. Lineas Aereas Costarricenses, S.A., 685 So. 2d 1238, 1239–40 (Fla. 1996)).

276. See id. at 1201, 1204 (Marstiller, J., dissenting).

277. This test would not be unlike the current foreseeability test of proximate causation used in common-law negligence analyses. See Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 101 (N.Y. 1928); see also McCain v. Fla. Power Corp., 593 So. 2d 500, 502 (Fla. 1992). This test would establish a limitation on arbitration with respect to the scope of broad arbitration clauses applied to torts. Palsgraf established the concept of proximate cause, which uses foreseeability to limit the liability in negligence cases to repercussions of an action which could reasonably been foreseen as opposed to every action which follows the negligent act. See Palsgraf, 162 N.E. at 101. Currently, Florida uses a test which is similar to the “but for” test in torts. See Seifert v. U. S. Home Corp., 750 So. 2d 633, 638 (Fla. 1999). However, with regard to arbitration agreements, it is almost certain that but for the contract these two parties would not have an issue in dispute. Therefore, one who seeks arbitration and is fortuitous enough to have an injury in tort which a judge, in his discretion, sees as significantly related or having a sufficient nexus to the contract—itself a perversion of “but for” applied to arbitration clauses—will be able to compel arbitration. See id. Sadly, if the judge does not find, in his opinion, a “but for” relationship, then the dispute will not be subject to arbitration. See id. Therefore, to avoid this, the author proposes that for a tort issue to be subject to a broad arbitration clause, it must be the type of dispute which reasonable contracting parties in a similar situation would contemplate as a result of this contract or a breach of the same.

278. See Jackson I, 61 So. 3d at 1197–98 (citing Seifert, 750 So. 2d at 636).

279. See D’Alemberte v. Anderson, 349 So. 2d 164, 168 (Fla. 1977) (explaining the reasonably prudent person standard). One could also listen in on the first week of any torts class at any law school within the state of Florida to learn about the reasonably prudent person standard.

The reasonable person is an ideal of a model citizen, but will have shortcomings as determined appropriate by the fact finder.

However, the reasonable person may act differently in different situations. The fact finder must determine what a reasonable person would do “under the same or similar cir-
ity is the best test to determine whether a particular claim is subject to arbitration, is because it falls directly in line with contractual intent. When discussing the intent of the parties within the bounds of contract law, courts have repeatedly fallen back upon the essence of intent as an objective meeting of the minds. Obviously then, whenever a court is determining the intent of the parties as to the breadth of an arbitration clause, the judges are implicitly asking themselves: “What did these two parties want to be covered by this arbitration clause in this contract?” It is at this point that logical consideration must be given to what that question means. It means that at some point, prior to signing the contract, the parties must have realized that certain types of disputes are the plausible result of the contract they intend to sign, and that those claims are too expensive, or present too much liability, or any myriad of other reasons parties prefer to avoid litigation. The simple point is that these parties contemplated and foresaw various disputes they would prefer to arbitrate, rather than litigate; and it is these disputes which are within the scope of the arbitration clause found within the agreement between the parties.

V. CONCLUSION

Due to the confusing nature of the test currently used in Florida, it is difficult for contracting parties to know at the outset what future disputes are
potentially subject to arbitration. The split of authority amongst the district courts of Florida results in a failure of uniform jurisprudence, leaving potential contractors without the capacity to determine their ability to redress foreseeable future torts via litigation when considering agreements containing arbitration provisions. Though courts have seen fit to manipulate the Seifert test under their discretion to decide conflicts, this test ultimately proves to be more confusing than workable, owing mostly to its highly discretionary nature. The judges and lawyers overseeing these cases are assuredly highly intelligent, and therefore always able to reach a conclusion. However, it is disturbing that two cases with analogous facts could reach opposite results. Therefore, the Supreme Court of Florida should take this opportunity to streamline the process of determining whether tort claims, which tenuously touch commercial contracts, are subject to arbitration.


285. See supra Parts II.A, III.

286. See supra Part III.B.2.

287. See Jackson I, 61 So. 3d 1194, 1197 (Fla. 1st Dist. Ct. App.), review granted, 74 So. 3d 1083 (Fla. 2011); see also Maguire v. King, 917 So. 2d 263, 264–65, 268 (Fla. 5th Dist. Ct. App. 2005).