
William E. Adams*

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I. INTRODUCTION

This article reviews decisions by the Supreme Court of Florida in the substantive area of criminal law issued between May 1, 2000 and May 1, 2002. The time period begins where the last Criminal Law Survey created for this Law Review ended. This article will follow the conventions in selecting cases for discussion utilized in prior Criminal Law Survey articles.

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1. The author has selected as the beginning and ending points of this article decisions reported in volumes 761 through 803 of the Southern Second Reporter.


3. As in past criminal law surveys, this article will not address issues concerning criminal procedure such as search and seizure. Although significant to the practitioner, those
As in past surveys, this article will focus on significant cases decided by the Supreme Court of Florida, but it will not address district courts of appeal decisions that have not been appealed to the supreme court.4

During this two-year period most of the cases selected have clarified conflicts between the district courts of appeal concerning the interpretation of a variety of criminal statutory provisions. For the most part, the supreme court has taken a logical approach to the issues utilizing traditional statutory interpretational doctrines. Although some splits have arisen over some of the interpretations, this is reflective of the fact that some of the traditional approaches will dictate contradictory results depending upon how ambiguous the legislature has been in drafting the provision at issue.

One area where statutory interpretation has been particularly difficult is discussed in Section II. As highlighted by the number of cases decided, the court has struggled with outlining the appropriate parameters of burglary law in the state, in part because the Florida Legislature seems determined to expand the state’s statutory definition of the crime beyond that of the common law and most other contemporary approaches. The exact parameters of the crime and how the court will deal with cases decided during its alternative interpretation of the statute before its most recent amendments probably will not be completely resolved until the court addresses some of the lingering questions.

Similarly, in Section III, the court addresses a problem that has perplexed courts through the ages: when does a touching of something connected to a person constitute a battery? Section IV discusses problems

issues raise constitutional concerns that extend beyond the substantive focus of this piece. Furthermore, consistent with past articles, this survey will not generally address the complex and specialized areas of the death penalty and sentencing guidelines. The article will address select sentencing and procedural cases that involve disputes about substantive crimes.

The Supreme Court of Florida did address important constitutional issues concerning the validity of the death penalty during this time period. In Provenzo v. State, 761 So. 2d 1097, 1099 (Fla. 2000), the court held that execution by lethal injection is not cruel and unusual punishment. Furthermore, in Farina v. State, 763 So. 2d 302, 303 (Fla. 2000), the court held that the imposition of a death sentence upon a sixteen-year old did constitute cruel and unusual punishment, citing its earlier decision of Brennan v. State, 754 So. 2d 1, 11 (Fla. 1999).

4. The article does not cover every decision issued by the Supreme Court of Florida during this time period. As in past Criminal Law Survey articles, cases that simply apply standard fact patterns to well-settled rules of law are not discussed. Instead, the survey attempts to identify and discuss cases that have settled conflicts, interpreted statutes for the first time or altered existing understandings of a statutory provision, or otherwise clarified or changed the substantive criminal law in Florida.
that have also troubled many courts. First, can the attempt doctrine be applied to crimes that do not require a specific intent? Second, how far should the doctrines of proximate cause and excusable homicide extend, and what are the appropriate standards for lower courts to follow? Section V deals with a case discussing the application of the complicity doctrine to the Florida statute concerning crimes committed while wearing a mask. In Section VI, the article discusses the court’s attempt to explain the rationale of two prior cases that attempt to establish the appropriate presumption to apply in possession cases where the defendant denies knowledge of a critical element.

Section VII reviews some of the constitutional challenges considered by the Supreme Court of Florida during the time period of the survey. First, the court discusses a familiar complaint about criminal statutes, vagueness. The article next reviews a decision in which the court attempts to clarify earlier decisions concerning double jeopardy where there is a dispute as to whether the acts arose from a single criminal episode. Finally, the article discusses a separation of powers challenge to a criminal sentencing statute. As can be seen from this summary, the Supreme Court of Florida has considered a number of challenges involving new statutory interpretation questions and has also revisited some recurring issues.

II. BURGLARY

A. Remaining in the Premises

A 4-3 decision by the Supreme Court of Florida in 2000 spawned a response from the Florida Legislature repudiating the court’s interpretation of the state’s burglary statute. In Delgado v. State, the court overturned the defendant’s murder convictions because it held that the grounds for the predicate burglary were inadequate to support the felony murder charges. In that case, the State prosecuted the defendant based upon the factual premise that he entered the home with the victims’ consent, but at

5. 776 So. 2d 233 (Fla. 2000). In a subsequent case, Jimenez v. State, 810 So. 2d 511, 513 (Fla. 2001), the court rejected a motion to apply this decision retroactively to the defendant who had been convicted under the court’s interpretation of the statute before it was amended.

6. The relevant portion of the burglary statute at the time of this case stated, “‘bunglary’ means entering or remaining in a structure or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain.” Fla. Stat. § 810.02(1) (1989).
some point before the killings, the consent was withdrawn. The court had interpreted the consent part of the burglary statute to constitute an affirmative defense. In construing that provision, the court referred to the commentary of the Model Penal Code that explained that the crime of burglary developed to compensate for perceived defects in the common law’s definition of attempt. It also noted that the Code’s drafters limited its definition of burglary to reflect that the primary objective of the crime is to punish perpetrators who invade premises under circumstances likely to terrorize its occupants. Furthermore, the Code comment urges states that adopt the concept of “remaining in the premises” as an alternative to “breaking and entering” attempt to limit the language to narrow circumstances involving suspects who surreptitiously remain. The court noted that this limitation has been supported by several legal commentators. As the court further noted, several states that include “remaining in” the premises as part of burglary expressly include “surreptitiously” or similar language in the statute itself. It also noted that New York, which includes “remaining in” language within its burglary statute, had refused to permit the commission of a criminal act to convert a lawful entry into an unlawful remaining that would support a burglary conviction.

The court reviewed the reasoning of the Third District Court of Appeal in Ray v. State, one of the cases to which the Florida Legislature referred with approval. The third district had declined to interpret “remaining in” to refer only to situations where the defendant surreptitiously remained as inappropriately injecting words into the statute. However, the supreme court correctly noted that to interpret otherwise essentially eliminates the clause “unless . . . the defendant is licensed or invited to enter.”

7. Delgado, 776 So. 2d at 236.
8. Id.
9. Id. (citing MODEL PENAL CODE § 221.1 cmt. 2 at 66 (1980)).
10. Id. (citing MODEL PENAL CODE § 221.1 cmt. 2 at 67 (1980)).
11. Delgado, 776 So. 2d at 237 (citing MODEL PENAL CODE § 221.1 cmt. 3(a) at 68–71 (1980)).
12. Id. (citing WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 8.13(b), at 795 (2d ed. 1986); 3 CHARLES E. TORCIA, WHARTON’S CRIMINAL LAW § 329, at 197–98 n.29 (14th ed. 1980)).
13. Delgado, 776 So. 2d at 240.
14. Id. at 237–38.
15. 522 So. 2d 963 (Fla. 3d Dist. Ct. App. 1988).
16. Delgado, 776 So. 2d at 240.
17. Id.
18. Id.
In an opinion joined by Justices Lewis and Quince, Chief Justice Wells dissented from the majority opinion on the grounds of stare decisis and statutory interpretation. In regard to the former, Wells noted that the court had accepted the contrary interpretation of withdrawal of consent in three of the cases cited by the Florida Legislature. In regard to the latter, the Chief Justice argued that the majority's insertion of the word “surreptitiously” into the statute, when the legislature had not chosen to so amend the statute after the court’s prior interpretations, amounted to judicial lawmaking. Wells also argued that it was reasonable to permit circumstantial evidence of criminal conduct to be considered by the jury as proof that consent had been withdrawn.

In response to the Delgado case, the Florida Legislature amended section 810.02 of the Florida Statutes. The legislature specifically found that this case was decided contrary to legislative intent and prior case law relating to burglary. The findings further state that it is not necessary for the licensee or invitee to remain surreptitiously in the dwelling, structure, or conveyance, and that consent remains an affirmative defense to burglary.

19. Id. at 242 (Wells, C.J., dissenting).
20. Id. (Wells, C.J., dissenting) (citing Raleigh v. State, 705 So. 2d 1324, 1329 (Fla. 1997); Jimenez v. State, 703 So. 2d 437, 440 (Fla. 1997); and Robertson v. State, 699 So. 2d 1343, 1346-47 (Fla. 1997)).
22. Delgado, 776 So. 2d at 243 (Wells, C.J., dissenting).
23. The statutory amendment in pertinent part added:
   (1)(b) For offenses committed after July 1, 2001, "burglary" means:
   
   2. Notwithstanding a licensed or invited entry, remaining in a dwelling, structure, or conveyance:
   a. Surreptitiously, with the intent to commit an offense therein;
   b. After permission to remain therein has been withdrawn, with the intent to commit an offense therein; or
   c. To commit or attempt to commit a forcible felony, as defined in s. 776.08.

   FLA. STAT. § 810.02(1)(b), (1)(b)(a–c) (2001).
24. Ch. 2001-58, § 1, 2001 Fla. Laws 404, 404 (to be codified at FLA. STAT. § 810.015).
25. The legislature directed that section 810.02(1)(a) of the Florida Statutes be construed in conformity with Raleigh v. State, 705 So. 2d 1324 (Fla. 1997) (ample circumstantial evidence for jury to conclude that consent of victim withdrawn when defendant shot several times and beat victim so viciously that gun bent, broken and bloody); Jimenez v. State, 703 So. 2d 437 (Fla. 1997) (ample circumstantial evidence to support withdrawal of consent where victim brutally beaten and stabbed multiple times); Robertson v. State, 699 So. 2d 1343 (Fla. 1997) (jury could conclude that consent withdrawn when defendant bound and blindfolded victim and stuffed brassiere down her throat); Routly v. State, 440 So. 2d 1257 (Fla. 1983) (burglary statute satisfied when defendant remains; unlawful entry not required);
Although it is the prerogative of the legislature to define crimes, and it is somewhat troubling that the Supreme Court of Florida did not choose to interpret the statute differently the first time it had the opportunity to do so, the court certainly seems to have the more persuasive argument if one wants coherency in the separation of crimes into logical and distinct categories. The expansion of common law definitions of crimes is understandable in light of the changing conditions of modern society, but to fundamentally alter the definition of a crime can subvert its purposes. Understandably, the terror caused by the forced entrance of an intruder who plans further criminal mischief in the dwelling or structure that he has invaded warrants severe criminal penalties to the act of intrusion. The legislature’s new definition of burglary now treats this act the same as one where a visitor exceeds the scope of his visit by engaging in aggressive behavior. The latter conduct is also worthy of criminal penalties, but it does not have to be penalized by the evisceration of the definition of the crime of burglary. It may also be important to more severely penalize the prior type of invasion for the policy reasons given by the drafters of the Model Penal Code and other legal commentators.

It is further troubling that the legislature seems to be exceeding its authority by stating its intention that the ruling in Delgado be nullified. This attempt has caused further confusion in the courts as demonstrated by a recent case from the Third District Court of Appeal, Braggs v. State. As the court of appeal correctly pointed out, only the court can recede from its ruling and the appellate court ruled that it had not yet done so. The appellate court certified a question to the Supreme Court of Florida to clarify whether it did plan to recede from its Delgado decision. Chief Judge Schwartz pointed out another fundamental problem with the legislature’s act, the ex post facto clause. By seeking to overrule Delgado and retroactively apply the statute to cases that were on appeal when it was

26. Id.
27. 815 So. 2d 657 (Fla. 3d Dist. Ct. App. 2002).
28. Id.
29. The court certified the following question: “WHETHER SECTION ONE OF CHAPTER 2001-58, LAWS OF FLORIDA, HAS LEGISLATIVELY OVERRULED DELGADO V. STATE, 776 So. 2d 233 (Fla. 2000), FOR CRIMES COMMITTED ON OR BEFORE JULY 1, 2001.” Id. at 661.
30. Id. at 663. See also U.S. Const. art. I, § 10, cl. 1.
decided, the legislature arguably seeks to retroactively apply the law in a manner forbidden by the United States Constitution.\(^\text{31}\)

B. *Open to the Public*

In another opinion concerning the coverage of the burglary statute, the Supreme Court of Florida resolved confusion about the application of some of its prior cases in *Johnson v. State*.\(^\text{32}\) In that case, the defendant argued that he was wrongly convicted of burglary of a convenience store because it was open to the public when he entered.\(^\text{33}\) Although the court had previously held, in *Miller v. State*,\(^\text{34}\) that it was a complete defense to the charge of burglary where the premises entered were open to the public, it was unclear whether this defense would also frustrate a burglary conviction where the defendant entered a structure open to the public, and then further entered a part of those premises not open to the public.\(^\text{35}\) The court held that it was a question of fact for the jury to decide if the area behind the counter of the store was open to the public and, therefore, a burglary conviction could be upheld even if the store was open.\(^\text{36}\) In *Johnson*, the question of whether the area behind the counter was open to the public was properly left to the jury to determine.\(^\text{37}\)

C. *Burglary of a Conveyance*

The court also resolved a conflict between the district courts of appeal concerning the proper application of the burglary statute to the removal of hubcaps or tires from vehicles in *Drew v. State*.\(^\text{38}\) In *Drew*, the defendant and his accomplice removed tires from a car parked at an auto sales

\(^{31}\) *Id.*

\(^{32}\) 786 So. 2d 1162 (Fla. 2001).

\(^{33}\) *Id.* at 1163.

\(^{34}\) 733 So. 2d 955 (Fla. 1998). For a further discussion of the impact of *Miller*, warning that its extension should be limited so as to permit burglary convictions where part of the premises are not open to the public, see William E. Adams, Jr., & Mark M. Dobson, *Criminal Law: 2000 Survey of Florida Law*, 25 NOVA L. REV. 1, 2–6 (2000).

\(^{35}\) See State v. Butler, 735 So. 2d 481, 482 (Fla. 1999), and State v. Laster, 735 So. 2d 481, 481 (Fla. 1999) (rejecting State's argument that area behind counter not open to the public).

\(^{36}\) *Johnson*, 786 So. 2d at 1164.

\(^{37}\) *Id.* at 1162–63.

\(^{38}\) 773 So. 2d 46 (Fla. 2000).
They were charged with petit theft, possession of burglary tools, and burglary. Drew filed a motion to dismiss the burglary and possession charges, arguing that the undisputed facts failed to establish a prima facie showing of guilt. As was noted in the above cases, Florida’s burglary statute is more expansive in its coverage than common law burglary. One of its expansions, which is consistent with other contemporary American jurisdictions, is coverage of burglary of a conveyance. Florida Statutes define conveyance to include “any motor vehicle, ship, vessel, railroad car, trailer, aircraft, or sleeping car,” and entry to include “taking apart any portion of the conveyance.”

In a prior constitutional challenge for vagueness to this statutory provision, the Supreme Court of Florida interpreted the burglary statute to require that the removal of a part of the conveyance be executed in order to facilitate the commission of an offense within the conveyance. In a subsequent case concerning this issue, the court clarified that burglary of a conveyance could be proven even when the underlying offense was stealing the conveyance itself. The court in Drew, however, refused to extend the statute to cover thefts of hubcaps or tires attached to the outside of the car without any entry into any enclosed portion of it. Acknowledging that its prior decisions had accepted that taking apart any portion of a conveyance constituted an entry, the court nevertheless required there also be proof of the requisite statutory intent to commit a crime within the conveyance. The court additionally warned lower courts to not end the analysis once entry has occurred because it is also necessary to find an intent to commit an offense therein. The supreme court noted that its holding was consistent with other jurisdictions with statutes similar to Florida’s.

39. Id. at 47.
40. Id.
41. Id.
42. Id. at 48.
43. FLA. STAT. § 810.02(4) (1997).
44. § 810.011(3).
45. Id.
49. Id. at 51.
50. Id. at 52.
51. Id.
Justice Shaw concurred in the result, but did not issue a separate opinion expressing his concern with the reasoning of the majority.\(^{52}\) Justice Quince dissented in an opinion, joined by Chief Justice Wells, that briefly cited the notion that entry into a conveyance includes taking apart any portion of the conveyance.\(^{53}\) The failure of the dissent to address the need to find a separate intent to commit an offense within the conveyance seems particularly problematic with this offense. Not only was the intent to commit a separate offense within a dwelling an essential element of the common law crime of burglary, it seems even more appropriate for an unoccupied automobile where there does not appear to be an intent to actually enter the vehicle beyond the constructive entry recognized by the court. As noted by the majority, a contrary interpretation turns what is otherwise a larceny automatically into the crime of burglary.\(^{54}\)

D. Unoccupied Dwellings

In yet another case clarifying the application of the state burglary statute, the Supreme Court of Florida was called upon to consider its application to unoccupied dwellings in *State v. Huggins*.\(^{55}\) In a case involving a certified conflict between the district courts of appeal, Huggins sought clarification as to whether burglary of an unoccupied dwelling is an enumerated felony in the Prison Release Reoffender Act.\(^{56}\) Coverage by this Act would have mandated a fifteen-year sentence for the defendant.\(^{57}\) The court was asked to resolve whether ""occupied"" as used in this statutory provision modifies only the word ""structure"" or both it and ""dwelling.""\(^{58}\) The court rejected the arguments of both parties that the statute was unambiguous, arguing that the two were arguing contrary interpretations of the provision, both of which were plausible.\(^{59}\) Noting that the Act requires that its provisions be ""strictly construed,"" and ""when the language is

\(^{52}\) Id.
\(^{53}\) *Drew*, 773 So. 2d at 52–53 (Quince, J., dissenting).
\(^{54}\) Id.
\(^{55}\) 802 So. 2d 276 (Fla. 2001).
\(^{56}\) *Id.* at 276. Section 775.082(8)(a)(1) provides that ""prison releasee reoffender"" means any defendant who commits, or attempts to commit: ... (q) Burglary of an occupied structure or dwelling; or ... within three years of being released from a state correctional facility operated by the Department of Corrections or a private vendor."" *Fla. Stat.* § 775.082(8)(a)(1) (1997).
\(^{57}\) *Huggins*, 802 So. 2d at 277.
\(^{58}\) Id.
\(^{59}\) Id.
susceptible of differing constructions, it shall be construed most favorably to
the accused," the court deemed itself bound to construe the language most
favorably to the defendant and held that it did not apply to the defendant. In
light of the statute's own interpretational mandate, the court's conclusion
seems logical and persuasive.

III. BATTERY

The Supreme Court of Florida also resolved a conflict in the lower
courts concerning whether the touching of a vehicle can constitute a battery
in Clark v. State. Clark, the defendant, was discovered while removing
construction materials from a storage site with his truck. An employee of
the entity owning the site and his supervisor attempted to block Clark's exit
with their trucks, but "Clark intentionally crashed his truck into the [other] vehicles." The supervisor testified that his truck was struck and spun by
the defendant, who was found guilty of aggravated battery and felony
criminal mischief. In this case, the court first acknowledged that the
aggravated battery statute, section 784.045(1)(a) of the Florida Statutes,
could be satisfied if the elements of simple battery were proven.

The defendant in Clark argued that the court should adopt a per se rule
that the intentional striking of an automobile could not constitute the
touching of the other vehicle's occupant so as to satisfy the requirements of
battery. The court rejected the adoption of such a per se rule and instead
held "the circumstances of the case will determine whether a vehicle is

60. § 775.021(1).
61. Huggins, 802 So. 2d at 279. Chief Justice Wells and Justice Lewis dissented with
spirited arguments as to why the statute should be construed to apply to unoccupied dwellings,
but the arguments fall short of overcoming the interpretational presumption that the Act itself
requires. Id. at 279–81 (Wells, C.J., dissenting; Lewis, J., dissenting).
62. 783 So. 2d 967 (Fla. 2001).
63. Id.
64. Id.
65. Id. at 967–68.
66. Id. at 968. The defendant was found not guilty of aggravated battery on the
employee. Clark, 783 So. 2d at 968.
67. This statute states "[a] person commits aggravated battery who, in committing
battery: 1. Intentionally or knowingly causes great bodily harm, permanent disability, or
permanent disfigurement; or 2. Uses a deadly weapon." FLA. STAT. § 784.045(1)(a) (1999).
68. "The offense of battery occurs when a person: 1. Actually and intentionally
touches or strikes another person against the will of the other; or 2. Intentionally causes
bodily harm to another person." FLA. STAT. § 784.03(1)(a) (1999).
69. Clark, 783 So. 2d at 968.
sufficiently closely connected to a person so that the striking of the vehicle would constitute a battery on the person.” The court held that there was sufficient evidence to support the jury’s conclusion in this case where the impact of the defendant’s vehicle spun the occupant of the other truck.

Subsequent to this case, the court remanded another case, in light of this opinion, where the defendant reversed his truck and rammed it into a police cruiser that had stopped him. This resolution appears to be a reasonable standard and consistent with prevailing legal norms.

IV. HOMICIDE

A. Attempted Murder

The Supreme Court of Florida also answered a question from the Fifth District Court of Appeal that asked if the crime of attempted second-degree murder existed in Florida in Brown v. State. In a prior case, the court had held that attempted second-degree murder does not require proof of the specific intent to kill. The court reaffirmed that the crime of attempted second-degree murder exists in Florida and stated that the crime requires a showing of an intentional act that would have resulted in death except that someone prevented him or he otherwise failed to kill the victim, and the act was imminently dangerous to another and demonstrated a depraved mind without regard for human life.

Justice Harding dissented with an opinion criticizing the logical inconsistencies inherent in recognizing this attempt crime. As noted by Harding, second-degree murder is a general intent crime. He also noted that the court had indicated in other cases that attempt crimes require a specific intent to commit a particular crime. He also noted that the court had encountered difficulty in other instances where it tried to recognize an

70. Id. at 969.
71. Id. Justice Pariente entered a separate concurrence encouraging the legislature to separately criminalize this type of conduct. Id. (Pariente, J., concurring).
73. 790 So. 2d 389 (Fla. 2000).
74. Gentry v. State, 437 So. 2d 1097, 1099 (Fla. 1983).
75. Brown, 790 So. 2d at 390.
76. Id. (Harding, J., dissenting).
77. Id. at 391 (Harding, J., dissenting).
78. Id. (Harding, J., dissenting) (citing Thomas v. State, 531 So. 2d 708, 710 (Fla. 1988); Gustine v. State, 97 So. 207, 208 (Fla. 1923)).
attempt crime where the completed crime only required a general intent.\textsuperscript{79} In supporting this argument, he points out that the court has inconsistently stated that attempted sexual battery requires either a general intent\textsuperscript{80} or a specific intent.\textsuperscript{81} Finally, he noted that Florida finally rejected the crime of attempted felony murder, in part because it recognized that attempt crimes require proof of the specific intent to commit the underlying crime.\textsuperscript{82}

Justice Harding's dissent points out that the overwhelming majority of jurisdictions hold that attempt crimes require a specific intent to commit the completed crime.\textsuperscript{83} These holdings are consistent with the common law definition of attempt and the conclusions of most criminal law scholars. As argued by noted criminal law scholars Professors LaFave and Scott, attempted murder requires that the perpetrator specifically intend the result of death.\textsuperscript{84} Such a result is not the intent of a person who acts with an intent to do serious bodily injury or with reckless disregard of human life, the kind of intent required for second-degree murder.\textsuperscript{85}

The confusion in Florida case law is not surprising in light of the logical incoherency of saying that a person can apply a criminal concept that normally requires a specific intent to a person who does not specifically intend the result that would have occurred had the defendant been successful in his actions. There are sound policy reasons for the common law's requirement that persons have a specific intent to commit an attempt crime. Attempt crimes, which can be satisfied by only minimal overt acts, more ambiguously indicate the underlying intent of the perpetrator. The requirement of proof of a higher level of intent protects innocent persons from being convicted of attempt crimes when they have engaged in ambiguous conduct whose underlying intent is unclear or who have not yet reached a point in effectuating criminal inclinations to warrant criminal punishment. This is particularly relevant when one notes that Florida's attempt statute is satisfied when the defendant does "any act toward the

\begin{itemize}
  \item \textsuperscript{79} Id. (Harding, J., dissenting).
  \item \textsuperscript{80} Brown, 790 So. 2d at 392 (Harding, J., dissenting) (citing Sochor v. State, 580 So. 2d 595, 601 (Fla. 1991), vacated on other grounds, 504 U.S. 227 (1992); Sochor v. State, 619 So. 2d 285, 290 (Fla. 1993)).
  \item \textsuperscript{81} Id. (Harding, J., dissenting) (citing Gudinas v. State, 693 So. 2d 953, 962 (Fla. 1997); Rogers v. State, 660 So. 2d 237, 241 (Fla. 1995)).
  \item \textsuperscript{82} Id. (Harding, J., dissenting) (citing State v. Gray, 654 So. 2d 552 (Fla. 1995)).
  \item \textsuperscript{83} Id. at 392-93 (Harding, J., dissenting) (citations omitted).
  \item \textsuperscript{84} LAFAVE & SCOTT, supra note 12 § 6.2(c)(1), at 501.
  \item \textsuperscript{85} Brown, 790 So. 2d at 397 (citing LAFAVE & SCOTT, supra note 12 § 6.2(c)(1), at 501).
\end{itemize}
commission of such offense." 86 With such a lax actus reus requirement, Florida should follow the majority of jurisdictions in rejecting the illogical crime of attempted second-degree murder. As noted by Justice Harding, such perpetrators can "still be [found] guilty of aggravated battery, a second-degree felony." 87

B. Excusable Homicide

In Weir v. State, 88 the Supreme Court of Florida further explored two issues that have consistently plagued law students, legal commentators, and courts throughout time—excusable homicide and proximate cause. 89 Weir was a houseguest of the sister of the victim, Michael Martin, who was also staying with his sister. 90 During an argument between Weir and his wife, Martin intervened, telling Weir to calm down and go take a walk. 91 Rather than heed the advice, Weir punched Martin once between the eyes. 92 Martin fell, got up, staggered and collapsed. 93 He was transported to the hospital, where he died. 94

Martin had suffered a head injury in an automobile accident years earlier before the punch from Weir. 95 The medical examiner found that Martin died of a subdural hemorrhage and found no evidence of an aneurysm. 96 It was her opinion that death was caused by the blunt head trauma that resulted from the "blow to the face." 97 The defendant's expert, a forensic neuropathologist, testified that the prior head injury received in the automobile accident could have caused an aneurysm and that ruptures of aneurysms are the most common cause of acute hemorrhage at the base of the brain in younger persons. 98 Weir was found guilty of manslaughter by culpable negligence. 99

86. FLA. STAT. § 777.04(1) (2001).
87. Brown, 790 So. 2d at 398.
88. 777 So. 2d 1073 (Fla. 2001).
89. Id.
90. Id. at 1074.
91. Id.
92. Id.
93. Weir, 777 So. 2d at 1074.
94. Id.
95. Id.
96. Id.
97. Id.
98. Weir, 777 So. 2d at 1074–75.
99. Id. at 1074.
The defendant moved for a judgment of acquittal, arguing that his acts resulted in an excusable homicide. Florida Statutes include sudden combat as a defense in its excusable homicide provisions. As noted by the court, the record supported the defendant’s argument that the act producing the fatal blow was but a single punch delivered during unarmed combat and that the defendant and victim were of similar stature. However, after reviewing other cases where sudden combat was raised as a defense, the court rejected Weir’s argument because the victim in this case did not engage in any type of physical assault. The court’s conclusion appears correct in viewing the totality of the circumstances of this case. As the record indicated, the victim’s hands were down by his side when Weir struck him.

The defendant also argued that he was not the cause of the victim’s death. First, he argued that the victim’s prior head injury may have made him more susceptible to being killed by the punch. The court rejected this argument, noting what every first-year law student learns in torts and criminal law, that generally, one usually must take his victim as he finds him and is not excused from liability or guilt by the frailty of the victim’s physical condition.

The court did not end its causation analysis on this note, however. It recognized that it should address proximate cause issues even if cause in fact

100. Id. at 1075.
101. Manslaughter is defined as: “(1) The killing of a human being by the act, procurement, or culpable negligence of another, without lawful justification . . . and in cases in which such killing shall not be excusable homicide.” FLA. STAT. § 782.07(1) (2001). Excusable homicide is defined as homicide:

when committed by accident and misfortune in doing any lawful act by lawful means with usual ordinary caution, and without any unlawful intent, or by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, without any dangerous weapon being used and not done in a cruel or unusual manner.

§ 782.03.
102. Weir, 777 So. 2d at 1075.
103. Id. at 1076.
104. Id. at 1074.
105. Id. at 1076.
106. Id.
107. Weir, 777 So. 2d at 1077. In a related argument the court rejected the defendant’s objection to the judge’s instruction on pre-existing injury which told the jury that “[d]efendants take their victims as they find them.” Id. at 1075, 1077.
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had been established. It noted that Florida courts had established the following test for Proximate cause: (1) whether the prohibited result of the defendant's conduct is beyond the scope of any fair assessment of the danger created by the defendant's conduct, and (2) whether it would be otherwise unjust, based on fairness and policy considerations, to hold the defendant criminally responsible for the prohibited result.

On the first question, the court held that this requirement was satisfied by the testimony of the medical examiner that a single punch could cause the type of injury and death inflicted in this case. On the second question, the court noted that the statutory definition of excusable homicide delineates when a manslaughter conviction would be unjust, and this defendant's conduct fell outside of its parameters. Once again, the court's handling of an issue that sometimes confuses courts seems to be a reasonable assessment of the causation and policy issues present in this case.

V. COMPLICITY

In addition to the issues discussed above, the Supreme Court of Florida considered the question of whether an accomplice to a masked offense could be convicted of enhanced charges in Wright v. State. Wright was the driver of a vehicle from which two masked cohorts emerged to rob another driver of his cell phone and bag, and also unsuccessfully attempted to steal his car. Wright was convicted of "robbery with a mask and attempted carjacking with a mask." Under Florida Statutes, a criminal offense can be reclassified to the next higher degree if the offender wears a hood, mask, or other device that conceals identity. The State conceded that Wright was not wearing a mask during the commission of the offenses. The court rejected the State's argument that a defendant could have his offenses

108. Id. at 1076.
109. Id. (citing Eversley v. State, 748 So. 2d 963, 967 (Fla. 1999)).
110. Id.
111. Id.
112. 810 So. 2d 873 (Fla. 2002).
113. Id. at 874.
114. Id.
115. Id. (citing FLA. STAT. § 775.0845 (1997)).
116. Wright, 810 So. 2d at 874.
enhanced based upon the conduct of his codefendants. Justice Pariente concurred in part and dissented in part, believing that double jeopardy barred conviction on both robbery and attempted carjacking because the taking was part of a single forceful transaction separated neither in time nor place. Chief Justice Wells dissented, arguing that by use of the term "offender[",] the legislature intended that the offense apply to accomplices.

VI. CONTROLLED SUBSTANCES

The Supreme Court of Florida rejected a claim about jury instructions in a controlled substance case in Scott v. State. Scott was charged with introduction or possession of contraband in a correctional facility. His counsel asked that the jury be instructed that the element of knowledge required that the defendant know the illicit nature of the substance possessed. In the case of State v. Medlin, the court had previously ruled that possession of a controlled substance raises a rebuttable presumption that the possessor was aware of the nature of the drug possessed. In Chicone v. State, the court had held that knowledge of both the substance and illicit nature of the substance are essential elements of possession of an illegal substance. In trying to reconcile these two decisions, the court argued that the presumption of knowledge only applies to cases of actual possession. In this case, the drugs were found in the defendant's locker in an eyeglass case. Therefore, the court held that the jury must be instructed on the element of knowledge and when it may be inferred.

117. Id.
118. Id. at 874–75 (Pariente, J., concurring).
119. Id. at 875–76 (Wells, C.J., dissenting).
120. 808 So. 2d 166 (Fla. 2002).
121. Id. at 168.
122. Id.
123. 273 So. 2d 394 (Fla. 1973).
124. Id. at 397.
125. 684 So. 2d 736 (Fla. 1996).
126. Id. at 737.
127. Scott, 808 So. 2d at 171.
128. Id. at 172.
129. Id.
Wells argued in a dissent that lack of knowledge should be an affirmative defense.\textsuperscript{130}

VII. CONSTITUTIONAL CHALLENGES

A. Vagueness

The Supreme Court of Florida reversed a vagueness challenge to the statute criminalizing the unlawful luring of a child in \textit{State v. Brake}.\textsuperscript{131} Brake was charged with violation of section 787.025 of the \textit{Florida Statutes}, which makes it illegal for a person convicted of certain specified sexual offenses from "intentionally lur[ing] or entic[ing]...a child under 12 into a structure, dwelling, or conveyance for other than a lawful purpose."\textsuperscript{132} Brake, previously convicted of indecency with a child in Texas, approached a ten-year-old girl and asked her to come to his house and get a toy.\textsuperscript{133} While inside his house, Brake hugged and kissed the girl and touched a mark on her left inner thigh.\textsuperscript{134} Brake filed a motion to dismiss, arguing that the phrase "other than a lawful purpose" was unconstitutionally vague.\textsuperscript{135} The trial court denied the motion, but the Second District Court of Appeal reversed.\textsuperscript{136} The court noted that the standard for vagueness was whether a statute provides "adequate notice of the conduct it prohibits when measured by common understanding and practice."\textsuperscript{137} The court found that "the dictionary definition of lawful" provided adequate notice of the prohibited conduct and upheld the statute.\textsuperscript{138}

\textsuperscript{130} \textit{Id.} at 173 (Wells, C.J., dissenting). Justice Harding argued in dissent that the issue was not properly reserved because the defendant's counsel did not submit the requested jury instructions in writing. \textit{Id.} at 173–75 (Harding, J., dissenting).

\textsuperscript{131} 796 So. 2d 522 (Fla. 2001).

\textsuperscript{132} The statute provides:
A person over the age of 18 who, having been previously convicted of a violation of chapter 794 [sexual battery] or s. 800.04 [lewd or lascivious offenses with minors under 16], or a violation of a similar law of another jurisdiction, intentionally lures or entices, or attempts to lure or entice, a child under the age of 12 into a structure, dwelling, or conveyance for other than a lawful purpose commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

\textit{Id.} at 525 n. 1 (F.L.A. STAT. § 787.025(2)(a) (1997)).

\textsuperscript{133} \textit{Brake}, 796 So. 2d at 525–26.

\textsuperscript{134} \textit{Id.} at 526.

\textsuperscript{135} \textit{Id.}

\textsuperscript{136} \textit{Id.}

\textsuperscript{137} \textit{Id.} at 527.

\textsuperscript{138} \textit{Brake}, 796 So. 2d at 529.
The court also addressed the finding of the district court that the statute created an unconstitutional mandatory rebuttable presumption in section 787.025 of the Florida Statutes, which provides that luring a child "without the consent of the child's parent or legal guardian shall be prima facie evidence of other than a lawful purpose."[1] "Mandatory presumptions [are] violat[ive] of the Due Process Clause if they relieve the state from the burden of persuasion on an element of the offense."[2] The court found this part of the defendant's argument persuasive and found the presumption unconstitutional.[3] It held that, by permitting the State to prove "other than a lawful purpose" by lack of parental consent, the trial court had approved an impermissible presumption of unlawful intent.[4] The court posited that a neighbor could innocently invite a child into his house without parental permission for innocent reasons.[5]

The Supreme Court of Florida also rejected a vagueness challenge to the statute criminalizing the conduct of contributing to the delinquency of a minor in State v. Fuchs.[6] The Fuchs case involved a report of an eleven-year-old boy left alone with his four-year-old and five-year-old sisters.[7] Ms. Fuchs was charged with misdemeanor counts of contributing to the delinquency or dependency of a child in violation of section 827.04(1)(a) of the Florida Statutes.[8] Fuchs complained that the criminal statute did not define "delinquent," "dependent," or "child in need of services."[9] The legislature arguably contributed to this dispute by deleting the words "as defined under the laws of Florida" after the terms in question when it amended the statute in 1996.[10] The court noted that the terms in question are defined in other parts of the Florida Statutes.[11] Therefore, the court

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139. Id.
140. Id.
141. Id.
142. Id.
143. Brake, 796 So. 2d at 529.
144. 769 So. 2d 1006 (Fla. 2000).
145. Id. at 1007.
146. Id. at 1008. The statute provides "(1) Any person who commits: Commits any act which causes, tends to cause, encourages, or contributes, to a child becoming a delinquent or dependent child or a child in need of services...commits a misdemeanor of the first degree." FLA. STAT. § 827.04 (2001).
147. Fuchs, 769 So. 2d at 1008.
148. Id. at 1009.
149. Id. at 1010.
Adams rejected the vagueness claim relying upon settled principles of statutory construction.\textsuperscript{150}

B. \textit{Double Jeopardy}

The Supreme Court of Florida resolved conflicts between the district courts in two cases dealing with assertions by defendants of violations of the Double Jeopardy Clause of the United States and Florida Constitutions.\textsuperscript{151} In \textit{Hayes v. State},\textsuperscript{152} the defendant was convicted of armed robbery, armed burglary of a structure, and grand theft of a motor vehicle.\textsuperscript{153} Hayes and two cohorts entered a residence and stole a variety of items, including keys to the victim's van.\textsuperscript{154} After leaving the residence, the defendant and his cohorts used the keys to steal the van parked outside the residence.\textsuperscript{155} Hayes argued that the court's prior decision in \textit{Sirmons v. State}\textsuperscript{156} prevented him from being convicted of both armed robbery and grand theft of a motor vehicle because both acts arose out of a single criminal episode and are degree variants of the core offense of theft.\textsuperscript{157} The court noted that multiple convictions and punishments may be imposed for separate offenses committed in a single criminal transaction or episode.\textsuperscript{158} It also noted that it explained its application of the Double Jeopardy Clause in \textit{Borges v. State}\textsuperscript{159} where the court stated that the clause "seeks only to prevent courts either from allowing multiple prosecutions or from imposing multiple punishments for a single, legislatively defined offense."\textsuperscript{160} In \textit{Sirmons}, the court held that a defendant who was convicted of both robbery and grand theft had been so

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{150} \textit{Id.} at 1011.
\item \textsuperscript{151} U.S. CONST. amend. V; FLA. CONST. art. I, § 9.
\item \textsuperscript{152} 803 So. 2d 695 (Fla. 2001). The court noted that the first district had reached a similar conclusion in \textit{Henderson v. State}, 778 So. 2d 1046 (Fla. 1st Dist. Ct. App. 2001) as the third district had in \textit{Hayes} and that both of these decisions conflicted with the decision of the fifth district in \textit{Castleberry v. State}, 402 So. 2d 1231 (Fla. 5th Dist. Ct. App. 1981). \textit{Id.} at 698.
\item \textsuperscript{153} \textit{Id.} at 697.
\item \textsuperscript{154} \textit{Id.}
\item \textsuperscript{155} \textit{Id.}
\item \textsuperscript{156} 634 So. 2d 153 (Fla. 1994).
\item \textsuperscript{157} \textit{Hayes}, 803 So. 2d at 698.
\item \textsuperscript{158} \textit{Id.} at 700 (citing FLA. STAT. § 775.021(4)(a) (1997)).
\item \textsuperscript{159} 415 So. 2d 1265 (Fla. 1985).
\item \textsuperscript{160} \textit{Hayes}, 803 So. 2d at 699 (citing Borges v. State, 415 So. 2d 1265, 1267 (Fla. 1982)).
\end{enumerate}
\end{footnotesize}
convicted in violation of double jeopardy in an incident in which he robbed
the victim of the motor vehicle at knife point.\textsuperscript{161} The court noted that the guiding principle in cases such as this one
involves the assessment of whether the taking arose from distinct and
independent acts, a factual issue dependent upon the circumstances.\textsuperscript{162} It
noted that it had adopted the single larceny rule in \textit{Hearn v. State},\textsuperscript{163} which
looked at whether the theft occurred at the same time, same place, and under
the same circumstances with the same intent.\textsuperscript{164} It then looked at the
"spectrum of approaches" that other jurisdictions have taken in assessing
whether a theft constituted the same or separate larcenies.\textsuperscript{165} The court
established that its guideline would require an assessment of whether there
was a separation of time, place, or circumstances between the initial robbery
and subsequent theft.\textsuperscript{166} In making this determination, courts are advised to
"consider the location of the items taken, the lapse of time between takings,
the number of owners of the items taken, and whether intervening events
occurred between the takings."\textsuperscript{167} In applying this standard to this case, the
court held that the robbery was complete before Hayes exited the residence
and that the taking of the motor vehicle occurred at a different time and
place.\textsuperscript{168} Despite the fact that there was a single owner, the court felt that the
separation was sufficient to constitute distinct and independent criminal
acts.\textsuperscript{169} It distinguished \textit{Sirmons} on the theory that the transaction in that
case involved a single taking of a motor vehicle.\textsuperscript{170}

As the court noted, it is difficult to formulate a bright-line rule in these
fact specific cases.\textsuperscript{171} This difficulty is reflected in the spectrum of
approaches utilized in other jurisdictions as described in the opinion.
Nonetheless, the results in \textit{Hayes} and \textit{Sirmons} can be distinguished, and
the guidelines set out by the court assist in reaching opposite determinations. How helpful they will be in future cases in which the factors fall
somewhere between the factual scenarios of these cases remains to be seen.

\textsuperscript{161} Id. at 700 (citing \textit{Sirmons}, 634 So. 2d at 153–54).
\textsuperscript{162} Id.
\textsuperscript{163} 55 So. 2d 559 (Fla. 1951).
\textsuperscript{164} \textit{Hayes}, 803 So. 2d at 701.
\textsuperscript{165} Id. at 702–04.
\textsuperscript{166} Id. at 704.
\textsuperscript{167} Id.
\textsuperscript{168} Id.
\textsuperscript{169} \textit{Hayes}, 803 So. 2d at 704.
\textsuperscript{170} Id.
\textsuperscript{171} Id. at 705.
C. Separation of Powers

In State v. Cotton, the Supreme Court of Florida rejected a separation of powers challenge to the Prison Release Reoffender Punishment Act. The court was called upon to resolve a conflict between the district courts in determining this question. The argument raised by the defendants was that the Act "deprives" the judiciary of all sentencing discretion and placed it "in the hands of the state attorney, who is a member of the executive branch." The court found that the legislature’s intent in the Act was to give the state attorney the authority to determine whether or not to seek sentencing under it. The court noted that Florida courts have traditionally applied a strict separation of powers doctrine and under this theory, this Act does not violate the doctrine. The court also rejected cruel or unusual punishment, overbreadth, and substantive due process claims.

VIII. Conclusion

As can be seen by this review, the Supreme Court of Florida has not issued any opinions in the past two years that seem to radically alter settled criminal law principles in this jurisdiction. The battle over the proper interpretation of Florida’s burglary statute reflects some of the ongoing debate between the Florida courts and the state legislature over the difference between interpretation of the law and creating law. In this area, unlike most of the other substantive decisions, the court’s interpretation of burglary and attempt in this state does seem out of step both with common law principles and the general trends in other jurisdictions. In most of the other areas addressed, however, Florida’s criminal law and its interpretation by its highest court seems to be in line with the approach taken by most American jurisdictions at this point in time.

172. 769 So. 2d 345 (Fla. 2000).
175. Id. at 349.
176. Id. at 353-54.
177. Id. at 353-58. Justice Quince argued in dissent that placement of the sentencing discretion in the hands of the state attorney was a violation of separation of powers doctrine. Id. at 358-59 (Quince, J., dissenting).