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Criminal Law

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Criminal Law: 2000 Survey of Florida Law

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I. INTRODUCTION

This article discusses Supreme Court of Florida decisions in the area of substantive criminal law handed down between January 1, 1999 and May 1, 2000.¹ Cases discussing substantive criminal procedure issues, e.g., search and seizure, are not the subject of this survey, although they obviously are important to the criminal law practitioner. As with past criminal law survey articles, cases discussing the death penalty and sentencing guidelines are omitted, as these are specialized areas beyond the scope of what actions (or inactions) may constitute a crime. Cases from Florida's district courts of appeal are mentioned in footnotes to the extent that their inclusion

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1. The authors have chosen as their beginning and ending points decisions reported in volumes 723 through 760 of the Southern Second Reporter.

supplements the textual discussion. Otherwise, Florida district court decisions are not the subject of this article.

Even after cases involving the death penalty and sentencing are eliminated, this survey does not discuss every Supreme Court of Florida substantive criminal law decision. Those cases that merely address the application of standard fact situations to a well-settled rule of law have also been eliminated. Thus, this survey focuses on decisions which "broke ground" in some way and thus contributed significantly to the dynamic growth of Florida's substantive criminal law.

This survey is divided into two main parts. The first part discusses Supreme Court of Florida cases concerning major or novel questions of substantive criminal law that do not involve constitutional questions. The second part discusses Supreme Court of Florida cases concerning constitutional challenges to some of Florida's substantive criminal law statutes.

II. BURGLARY

At common law, burglary was the breaking and entering of the dwelling house of another during the nighttime in order to commit a felony therein.² Like other states' statutes, Florida's definition of burglary has significantly broadened this definition.³ Section 810.02 of the *Florida Statutes* defines "burglary" as "entering or remaining in a dwelling, 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."⁴ This definition expands the common law definition of burglary to protect structures and conveyances as well as dwellings⁵ and

2. See, e.g., *State v. Hicks*, 421 So. 2d 510, 511 (Fla. 1982).

3. See *id.* at 512.

4. FLA. STAT. § 810.02(1) (2000).

5. The burglary statute's definitions of "structure" (subsection 810.011(1)) and "dwelling" (subsection 810.011(2)) also include the "curtilage" of these two places. See § 810.011(1)–(2). Both subsections specifically contain the language "together with the curtilage thereof" in their definitions. *Id.* The term "curtilage" itself is not defined in the *Florida Statutes*. *Hamilton* defined the term "curtilage" to require an enclosed area, not just any area connected with a dwelling or structure. *State v. Hamilton*, 660 So. 2d 1038, 1044 (Fla. 1995). For a detailed discussion of *Hamilton*, see Mark M. Dobson, *Criminal Law: 1996 Survey of Florida Law*, 21 NOVA L. REV. 101, 117–22 (1996). The enclosure requirement also applies to Florida's trespass statute. See FLA. STAT. § 810.08 (2000); *L.K.B. v. State*, 677 So. 2d 925, 926 (Fla. 5th Dist. Ct. App. 1996).

For a recent case discussing the meaning of "curtilage," see *Mejias*, where the court found that a common parking area of an industrial park where several businesses were located within two separate buildings could not be considered within the curtilage of one of the businesses even

eliminates the requirement of a “breaking.”⁶ The intruder also does not have to intend to commit a felony; the intent to commit any offense inside the protected area will do.⁷ Finally, the unlawful entry with criminal intent can occur anytime, not just at night.⁸

The language in the second part of the definition of burglary in section 810.02 of the *Florida Statutes* has been labeled the “consent clause.”⁹ The courts have construed the language “unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain” as constituting an affirmative defense to a burglary charge rather than an element of the offense which the State must allege and subsequently

though the entire industrial park was enclosed. *Mejias v. State*, 731 So. 2d 728, 729 (Fla. 3d Dist. Ct. App. 1999). Additionally, in *Freeman*, the court explained that an unenclosed area in front of an abandoned apartment building was not within the “curtilage” for purposes of the trespass in a structure statute. *Freeman v. State*, 743 So. 2d 603, 603 (Fla. 4th Dist. Ct. App. 1999).

For a recent case discussing what is a “structure” within the definition of section 810.011(1) of the *Florida Statutes*, see *Bean*, where the court found that an attached garage within a wing of a house that shared a common roof and three walls with the rest of the building was a structure under the burglary statute, even though it did not have a door. *Bean v. State*, 728 So. 2d 781, 782 (Fla. 4th Dist. Ct. App. 1999).

If the structure that is burglarized or trespassed upon is “occupied,” then a higher degree of burglary or trespass is committed. Section 810.02(2)(c) of the *Florida Statutes* makes burglary of an occupied structure a first-degree felony, and section 810.08(2)(b) makes trespass in an occupied structure a first-degree misdemeanor. FLA. STAT. § 810.02(2)(c), .08(2)(b) (2000). In *D.E.*, the court recently found that when the only other persons in the place involved are the defendant’s confederates, that place is not occupied for purposes of the trespass statute. *D.E. v. State*, 725 So. 2d 1269 (Fla. 4th Dist. Ct. App. 1999). As chapter 810 does not define when a place should be considered “occupied” and does not make a distinction between burglary and trespass for purposes of this term, the same result should occur if the charge involved is a burglary.

6. See *State v. Hicks*, 421 So. 2d 510, 511 (Fla. 1982).

7. Although intent to commit a felony is no longer required for a burglary offense, the specific intent to commit a crime within the protected area is an essential element of burglary. *Id.* at 512. Thus, a jury instruction that omits the requirement that the jury find an accused intended to commit a crime after the unlawful entry constitutes reversible error even without an objection at trial, as failure to adequately instruct the jury on an element of an offense is fundamental error. *Davis v. State*, 736 So. 2d 27, 28 (Fla. 4th Dist. Ct. App. 1999). However, it is not necessary to instruct the jury on any specific crime that the accused purportedly intended to commit. *Puskac v. State*, 735 So. 2d 522, 523 (Fla. 4th Dist. Ct. App. 1999). The requirement that a jury be instructed that it must find the defendant intended to commit an offense within a protected area cannot be satisfied by instructing the jury that it must find the defendant intended to commit “burglary.” *Viveros v. State*, 699 So. 2d 822, 824–25 (Fla. 4th Dist. Ct. App. 1997); *Puskac*, 735 So. 2d at 523.

8. *Hicks*, 421 So. 2d at 511.

9. *Id.*

disprove.¹⁰ In actuality, this clause contains two separate affirmative defenses. An accused can either claim that the entry into or remaining in even a private protected area was with the legal occupant's explicit consent, or allege that the entry was impliedly consensual by virtue of the premises being open to all members of the public.

As to the first of these affirmative defenses, explicit consent to enter or remain, the defense has the burden of offering evidence to raise this argument.¹¹ Once this occurs, the State has the burden to disprove the presence of explicit consent beyond a reasonable doubt.¹² As to the second of these two affirmative defenses, the Supreme Court of Florida recently clarified the respective burdens in the "open to the public" affirmative defense in *Miller v. State*.¹³

In *Miller*, the State charged Miller with multiple offenses stemming from the holdup of a grocery store, committed with the aid of his juvenile

10. *Id.*

11. *Jones v. State*, 745 So. 2d 403, 404 (Fla. 3d Dist. Ct. App. 1999). As consent is an affirmative defense, an accused who pleads guilty or nolo contendere to a burglary charge waives this defense. *Id.*

12. For a recent case discussing this in detail, see *D.R.*, where a trailer owner had given the defendant permission to stay in the trailer several nights before the owner locked the trailer up and moved his family elsewhere. *D.R. v. State*, 734 So. 2d 455 (Fla. 1st Dist. Ct. App. 1999). The defendant admitted going inside the trailer while the owner was away but claimed he believed he had the owner's permission to do so. *Id.* at 458. At trial, the owner testified that it was his understanding that D.R. could not go inside until the owner returned. *Id.* at 457-58. However, this testimony was insufficient to prove revocation of consent to enter, as it only went to the owner's state of mind, not the accused's knowledge of the consent's revocation. *Id.* at 460. As "[n]othing in the record suggests that consent to enter, once given to D.R., was ever withdrawn expressly or by implication and communicated to him," the State failed to meet its burden. *Id.*

For another recent case on this point, see *Medina*, where the court found that after permission to enter is given, the mere fact that the accused subsequently commits a crime inside a protected place does not automatically require a finding that consent to remain was revoked. *Medina v. State*, 743 So. 2d 116, 117 (Fla. 3d Dist. Ct. App. 1999).

Any alleged consent to enter that has been obtained by trick or fraud will not be considered valid or lawful consent for purposes of avoiding a conviction. For a recent case on this issue, see *Gordon*, where initial entry was gained through a ruse in which the defendant pretended to have a toothache. *Gordon v. State*, 745 So. 2d 1016, 1018 (Fla. 4th Dist. Ct. App. 1999).

However, the lawful occupant does not have to explicitly tell an accused to leave. *Ray v. State*, 522 So. 2d 963, 966 (Fla. 3d Dist. Ct. App. 1988) (holding that a defendant who entered another's apartment with consent had unlawfully remained there for purposes of a burglary when the occupant fought with the defendant when he tried to sexually assault her). Consent to remain after a lawful entry can be revoked implicitly. *Id.*

13. 733 So. 2d 955 (Fla. 1998).

nephew.¹⁴ The two entered the store in the late afternoon armed with a rifle.¹⁵ They disarmed the store's security guard, shot both the guard and the store's operator, took money from the cash register, and fled.¹⁶ The operator recovered, but the guard died from injuries caused by his wounds.¹⁷ Miller was subsequently arrested and found guilty on all the charges against him: first-degree murder; attempted first-degree murder with use of a firearm; armed robbery with a firearm; robbery with a firearm; and burglary.¹⁸ The judge followed the jury's unanimous recommendation and sentenced Miller to death.¹⁹

On appeal, Miller raised no issue regarding the guilt phase of his trial, but raised six issues regarding the penalty phase.²⁰ However, upon an independent review of the record, the Supreme Court of Florida reversed his burglary conviction and remanded the case to the trial court for a new penalty phase hearing.²¹ The court believed that there had been some confusion regarding the "open to the public" affirmative defense, as opposed to the licensee or invitee affirmative defense in the "consent clause" of section 810.02(1) of the *Florida Statutes*.²² The court subsequently held that "if a defendant can establish that the premises were open to the public, then this is a complete defense."²³ Thus, even if an accused enters an area publicly open, and the lawful occupants subsequently withdraw consent, this will still not make the accused guilty of burglary.²⁴ A finding otherwise was considered not only to be in direct conflict with explicit language in the

14. *Id.* at 955. The nephew was a prosecution witness against Miller at trial. *Id.* at 956. The opinion does not indicate what charges were brought against the nephew or what ultimately happened to him. *See id.*

15. *Id.*

16. *Miller*, 733 So. 2d at 956. Three other people were also inside the store at the time, including two children. *Id.* The nephew, who shot the store's operator, claimed that the shooting was accidental. *Id.* The opinion contains no facts as to why the guard was shot after being disarmed or why the two did not shoot any of the other four occupants. *See id.* at 955.

17. *Id.* at 956.

18. *Miller*, 733 So. 2d at 955.

19. *Id.*

20. *Id.* at 956.

21. *Id.* at 957. The court found a new sentencing hearing was needed, as its decision invalidated the "committed during the course of a burglary" aggravating factor in Miller's case. *Id.* The court declined to find that use of this improper factor was harmless error. *Miller*, 733 So. 2d at 957.

22. *Id.*; *see* FLA. STAT. § 810.01(1) (2000).

23. *Miller*, 733 So. 2d at 957.

24. *See, e.g., Franklin v. State*, 750 So. 2d 63, 65 (Fla. 4th Dist. Ct. App. 1999) (rejecting the argument that once an accused entered a 24-hour convenience store and demanded money, consent for him to be there was implicitly revoked as the employees knew he was only there to commit a crime).

consent clause of section 810.02(1),²⁵ but also would produce absurd results. For example, a thief would automatically be guilty of burglary whenever entering a store to secretly steal an item, no matter how open to the public the premises would be.²⁶ As the State conceded that the store Miller robbed was open to the public, his burglary conviction was reversed.²⁷

Several subsequent cases show that the principle established in *Miller* could be extended too far. Business areas may have a dual nature or character; that is, part of them may, by virtue of the business engaged in, be open to the public, and part of them may be closed to the public. When defendants go beyond the publicly open areas with the intent to commit a crime, they may easily find themselves being charged and convicted of burglary. Thus, a defendant who gained access through deception to a hotel manager's private office even though his entry into the hotel's lobby had been to a public area,²⁸ a defendant who dove head first through a restaurant's drive-up window to take cash,²⁹ and a defendant who entered a locked, gated employee area of a cellular telephone store,³⁰ all were found guilty of burglary.

III. POSSESSION OF BURGLARY TOOLS

The Supreme Court of Florida also recently decided an important case concerning possession of burglary tools. Section 810.06 of the *Florida Statutes* states that "[w]hoever has in his or her possession any tool, machine, or implement with intent to use the same, or allow the same to be used, to commit any burglary or trespass" commits a crime.³¹ In *Calliar v. State*,³² a teacher saw Calliar on school property trying to break a bicycle's chain with wire cutters and a screwdriver.³³ Calliar had entered the property through an open gate in a fence and was trying to get the bicycle unchained from a rack in the school's fenced area.³⁴ Calliar was subsequently

25. *Miller*, 733 So. 2d at 957.

26. *Ray v. State*, 522 So. 2d 963, 967 n.6 (Fla. 3d Dist. Ct. App. 1999) (citing a similar factual situation it deemed ridiculous in *State v. Shult*, 380 N.W.2d 352 (S.D. 1985), where a pizza thief was convicted of burglary for entering a store with intent to shoplift).

27. *Miller*, 733 So. 2d at 957.

28. *Thomas v. State*, 742 So. 2d 326 (Fla. 3d Dist. Ct. App. 1999).

29. *Fine v. State*, 758 So. 2d 1246 (Fla. 5th Dist. Ct. App. 2000).

30. *Millian v. State*, 758 So. 2d 1271 (Fla. 4th Dist. Ct. App. 2000).

31. FLA. STAT. § 810.06 (2000). This section makes the crime a third-degree felony. *Id.*

32. 760 So. 2d 885 (Fla. 1999).

33. *Id.* at 885.

34. *Id.*

convicted of possession of burglary tools, burglary of an occupied structure, and resisting an officer without violence.³⁵

Calliar appealed his conviction for possession of burglary tools, claiming that section 810.06 only criminalizes possession of tools with intent to use them to commit burglary or trespass, not theft.³⁶ The First District Court of Appeal affirmed his conviction³⁷ and rejected the contrary reasoning of the Third District in *Hierro v. State*.³⁸ The First District criticized the *Hierro* court as having “ignored . . . that the intent to commit the theft at the time of the illegal entry is an element of the crime of burglary. The two charges should not be treated as separate incidents, but rather as one criminal episode with a unified intent.”³⁹

The Supreme Court of Florida, in a short, well-reasoned opinion, quashed the district court’s opinion.⁴⁰ The court cited with approval, *Hierro’s* reasoning that the explicit statutory language of section 810.06 required “not merely that the accused intended to commit a burglary or trespass while those tools were in his possession, but that the accused actually intended to use those tools to perpetrate the crime.”⁴¹ The court thus held that “the crime of possession of burglary tools is just what it appears to be: possession of tools used or intended to be used to unlawfully enter the premises of another.”⁴² Several reasons supported this interpretation. First, under the plain meaning rule, a court must give words in a statute their plain meaning.⁴³ Here, that meant “burglary tools” should only be considered as those tools actually used or intended for use in a burglary or trespass, and not merely tools that were intended to commit another crime once the trespass or burglary was accomplished.⁴⁴ Under section 810.02(1), all Calliar needed to commit a burglary was an unlawful entry of a statutorily protected place “with the intent to commit an additional offense.”⁴⁵ Second, the court found that a contrary construction would lead to absurd results, since as long as an accused possessed something that was intended to commit any other crime after an illegal entry, the accused would

35. *Id.*

36. *Id.*

37. *Calliar v. State*, 714 So. 2d 1134, 1134 (Fla. 1st Dist. Ct. App. 1998).

38. 608 So. 2d 912 (Fla. 3d Dist. Ct. App. 1992).

39. *Calliar*, 714 So. 2d at 1135.

40. *Calliar v. State*, 760 So. 2d 885, 887–88 (Fla. 1999).

41. *Id.* at 886 (quoting *Thomas v. State*, 531 So. 2d 708, 709 (Fla. 1988)) (emphasis omitted).

42. *Id.* at 887.

43. *Id.*

44. *Id.*

45. *Calliar*, 760 So. 2d at 887 (discussing FLA. STAT. § 810.02(1) (1995)). For a more detailed discussion of burglary see *supra* notes 2–30 and accompanying text.

be guilty of possession of burglary tools.⁴⁶ Instead, the court found that the tools possessed must be used to commit a burglary or trespass for section 810.06 to be violated.⁴⁷ In this case, since there was no evidence that the wirecutters or screwdriver had been used to help Calliar burglarize or trespass on school grounds, his burglary conviction was reversed.⁴⁸

IV. POSSESSION OF CONCEALED WEAPONS OR FIREARMS

Florida's substantive criminal law makes the possession of a weapon or firearm a crime in a variety of circumstances. The possession may be criminal depending on the status of the possessor,⁴⁹ the nature of the weapon

46. *Callier*, 760 So. 2d at 887.

47. *Id.* The court could have possibly cited to a third rationale to support its decision. Assuming the court found ambiguity in the statutory language of section 810.06, the court could have then relied on the rule of leniency, which requires a court to strictly construe criminal statutes in favor of the accused.

48. *Id.*

49. FLA. STAT. § 790.23(1) (2000) (making possession of a firearm, electric weapon, or concealed weapon illegal if the possessor is a convicted felon or has been found delinquent of an offense that would have been a felony for an adult, and the possessor is under 24 years of age). Until 1999, if the possessor had been adjudicated delinquent, but the juvenile court's jurisdiction over him or her had expired or been relinquished, then the accused would not have been a delinquent in possession. § 790.23(2). The 1999 Legislature amended section 790.23 to extend the applicable age of former delinquents from 18, when juvenile court jurisdiction over them expires, until 24. Ch. 99-284, § 39, 1999 Fla. Laws 3133, 3133 (codified at FLA. STAT. § 790.23(1) (2000)).

For a recent case involving offenses under this subsection, see *Adkins*, where the court found that the felon defendant could not be convicted of possession of a firearm where the firearm was found in the trunk of his girlfriend's car that he happened to be driving, and there was no proof he knew of its presence. *Adkins v. State*, 738 So. 2d 961 (Fla. 2d Dist. Ct. App. 1999). Further, in *Bullis*, the court found that the accused could be convicted of a felony charge for possession of firearm based upon the testimony of a deputy sheriff placing the accused inside a motor home where weapons were found scattered about in the open. *Bullis v. State*, 734 So. 2d 463 (Fla. 5th Dist. Ct. App. 1999).

For an important recent decision holding that voluntary intoxication is not an available defense to violations of section 790.23 of the *Florida Statutes*, as these are general, rather than specific, intent crimes, see *Goodwin v. State*, 734 So. 2d 1057 (Fla. 1st Dist. Ct. App. 1998).

Section 790.235(1) of the *Florida Statutes* makes it a crime for a violent career criminal to "own[] or ha[ve] in his or her care, custody, possession, or control any firearm or electric weapon . . . or carr[y] a concealed weapon." In *Jackson*, the court recently rejected due process, equal protection, and ex post facto attacks on the statutory predecessor to section 790.235. *Jackson v. State*, 729 So. 2d 947, 949-50 (Fla. 1st Dist. Ct. App. 1998).

For another recent case involving this subsection, see *Jacobs*, where the court found that the accused was properly convicted of being a violent career criminal in possession of a firearm

or firearm possessed,⁵⁰ how the weapon or firearm is possessed,⁵¹ or the geographical area where the weapon or firearm is possessed.⁵² Recently, the Supreme Court of Florida decided an important case clarifying the test to be used and factors to be considered in determining whether a weapon or firearm was possessed in a “concealed” fashion.⁵³

In *Dorelus v. State*,⁵⁴ the defendant and a co-defendant, Presume, were in a car stopped for a traffic violation.⁵⁵ The defendant was the driver, and the co-defendant was a passenger.⁵⁶ While standing outside the car, the officer who stopped them claimed, according to his probable cause affidavit, that he saw “the shiny silver butt of a handgun . . . located underneath the

when a handgun was found partially hidden under the driver’s seat of the car he was seen driving, and the car’s owner testified it was not hers. *Jacobs v. State*, 742 So. 2d 333 (Fla. 3d Dist. Ct. App. 1999).

50. See, e.g., FLA. STAT. § 790.221 (2000) (making it a crime to possess a short-barreled rifle, short-barreled shotgun, or a machine gun); § 790.225 (making possession of self-propelled knives illegal).

51. Sections 790.01(1) and (2) of the *Florida Statutes* make it a crime to possess concealed or electric weapons or concealed firearms. § 790.01(1), (2). However, a person may be licensed to carry a concealed weapon or firearm pursuant to section 790.06, or lawfully carry such concealed weapons even without a license if the weapon or firearm is in a “private conveyance . . . [and] is securely encased or is otherwise not readily accessible for immediate use” pursuant to section 790.25(5). § 790.25(5). Section 790.053 makes it a crime to openly carry a firearm or device. § 790.053.

52. See, e.g., § 790.115(1)–(2) (making it a crime to possess firearms or weapons on school property or at school-sponsored events). *But see* *R.L.S. v. State*, 732 So. 2d 39 (Fla. 2d Dist. Ct. App. 1999) (finding that the accused could not be convicted of possessing a weapon on school property when the knife he had was so short-bladed that it fell within the “common pocketknife” exception to the definition of a weapon under section 790.001(13)).

For another recent case discussing this exception, see *Walls*, where the court found that a knife approximately nine inches long and carried with the blade locked open could be considered a weapon for purposes of a conviction. *Walls v. State*, 730 So. 2d 294 (Fla. 1st Dist. Ct. App. 1999).

For detailed discussion of the “common pocketknife” exception, see *L.B. v. State*, 700 So. 2d 370 (Fla. 1997).

53. *Dorelus v. State*, 747 So. 2d 368 (Fla. 1999). The case only involved a charge of carrying a concealed firearm. *Id.* at 370. However, the supreme court noted that since the critical statutory language concerning what constitutes concealment was the same for both concealed firearms and concealed weapons, its decision should be applicable to both offenses. *Id.*

54. 747 So. 2d 368 (Fla. 1999).

55. *Id.* at 369.

56. These facts come from the district court’s opinion in the co-defendant’s case. *State v. Presume*, 710 So. 2d 604, 604 (Fla. 4th Dist. Ct. App. 1998). The opinions in both the defendant’s and the co-defendant’s cases are silent as to where the co-defendant, Presume, was sitting when the car was stopped; however, the facts imply that he was in the front seat. *See id.* at 605.

radio.”⁵⁷ The officer arrested both men for carrying a concealed weapon.⁵⁸ Before trial, both Presume and Dorelus separately filed sworn motions to dismiss.⁵⁹ The State filed a traverse to Presume’s motion, denying its material allegations.⁶⁰ At the hearing on the motion, the State argued unsuccessfully that it needed to present the arresting officer’s testimony to show how the gun was concealed.⁶¹ The prosecution additionally argued that the question of concealment was a matter of fact for the jury and thus not the proper subject of a motion to dismiss.⁶² However, after examining the officer’s probable cause affidavit, the trial court rejected these arguments and granted Presume’s motion.⁶³ Dorelus’ motion was filed after his co-defendant’s successful hearing.⁶⁴ Dorelus’ motion asked the court to judicially notice the order granting his co-defendant’s motion to dismiss.⁶⁵ The State did not traverse this time but instead relied on its arguments in the previous case.⁶⁶ Once again, the motion to dismiss was granted.⁶⁷

The State appealed both orders dismissing the charges.⁶⁸ In both cases, the district court of appeal reversed.⁶⁹ Both opinions found that the trial court had erred by granting the motions based on the appellate court’s findings that whether a weapon is concealed is a question for the trier of fact and never a question of law,⁷⁰ relying on the supreme court’s decision in *Ensor v. State*.⁷¹ Dorelus subsequently appealed the decision in his case to the supreme court.⁷²

57. *Dorelus*, 747 So. 2d at 370. The Fourth District’s opinion in *Presume* noted that the affidavit also alleged the gun was “‘easily accessible to both the defendant & co-defendant.’” *Presume*, 710 So. 2d at 604.

58. *Dorelus*, 747 So. 2d at 370.

59. *Id.* Both motions were filed pursuant to FLA. R. CRIM. P. 3.190(c)(4).

60. *Presume*, 710 So. 2d at 604–05.

61. *Id.* at 605.

62. *Id.*

63. *Id.*

64. *Dorelus*, 747 So. 2d at 370.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*; *Presume*, 710 So. 2d at 604.

69. *Dorelus*, 720 So. 2d at 543; *Presume*, 710 So. 2d at 606.

70. *Dorelus*, 720 So. 2d at 543; *Presume*, 710 So. 2d at 606. The *Presume* opinion also found that the State’s traverse, along with the statements in the arresting officer’s probable cause affidavit, created an issue of material fact for a jury. *Id.* at 605.

71. 403 So. 2d 349 (Fla. 1981). The court in *Ensor* held that a firearm may be within a police officer’s sight for purposes of invoking the “plain view” doctrine to support a warrantless seizure under the Fourth Amendment and still be found to be a “concealed firearm” under section 790.001(2). *Id.* at 351.

72. *Dorelus*, 747 So. 2d at 370.

In an important, well-organized opinion, the Supreme Court of Florida quashed the appellate court's decision.⁷³ The court noted that section 790.001(2) of the *Florida Statutes* defined a concealed firearm as one "carried on or about a person in such a manner as to conceal the firearm from the ordinary sight of another person."⁷⁴ It agreed with the Fourth District's characterization of *Ensor* as the seminal case discussing when a weapon or firearm is considered "concealed" under section 790.001.⁷⁵ The court in *Ensor* found that a firearm does not have to be totally out of sight to be considered concealed.⁷⁶ Rather, the test for concealment was whether the firearm was "hidden from the ordinary sight of another person."⁷⁷ "Ordinary sight of another person" was in turn defined as "the casual and ordinary observation of another in the normal associations of life."⁷⁸ The court declared that this would depend "on whether an individual, standing near a person with a firearm or beside a vehicle in which a person with a firearm is seated, may by ordinary observation know the questioned object to be a firearm."⁷⁹ According to *Ensor*, this question "must rest upon the trier of fact under the circumstances of each case."⁸⁰

The supreme court in *Dorelus* noted that *Ensor* has been interpreted as standing for the proposition that concealment is always a question of fact and never a question of law which could be decided on a motion to dismiss.⁸¹ *Dorelus* rejected this broad interpretation of *Ensor* and clarified that what the court in that case meant to say was that "the issue of concealment is *ordinarily* an issue for the trier of fact."⁸² The court also noted that *Ensor* may have been misleading in another respect, *viz.*, the extent to which its discussion focused on the observer's viewpoint.⁸³ Instead, to be consistent with the statutory definition of "concealed firearm," the *Dorelus* court declared that the emphasis should be on "the manner," that is, *how* someone

73. *Id.*

74. *Id.* (quoting FLA. STAT. § 790.001(2) (1995)). This language is the same as that currently found in that section. See FLA. STAT. § 790.001(2) (2000). The same language is also found in the statutory definition of a "concealed weapon." § 790.001(3)(a).

75. *Dorelus*, 747 So. 2d at 370.

76. *Ensor*, 403 So. 2d at 354.

77. *Id.*

78. *Id.*

79. *Id.* at 355.

80. *Id.*

81. *Dorelus*, 747 So. 2d at 371.

82. *Id.* (emphasis added).

83. *Id.* at 372.

carries the firearm.⁸⁴ This manner of carrying would again focus on whether the firearm involved was out of “the ordinary sight of another person.”⁸⁵

The supreme court’s opinion, besides clarifying earlier statements in *Ensor*, is especially helpful because the court also discussed in some detail what factors are and are not relevant in determining if the manner in which the firearm is carried means it should be considered concealed.⁸⁶ Factors which *Dorelus* deemed relevant to whether the manner of carrying the firearm made it concealed included where it was inside a vehicle,⁸⁷ how much or how little it was covered by another object,⁸⁸ whether an accused used his/her body to conceal what would otherwise be ordinarily visible,⁸⁹ and “the nature and type of weapon involved.”⁹⁰ Finally, as to relevant factors, the court said that the police officers’ observations are important.⁹¹ Thus, a statement that the officer could “immediately recognize” an object as a weapon may conclusively show it was not concealed.⁹² However, just because an officer cannot or did not immediately make such a recognition would not automatically mean a jury could find that an object was concealed.⁹³ This contrary result is rational, since a weapon may be immediately visible in the open if viewed from one position but not from another one. Likewise, someone may not see a firearm or weapon that is in the open just because the person does not happen to be looking in that direction or may be just careless in his or her observation. An observer’s viewpoint or lack of attention should not determine if how an object is carried makes it concealed, as this would make the issue depend on factors totally beyond the control of the person accused of carrying it in a concealed fashion.⁹⁴

84. *Id.*

85. *Id.* at 371.

86. *Dorelus*, 747 So. 2d at 370–72.

87. *Id.* at 371. Places specifically mentioned in this regard included “the floorboard, the seat, a seat pocket, or an open console.” *Id.*

88. *Id.* The objects mentioned as examples were “a sheet or a towel.” *Id.*

89. *Dorelus*, 747 So. 2d at 371–72. The court gave as an example a Second District case where a driver leaned over a weapon located between the seats and tried to put one arm over the weapon’s butt to prevent a police officer from seeing it. *Id.* (discussing *State v. Hankerson*, 430 So. 2d 517 (Fla. 2d Dist. Ct. App. 1983)).

90. *Id.* at 372. The court noted that rifles are more difficult to conceal than handguns, and that obviously smaller firearms can be concealed more easily than larger ones. *Id.*

91. *Id.*

92. *Dorelus*, 747 So. 2d at 372.

93. *Id.* at 371.

94. *Id.* at 372. The court rejected the First District’s reasoning which found that a firearm carried in a stopped car could be concealed even though the officer looking through a passenger side window could readily see it but the officer looking through the driver’s side

The court rejected the State's argument that other factors extraneous to how the weapon involved was carried may be relevant to whether it was concealed or not.⁹⁵ Thus, time of day and whether a vehicle's window is open or closed should not be considered in making this determination. The court felt that using such factors would create the risk that the concealed weapons and firearm law would be unconstitutionally vague.⁹⁶

Looking at the actual facts in *Dorelus* and applying the appropriate factors as to how the firearm was carried, the supreme court agreed with the trial court's determination that, as a matter of law, it was not concealed.⁹⁷ There was no dispute it was in an open console with the butt of the handgun sticking out.⁹⁸ The handgun was not covered, and the defendant made no attempt at all to use his body to shield the gun from the officer's view.⁹⁹ Finally, the officer had no difficulty recognizing it as a firearm.¹⁰⁰

When the court's reasoning is examined in light of some of criminal law's basic principles, the correctness of this decision becomes even more evident. One of the basic principles of criminal law in a free, democratic society is that citizens should be able to govern their conduct to avoid the potentially coercive effects that criminal law can impose on them through charging, conviction, and ultimately punishment. Before citizens can govern their conduct so as to avoid the possibility of conviction and punishment, they must know what conduct will violate the law. A second basic principle is that citizens should only be punished for factors, usually action or inaction, within their own control, not someone else's. The court furthered both of these principles by elaborating on those factors that may make a weapon or firearm concealed. First, it provided better notice to citizens, as well as to the courts, regarding what conduct to avoid so as not to run the risk of being charged and convicted of carrying a concealed item. Second, the conduct to avoid is limited to factors that citizens who might be charged with carrying a concealed weapon can avoid, because it is their own conduct,

window could not. *Id.* (discussing *McGraw v. State*, 404 So. 2d 817 (Fla. 1st Dist. Ct. App. 1981)). As the *Dorelus* court said, "[w]hether a crime has occurred should not depend on whether the officer's initial vantage point is the driver's rather than the passenger's side of the automobile." *Id.*

95. *Dorelus*, 747 So. 2d at 373. One extraneous factor the court did not mention is the weather. This, too, should be considered irrelevant, as it is outside the accused possessor's control. Why should a weapon resting uncovered on the back seat of a car be considered concealed because it cannot be readily seen through a rain-fogged window but would be readily seen in the exact same spot on a clear, sunny day?

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Dorelus*, 747 So. 2d at 373.

and not someone else's, on which a charge would be brought. Citizens may not always be able to control how observant an officer is, but they can control how secluded a weapon is by where it is placed, what covers it, and what actions are taken or not taken to try or not try to hide it with the body.

At the conclusion of its opinion, the supreme court suggested that the legislature should consider amending the law "to set forth the exact parameters for carrying a weapon [or firearm] in a vehicle in this state."¹⁰¹ The court cited three groups that would benefit from such a statutory clarification.¹⁰² First, police would benefit because they would better know when to arrest for a concealed weapon violation.¹⁰³ Second, citizens would benefit because, as mentioned above, they would better know how to transport certain items legally.¹⁰⁴ Finally, courts would benefit because it is they who must decide whether a weapon has been carried in a prohibited manner.¹⁰⁵

At least through the 1999 session, the Florida legislature has not acted on the court's suggestion. However, the *Dorelus* opinion will still be useful to all three groups, especially the trial courts. When called upon to make the initial judgment as to whether a person has unlawfully carried a concealed firearm or weapon, trial judges should look to *Dorelus* for guidance. Furthermore, unless and until the legislature acts upon the supreme court's suggestion, trial judges may wish to consider instructing juries on those factors *Dorelus* has explicitly declared relevant and irrelevant when a jury trial is involved. Finally, strong consideration should be given to amending the *Florida Standard Jury Instructions* in criminal cases to incorporate these factors for charges related to carrying concealed weapons or firearms.¹⁰⁶

V. MANSLAUGHTER: OMISSIONS, CAUSATION, AND CULPABLE NEGLIGENCE

Substantive criminal law sometimes, but not always, requires that there be a harmful result for there to be a crime. When such a harmful result

101. *Id.* at 374.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Dorelus*, 747 So. 2d at 374.

106. For another recent case involving carrying concealed firearms, see *Walker*. *Walker v. State*, 733 So. 2d 564 (Fla. 2d Dist. Ct. App. 1999). In *Walker*, there was no question that firearms carried in a car Walker drove and shared with a passenger were concealed. *See id.* at 564. However, there was no direct or even circumstantial evidence, such as Walker's fingerprints on any of the guns, to show he knew of their presence. *Id.* at 564-65. Thus, Walker could not even be convicted on a theory of constructive possession with a joint occupant. *Id.* at 564.

occurs, criminal law further requires that it be the result of an accused's act. This second requirement is the requirement of causation. Usually, when a harmful result occurs, causation is self-evident. However, occasionally cases arise where the issue of causation raises serious problems. These issues almost always arise in the context of homicide prosecutions. A homicide prosecution requires proof of a harmful result, the killing of a human being, as well as proof of causation, by another human being. Where the killing stems solely from a voluntary act of the accused, both elements are easily satisfied. For instance, if one person pulls a gun and shoots another person, killing the second person instantly, both the killing and the causation through human agency are obvious. However, when the killing occurs through the alleged omission, rather than commission, of another, then serious questions of causation can arise. The Supreme Court of Florida recently addressed the issues of causation and omissions in *Eversley v. State*.¹⁰⁷ This case also gave the court an opportunity to discuss culpable negligence and Florida's felony child abuse statute.¹⁰⁸

Eversley was charged with manslaughter and felony child abuse stemming from the death of her infant son, Isaiah.¹⁰⁹ When Isaiah was born, the defendant contracted with another woman to keep and to care for him as Eversley felt she could not do so because of her work.¹¹⁰ Two months later, Eversley decided to care for Isaiah herself, showed up at the woman's home, and took him with her.¹¹¹ The next day, Isaiah began to act as if he were sick.¹¹² Eversley took him to a clinic where medical staff, including a doctor, repeatedly told her that he might have pneumonia and that she needed to take him to a hospital for immediate testing.¹¹³ Eversley took the baby to a hospital emergency room but left without having him examined because she became impatient while waiting for doctors to see several people ahead of her.¹¹⁴ That evening, Isaiah continued to show signs of labored breathing.¹¹⁵ Eversley went to sleep with him lying next to her.¹¹⁶ When she woke up in the early morning hours the next day, she noticed he

107. 748 So. 2d 963 (Fla. 1999).

108. *Id.* at 968-70.

109. *Id.* at 964.

110. *Id.*

111. *Id.*

112. *Eversley*, 748 So. 2d at 964.

113. *Id.*

114. *Id.* at 965.

115. *Id.*

116. *Id.*

was not breathing.¹¹⁷ Paramedics were summoned and found that Isaiah had been dead for some time.¹¹⁸

At trial, cause of death was a major issue.¹¹⁹ Eversley claimed the baby was sick when she first picked him up at the other woman's home.¹²⁰ However, both the woman and Eversley's aunt, who had also seen Isaiah that day, said he was not sick when Eversley picked him up.¹²¹ Nurses and the doctor at the clinic testified about the repeated admonitions they had given Eversley concerning the need for the baby to receive testing at a hospital.¹²² Eversley herself admitted that she knew if she had told the hospital emergency room staff she had been sent there by a doctor, Isaiah would have been seen ahead of the people who were there before her.¹²³ She claimed she believed the baby only had a cold, but this testimony was countered by the clinic staff who testified they specifically told her he might have pneumonia.¹²⁴ At trial, medical experts for both sides differed in their estimates of Isaiah's chances for survival had he been given prompt medical care.¹²⁵ The defense's expert estimated that the mortality rate for the type of pneumonia the baby had was twenty-five percent, thus giving him only a seventy-five percent chance of survival even with adequate care.¹²⁶ The State's expert put the mortality rate at only one percent, assuming adequate medical care.¹²⁷

The jury convicted Eversley of manslaughter and felony child abuse, but the trial court, in ruling on the defense's post trial motion for judgment of acquittal, overturned the manslaughter conviction and reduced the child abuse conviction to a misdemeanor.¹²⁸ The trial court based its ruling on the supreme court's early decision in *Bradley v. State*,¹²⁹ which it read as finding that a parent's failure to provide medical care for a sick child can never be considered the legal cause of the child's death.¹³⁰ The State appealed and the district court reinstated both the manslaughter and felony child abuse

117. *Eversley*, 748 So. 2d at 965.

118. *Id.*

119. *Id.*

120. *Id.* at 964.

121. *Id.*

122. *Eversley*, 748 So. 2d at 964.

123. *State v. Eversley*, 706 So. 2d 1363, 1365-66 (Fla. 2d Dist. Ct. App. 1998).

124. *Id.* at 1366.

125. *See Eversley*, 748 So. 2d at 967.

126. *Id.*

127. *Id.*

128. *Id.* at 964.

129. 84 So. 677 (Fla. 1920).

130. *Eversley*, 748 So. 2d at 965.

convictions.¹³¹ The defense subsequently appealed this decision to the supreme court.¹³²

As both the district court and the supreme court's opinions discussed *Bradley*, an examination of that decision is helpful. In *Bradley*, the defendant's epileptic daughter fell into a fire during a seizure and was severely burned.¹³³ This occurred on April 26.¹³⁴ From then until May 30, the defendant repeatedly refused to have her seen by a doctor, although relatives and even a justice of the peace urged him to do so.¹³⁵ Bradley apparently could have paid for the medical attention and turned down offers from others to pay for a doctor to examine his daughter.¹³⁶ The father told anyone who urged him to seek medical treatment for his daughter that he was relying on the will of God, and that "the greatest physician was God himself."¹³⁷ Finally, the daughter was taken to a state hospital where she died on June 22.¹³⁸ Bradley was charged with manslaughter by culpable negligence.¹³⁹ At trial, the doctors who treated his daughter testified she would have recovered from the burns if prompt medical care had been given, and that the burns were the cause of her death.¹⁴⁰

On appeal, the supreme court reversed.¹⁴¹ The statute under which the State charged Bradley defined manslaughter as "[t]he killing of a human being by the act, procurement or culpable negligence of another, in cases where such killing shall not be justifiable or excusable homicide nor murder."¹⁴² Justice Whitfield, in his majority opinion, first invoked as the basis for reversal the principle of legality, that is, that no act can be a crime unless the legislature has made it so.¹⁴³ According to Justice Whitfield, "statutes creating and defining crimes cannot be extended by intendment, and that no act, however wrongful, can be punished under such a statute unless clearly within its terms."¹⁴⁴ Justice Whitfield found that there was no state law "specifically making the failure or refusal of a father to provide medical attention for his child a felony, and [that] the general [statutory]

131. *Id.*

132. *See id.* at 964.

133. *Bradley*, 84 So. at 679 (West, J., dissenting).

134. *Id.*

135. *Id.* at 679–80.

136. *Id.* at 680.

137. *Id.* at 681.

138. *Bradley*, 84 So. at 680.

139. *Id.* at 681.

140. *Id.* at 680.

141. *Id.* at 679.

142. *Id.* at 678 (quoting FLA. STAT. § 3209 (1906)).

143. *See Bradley*, 84 So. at 678–79.

144. *Id.* at 679.

definition of ‘manslaughter’ . . . does not appear to cover a case of this nature.”¹⁴⁵ Looking at both the indictment’s allegations and the evidence at trial, the justice then found no proof the girl had been killed “by the [defendant’s] act, procurement or culpable negligence.”¹⁴⁶ Justice Whitfield concluded by asserting that even if the girl would have recovered, the cause of her death was accidentally being burned, not her father’s failure to get prompt care.¹⁴⁷ Thus, “even if the failure or refusal of the father to provide medical attention was ‘culpable negligence’ within the intent of the statute,” this culpable negligence would not have caused the daughter’s death.¹⁴⁸

In a brief concurring opinion, Chief Justice Browne agreed that the conviction should be reversed.¹⁴⁹ Although his concurrence purports to address a number of different questions, all of them seem to be directed to the issue of causation.¹⁵⁰ Browne believed that whatever the State’s claims factually and legally, it had not met its burden of proof as to causation.¹⁵¹ Thus, he claimed that “it was not proven, and was not capable of being proven that if the child had had medical attention it would have recovered.”¹⁵²

Justice West wrote an extensive dissent.¹⁵³ He began by asserting that “[a]ll the essential elements of the offense charged in the indictment . . . were proved.”¹⁵⁴ That being so, he found only two questions that needed to be addressed: did the facts proven “make a case of manslaughter within the terms of the statute,” and, if so, did the defendant’s religious beliefs provide a “sufficient justification or excuse for his failure to secure any medical treatment for his daughter?”¹⁵⁵ The first question addressed Justice Whitfield’s principle of legality argument.¹⁵⁶ Justice West noted that a father owes a legal duty to his minor children to provide the necessities of life, if possible.¹⁵⁷ Thus, a father must provide his children

145. *Id.*

146. *Id.*

147. *Id.*

148. *Bradley*, 84 So. at 679.

149. *Id.* (Browne, J., concurring).

150. *See id.*

151. *Id.*

152. *Id.* Justice Browne believed that the State could never factually prove causation in a case like this “until the practice of medicine becomes an exact science so that it can be established beyond the peradventure of a doubt that death would not have ensued if a physician had been in attendance.” *Bradley*, 84 So. at 679.

153. *Id.* at 679–83 (West, J., dissenting).

154. *Id.* at 680.

155. *Id.*

156. *Id.*

157. *Bradley*, 84 So. at 681.

with food, clothing, shelter, and medical care if he can.¹⁵⁸ Failure to do so could be culpable negligence in West's opinion, thus coming within the prohibition of the manslaughter statute.¹⁵⁹ Having answered the first question affirmatively, the dissent cited a number of cases from other jurisdictions all concluding that defendants' personal religious beliefs will not exonerate them when their actions otherwise break the law.¹⁶⁰ Thus, Justice West found Bradley's religious belief in leaving the matter of his daughter's recovery solely in God's hands neither a justification nor an excuse for failing to get her prompt medical care.¹⁶¹

The *Bradley* majority opinion is a confusing combination of legal and factual justifications for reversal. The first basis, the principle of legality, would mean that the accused could never be convicted of manslaughter under the law at the time, as his omissions did not fall within the statute's prohibition. This could be so either because Justice Whitfield believed that an omission could never give rise to criminal liability unless there was a statute specifically declaring that such liability existed, or because even if omissions could sometimes give rise to criminal liability under the manslaughter statute, the father's omissions did not do so here as a matter of law. Justice Whitfield's comments regarding "no proof" provided at least two additional bases for reversal.¹⁶² First, the Justice may have believed that the State had not presented sufficient medical testimony to prove causation. Second, even if the State had proved causation, it had not offered enough evidence to prove the accused was culpably negligent here. Unfortunately,

158. *Id.*

159. *Id.*

160. *Id.* at 681–83.

161. *Id.* at 683. Neither the majority nor concurring opinions directly discuss whether Bradley's beliefs could have been a reason to exonerate him. Reading both of these opinions, one cannot help but feel that possibly the justices silently felt that maybe Bradley was a good man who had "suffered enough," but the justices were at the same time hesitant to endorse the notion that a person's religious beliefs can be a reason not to hold someone criminally responsible. Justice Whitfield's opinion refers to "[w]hatever motive may have prompted the father" and notes that the father was not charged with willfully depriving the daughter of medical attention. *Bradley*, 84 So. at 679. To an extent, this is a true statement, as Bradley was not charged with violating an existing statute making it a crime to "willfully deprive his child of necessary medical attention." *Id.* at 678 (citing FLA. STAT. § 3238 (1906)). Certainly, though, as the word "willfully" is commonly understood, Bradley's inaction was willful; his child needed medical help, and he made the decision not to provide it promptly because of his religious beliefs.

Chief Justice Browne asked whether a father "who belongs to that exemplary band of Christians who have no faith in the efficacy of medicine as a curative agency," should be convicted when he does not provide necessary medical care to a child who dies. *Id.* at 679.

Of course, there is no way of knowing whether these two justices did indeed silently cast their votes to overturn the conviction on this basis.

162. *Id.*

Justice Whitfield's opinion never clarifies which one or ones of these three grounds he relies upon in reversing the conviction.¹⁶³

In *Eversley*, the district court of appeal reversed the trial court's order overturning the manslaughter conviction and reducing the child abuse conviction to a misdemeanor.¹⁶⁴ The district court noted that the trial court had read *Bradley* to mean that a parent's failure to provide needed medical care could never be the legal cause of death.¹⁶⁵ The district court believed that continued reliance on *Bradley* for this proposition was inconsistent with the development of Florida's laws regarding the protection of children.¹⁶⁶ Unlike the state of the law in 1906, Florida law in effect when *Eversley* was decided provided extensive protection for children and explicitly made parental failure to obtain medical care for a sick child a serious crime.¹⁶⁷ Thus, parents who willfully failed to provide medical care to their child could be prosecuted for manslaughter provided three elements were proven.¹⁶⁸ The defendant had to: 1) cause the child's death; 2) do so by culpable negligence; and 3) have no lawful justification for doing so.¹⁶⁹ Culpable negligence would exist "when a defendant recklessly or wantonly disregards the safety of another."¹⁷⁰ As for causation, the district court believed that this concept had been significantly liberalized in modern manslaughter cases.¹⁷¹ No longer did the State have to prove that "but for" an accused's acts or omissions, the death would not have occurred.¹⁷² Instead, causation would lie "when a defendant's action is a material contributing factor in the victim's death."¹⁷³

Applying these two standards, the district court first concluded that a jury could find *Eversley* culpably negligent.¹⁷⁴ Her actions in leaving the

163. *Id.* at 678–79. Unfortunately, Justice Whitfield also mentions all three grounds in the same paragraph, thus adding to the difficulty of determining his grounds for reversal. *Bradley*, 84 So. at 678.

164. *State v. Eversley*, 706 So. 2d 1363, 1364 (Fla. 2d Dist. Ct. App. 1998).

165. *Id.* at 1365.

166. *Id.*

167. FLA. STAT. § 827.04(1) (1995). This section was subsequently changed and incorporated into section 827.03 of the *Florida Statutes*. For a brief discussion of the changes, see *infra* notes 226–29 and accompanying text.

Florida criminal law when *Bradley* was decided in 1906 made depriving a child of needed medical care a crime; however, it was only a misdemeanor. FLA. STAT. § 3238 (1906).

168. *Eversley*, 706 So. 2d at 1365.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Eversley*, 706 So. 2d at 1365.

174. *Id.* at 1366.

hospital emergency room without having her child treated or even examined, after having been advised by doctors of the baby's potentially serious medical situation, "epitomize[d] willful and wanton recklessness."¹⁷⁵ As to causation, the medical testimony established that "[t]here was a significant chance that, given medical aid, Isaiah could have survived his bout of pneumonia."¹⁷⁶ Since the defendant's failure to get him that aid deprived the baby of that chance for life, there was enough evidence for a reasonable jury to conclude the mother's actions and omissions contributed to his death.¹⁷⁷

Finally, the district court reinstated the felony child abuse conviction.¹⁷⁸ The 1995 statute under which Eversley was charged with criminal child abuse made it a third-degree felony to "willfully or by culpable negligence, depriv[e] a child of . . . necessary . . . medical treatment . . . and in so doing caus[e] great bodily harm . . . to such child."¹⁷⁹ The district court's opinion does not even discuss culpable negligence as far as a conviction under this law.¹⁸⁰ Instead, "Eversley's capricious decision to leave the emergency room, despite her knowledge that she could obtain immediate assistance, evidence[d] a specific and willful intent to deny Isaiah medical services."¹⁸¹

The Supreme Court of Florida, in an extensive discussion of causation and culpable negligence, reversed the district court's finding that Eversley could be convicted of manslaughter, but upheld the court's finding that she was guilty of felony child abuse.¹⁸² The supreme court first noted that the language of the two manslaughter statutes under which Bradley¹⁸³ and

175. *Id.*

176. *Id.*

177. *Id.* Once again, the district court found that *Bradley* presented an antiquated view which should no longer be followed. *Eversley*, 706 So. 2d at 1365. The court rejected Justice Browne's reasoning in his concurring opinion that causation was factually incapable of being proved in these types of cases. *Id.* at 1366. "Medical science has progressed significantly since the days when 'it was not capable of being proven that if the child had had medical attention it would have recovered.'" *Id.* (quoting *Bradley v. State*, 84 So. 2d 677 (Fla. 1920)).

178. *Id.*

179. FLA. STAT. § 827.04(1) (1995).

180. See *Eversley*, 706 So. 2d at 1363-66.

181. *Id.* at 1366. The district court's opinion does not discuss whether culpable negligence for purposes of a manslaughter conviction is the same as for a child abuse conviction. Presumably the definitions would be the same, as the same term is used in both statutes and thus should be given the same meaning unless an explicit legislative intent to do otherwise is shown. As the district court found Eversley guilty of willful child abuse, one can assume it also would alternatively have found her guilty of child abuse by culpable negligence.

182. *Eversley v. State*, 748 So. 2d 963, 970 (Fla. 1999).

183. FLA. STAT. § 3209 (1906). See *supra* note 142 and accompanying text for the language of this statute.

Eversley¹⁸⁴ were prosecuted is substantially the same.¹⁸⁵ The supreme court agreed with the district court as to the three elements needed to prove manslaughter under these statutes.¹⁸⁶ However, the supreme court disagreed with the district court's opinion in its analysis of causation and culpable negligence.¹⁸⁷

Eversley examined the majority's opinion in *Bradley* and found it "rather ambiguous," especially on the issue of causation.¹⁸⁸ The supreme court disagreed with the district court's finding that the "but for" test for cause-in-fact causation need no longer be satisfied, and that instead cause-in-fact causation could be established by using a "material contributing factor" test.¹⁸⁹ As *Eversley* correctly recognized, causation in criminal law consists of two parts.¹⁹⁰ First, "but for" causation must be found before an accused can be potentially criminally liable.¹⁹¹ However, this alone is not enough for criminal responsibility to be imposed.¹⁹² There must be a second category of causation, usually called legal causation.¹⁹³ Only when both types of causation exist can criminal responsibility be found.¹⁹⁴ As to "but for" causation, in *Eversley* the supreme court noted that "the State usually must demonstrate that 'but for' the defendant's conduct, the harm would not have occurred."¹⁹⁵ If a harm would have occurred anyway despite the accused's conduct, then "but for" causation is not satisfied, and there should be no criminal responsibility for the harm.¹⁹⁶ When "but for" causation has been

184. FLA. STAT. § 782.07 (1995) (defining manslaughter in part as "[t]he 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 or murder...").

185. *Eversley*, 748 So. 2d at 965-66.

186. *Id.* at 966.

187. *Id.* at 966-70.

188. *Id.* at 966. The *Eversley* court found that the concurring and dissenting opinions in *Bradley* only contributed to this ambiguity. *Id.* Chief Justice Browne's concurrence was described as only begging the question posed in the majority opinion, "[W]as the majority holding that the State failed to prove causation in this case or that the State could never prove causation in this case or any other case with similar facts?" *Eversley*, 748 So. 2d at 966 n.3.

189. *Id.* at 966.

190. *Id.* at 966-67.

191. *Id.* at 967. "But for" causation is also sometimes called "factual" or "actual" causation. All three terms stand for the same concept.

192. *Id.*

193. *Eversley*, 748 So. 2d at 966-67. This type of causation can also go by other names such as "proximate cause." *Id.*

194. *Id.*

195. *Id.* at 967.

196. For example, assume baby Isaiah had a rare, untreatable disease that would have killed him before or by the time he eventually died, then "but for" causation would not have been

established, then legal causation becomes an issue.¹⁹⁷ The Supreme Court of Florida declared that two questions must be answered positively before this type of causation exists.¹⁹⁸ The first question is “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.”¹⁹⁹ The second question is, “whether it would be otherwise unjust, based on fairness and policy considerations, to hold the defendant criminally responsible for the prohibited result.”²⁰⁰

The court noted that the issue in *Eversley* involved “but for” causation and not legal causation.²⁰¹ That being so, the district court erred by using the “substantial factor” or “material contributing factor” test.²⁰² These types of tests may be appropriate for the issue of legal causation but not for factual causation.²⁰³ However, the supreme court in *Eversley* agreed with the district court’s conclusion that the evidence at trial was sufficient to prove causation here and rejected Chief Justice Browne’s statements in *Bradley* that “medical testimony cannot be the basis for establishing causation.”²⁰⁴ Advancements in medicine since *Bradley* were such that “it is common to uphold convictions on the basis of medical testimony advancing reasonable theories of causation when such testimony has been supplemented by other

proven. His mother may still have been culpably negligent for not getting him prompt examination or treatment, but her negligence would not have been the factual cause of his death.

197. *Id.*

198. *Eversley*, 748 So. 2d at 967.

199. *Id.*

200. *Id.* Neither of these two questions can be answered with precision. Instead, in any case where the fact finder must explicitly address the question of legal causation, the fact finder is really being asked to make a policy decision that, given the circumstances of the case, criminal responsibility should or should not be imposed on the accused. Only where the imposition of criminal responsibility seems beyond the bounds of all fairness is an appellate court likely to reverse a conviction for lack of legal causation.

As stated by one writer, “The decision to attach causal responsibility for social harm to one rather than to another actual cause is one made [by the fact finder] by use of common sense and moral intuitions.” JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 163 (1987). Dressler clearly believes that unlike “but for” causation which can be reduced to answering precise, fact based inquiries, legal causation is incapable of being found through using a formulaic process. Instead, he suggests that courts can only consider a number of factors in making the intuitive judgment they must make on legal causation. His discussion of both “but for” causation and legal causation is among the best on these subjects and is highly recommended for readers desiring more about these topics.

201. *Eversley*, 748 So. 2d at 967.

202. *Id.* at 966.

203. *See id.* at 967.

204. *Id.*

evidence supporting the causal relation at issue.”²⁰⁵ This medical testimony “does *not* have to be expressed in terms of a reasonable medical certainty” but instead could be stated as probabilities.²⁰⁶ Thus, the State’s expert testimony that there was a ninety-nine percent chance of survival had the accused obtained prompt medical care for the child was sufficient to show “but for” causation.²⁰⁷ The court recognized that Eversley had offered contrary medical testimony but found that it was up to the jury to resolve the differences between the two, as juries must with all questions of fact.²⁰⁸

After rejecting both *Bradley’s* and the district court’s treatment of “but for” causation, the Supreme Court of Florida turned its attention to the issue of culpable negligence.²⁰⁹ Here the *Eversley* court found that the *Bradley* opinion resolved the issue.²¹⁰ *Eversley* used the principle of legality to resolve the question of whether the defendant could be convicted under the manslaughter statute she was charged with violating.²¹¹ The court focused on Justice Whitfield’s language from the majority in *Bradley* that “*the general definition of ‘manslaughter’ contained in the statute does not appear to cover a case of this nature.*”²¹² As the manslaughter statute in that case was virtually the same as in *Eversley*, *Bradley’s* reasoning was still controlling.²¹³ Thus, *Eversley* held “that under the statute in effect at the time of the crime . . . the failure to provide medical care does not satisfy the culpable negligence element of manslaughter,” so the mother’s conviction for this had to be overturned.²¹⁴

The State fared better on the argument that Eversley had committed felony child abuse.²¹⁵ The felony child abuse statute in effect when Isaiah died specifically provided that “[w]hoever, willfully or by culpable negligence, deprives a child of . . . necessary . . . medical treatment . . . and in so doing causes great bodily harm” was guilty of a third-degree felony.²¹⁶ Unlike the manslaughter statute, “culpable negligence” for purposes of a child abuse conviction had been interpreted several times to include

205. *Id.* at 968.

206. *Eversley*, 748 So. 2d at 968 (quoting *Delap v. State*, 440 So. 2d 1242, 1253 (Fla. 1983)) (emphasis added).

207. *Id.* at 967.

208. *Id.* at 968.

209. *Id.*

210. *Id.*

211. *Eversley*, 748 So. 2d at 968–70.

212. *Id.* at 968 (quoting *Bradley v. State*, 84 So. 677, 679 (Fla. 1920)) (emphasis added).

213. *Id.*

214. *Id.*

215. *Id.* at 970.

216. *Eversley*, 748 So. 2d at 970.

purposeful omissions which caused harm.²¹⁷ The supreme court noted that the trial court's reduction of Eversley's child abuse conviction rested on its erroneous finding that there was insufficient evidence to believe she caused the baby "great bodily harm."²¹⁸ As the only difference between felony and misdemeanor child abuse was causing great bodily harm versus "the infliction of physical or mental injury,"²¹⁹ and the supreme court had found the causation element met, it reinstated the *Eversley* jury's felony child abuse verdict.²²⁰ Thus, the supreme court did not have to address the district court's finding that the defendant's actions had amounted to willfulness under the statute.

There is certainly an ironic bent to the supreme court's rulings in *Eversley*. The mother was statutorily unable as a matter of law to commit "culpable negligence" for purposes of a manslaughter charge but was not only able, but explicitly found guilty of committing "culpable negligence" for purposes of felony child abuse.²²¹ Unless one believes that the supreme court intended "culpable negligence" to mean factually one thing for one offense and something completely different for the other offense, there initially seems to be an unresolvable conflict between the two rulings in the same opinion. However, when the court's reasoning is examined closely, no such inconsistency exists. Indeed, the *Eversley* holding is completely consistent with basic notions of stare decisis, statutory construction, and even constitutional law.

The bedrock for *Eversley's* different rulings on culpable negligence is the principle of legality. Justice Whitfield in *Bradley's* majority had relied on one aspect of this principle to find Bradley not guilty of manslaughter.²²² This aspect of the principle requires that before an act can be criminal, the legislature must make it such by law.²²³ Thus, Whitfield's opinion rested on his statement that "[t]here is *no statute in this state* specifically making the failure or refusal of a father to provide medical attention for his child a felony," and therefore Whitfield found that the general definition of manslaughter did not extend to such inaction.²²⁴ Another aspect of the principle of legality is that a legislature cannot judicially amend a statute to make criminal, acts or omissions that were not previously considered to be

217. See, e.g., *Nicholson v. State*, 600 So. 2d 1101, 1104 (Fla. 1992) (finding that "a willful 'omission . . . whereby unnecessary or unjustifiable pain or suffering is caused' constitutes aggravated child abuse under section 827.03(1)").

218. *Eversley*, 748 So. 2d at 970.

219. FLA. STAT. § 827.04(2) (1995).

220. *Eversley*, 748 So. 2d at 970.

221. See *id.*

222. *Bradley v. State*, 84 So. 677, 678 (Fla. 1920).

223. *Id.* at 678-79.

224. *Id.* at 679 (emphasis added).

prohibited by the statute. Thus, even though failure to provide a child necessary medical aid had been made legislatively a felony when Isaiah died, the legislature had not amended the general definition of manslaughter beyond that in *Bradley*. As a result, the principles of legality and of stare decisis forced the supreme court in *Eversley* to follow the *Bradley* holding, whether the justices personally wanted to or not. If the court had not done so, it would not only have violated the principle of legality and the concept of stare decisis, but would also have possibly raised constitutional issues. Judicial amendment of the manslaughter statute would have violated the due process principle that people are entitled to fair notice of what constitutes a crime. It would also have violated the prohibition against ex post facto laws²²⁵ by retroactively making criminal what was previously not considered criminal, that is, Eversley's failure to get care for her child. When examined in light of these considerations, one certainly may not like the result that Eversley could not be convicted of manslaughter but still must respect the supreme court's ruling for sticking to higher principles of law.

Fortunately, *Eversley's* ruling on manslaughter has become an aberration and should not occur again. As the court itself noted, shortly after Isaiah's death, the Florida Legislature amended section 782.07 of the *Florida Statutes* to add a third subsection explicitly stating that "[a] person who causes the death of any person under the age of 18 by culpable negligence under [section] 827.03(3) commits aggravated manslaughter of a child," a first-degree felony.²²⁶ The 1996 Legislature also amended section 827.03 to include two new subsections explicitly defining what constitutes "aggravated child abuse"²²⁷ and "neglect of a child."²²⁸ Thus, "it is clear that the Legislature now intends to include the failure to provide medical care within the definition of manslaughter."²²⁹ This legislative amendment also

225. U.S. CONST. art. I, § 9, cl. 3.

226. Ch. 96-322, § 12, 1996 Fla. Laws 1761, 1774 (codified at FLA. STAT. § 782.07(3) (2000)).

227. *Id.* § 8, 1996 Fla. Laws 1761, 1770 (codified at FLA. STAT. § 827.03(2)(a)-(c) (2000)).

228. *Id.*

229. *Eversley v. State*, 748 So. 2d 963, 969 (Fla. 1999). The court also explicitly declared that "[h]ad the amended statutes been in effect at the time of the alleged crime in this case, Eversley's conduct would have been punishable as manslaughter." *Id.*

Eversley noted in its discussion that at least one previous Florida decision had concluded that the failure to provide medical care when one would be considered to have a legal duty to do so could not result in a manslaughter conviction. *Id.* at 965 (citing *Neveils v. State*, 145 So. 2d 883 (Fla. 1st Dist. Ct. App. 1962)) (finding that a husband's failure to provide medical care for his wife who died could not constitute manslaughter). Failure to provide necessary medical aid to a child for whom one had assumed the duty of care had also been declared a proper basis for a manslaughter conviction in other jurisdictions. See *Jones v. United States*, 308 F.2d 307 (D.C.

demonstrates an additional argument that *Eversley* was correct in overturning the manslaughter conviction. Legislatures, when enacting or amending statutes, are presumed to not engage in useless acts.²³⁰ Thus, if the previous definition of manslaughter had been meant to include those acts or omissions included in the new amendments, these would have been mere redundancies. Since statutes should not be construed in a way that makes them totally or even partially redundant, the previous manslaughter statute could not have included culpable negligence through failure to furnish needed medical care to a child.

VI. SELF-DEFENSE, DUTY TO RETREAT, AND THE "CASTLE DOCTRINE"

Florida statutory law recognizes that one may use force to defend oneself from an attack.²³¹ This use of force may even extend to the use of deadly force when one "reasonably believes that such [deadly] force is necessary to prevent imminent death or great bodily harm to himself."²³² However, the person threatened cannot use deadly force without first doing everything possible to avoid doing so, including retreating, even though the other person is the wrongful aggressor.²³³ Common law has recognized one exception to this duty to retreat whenever possible, known as the "castle doctrine."²³⁴ Under this doctrine, Florida courts have recognized that persons attacked at home do not have to retreat or try to retreat from their home before using deadly force in self-defense, so long as the deadly force is necessary to prevent death or great bodily harm.²³⁵ Unfortunately, Florida case law has also crafted exceptions to this exception, leaving the state of the law in this area confusing and irrational.²³⁶

Cir. 1962). Thus, the Florida Legislature's amendment of section 782.07 is not surprising; what is surprising is how long it took for this to be done after *Bradley*.

230. *Beach v. Great W. Bank*, 692 So. 2d 146, 152 (Fla. 1997).

231. FLA. STAT. § 776.012 (2000).

232. *Id.* The remainder of this section justifies deadly force if one reasonably believes it necessary to prevent the same bodily harm to "another or to prevent the imminent commission of a forcible felony." *Id.*

Use of deadly force to defend another or prevent the commission of a forcible felony is beyond the scope of this article's discussion. For the statutory definition of what constitutes a "forcible felony," see § 776.08.

233. *See State v. Bobbitt*, 415 So. 2d 724, 725 (Fla. 1982) (quoting the trial court's jury instructions on the legal duty to retreat).

234. *Weiand v. State*, 732 So. 2d 1044, 1049 (Fla. 1999).

235. *Id.*

236. *Id.* at 1049–51.

In *Weiland v. State*,²³⁷ the Supreme Court of Florida recently eliminated these irrational exceptions and helped bring clarity to the “castle doctrine’s” application. In *Weiland*, the defendant was charged with the first-degree murder of her husband.²³⁸ During a violent argument, Weiland shot her husband in the apartment where they lived with their newborn child.²³⁹ She claimed the killing was in self-defense and presented expert testimony about battered woman’s syndrome to support her argument.²⁴⁰ Weiland herself claimed her husband had choked, beaten, and threatened her with more violence if she ever tried to leave him.²⁴¹ Two experts testified that she suffered from battered woman’s syndrome.²⁴² One of these experts, based on her examination of Weiland and the expert’s own studies, concluded that “when Weiland shot her husband she believed that he was going to seriously hurt or kill her.”²⁴³ This expert also explained that Weiland did not leave her home during the fatal argument for several reasons despite her apparent opportunities to do so.²⁴⁴ The defense requested that the trial court give the standard jury instruction on the “castle doctrine.”²⁴⁵ However, the court refused and instead gave the instruction regarding the general duty to retreat in a case of self-defense.²⁴⁶ The jurors were told that “[t]he fact that the defendant was wrongfully attacked cannot justify her use of force likely to cause death or great bodily harm if by retreating she could have avoided the

237. 732 So. 2d 1044, 1044 (Fla. 1999).

238. *Id.* at 1048.

239. *Id.*

240. *Id.* In *Hickson*, the court held that expert testimony about the battered spouse syndrome should be admissible to support a self-defense claim, provided that the expert witness is properly qualified to testify on this subject. *State v. Hickson*, 630 So. 2d 172, 176 (Fla. 1993). The syndrome itself is not a defense but only a way of explaining to the fact finder why a battered spouse would have acted the way the spouse did in certain circumstances.

241. *Weiland*, 732 So. 2d at 1048.

242. *Id.*

243. *Id.*

244. *Id.* The expert believed that Weiland did not flee, because she felt unable to do so as she had recently given birth, she was paralyzed with fear, she had been choked unconscious (although when this occurred in relation to the killing is not clear), and past experience had shown her that threatening to leave only increased her husband’s violence. *Id.*

245. *Weiland*, 732 So. 2d at 1048. This instruction would have told the jurors that: If the defendant was attacked in [his][her] own home or on [his][her] own premises, [he][she] had no duty to retreat and had the lawful right to stand [his][her] ground and meet force with force, even to the extent of using force likely to cause death or great bodily harm if it was necessary to prevent either death or great bodily harm.

Id.

246. *Id.*

need to use that force."²⁴⁷ In the prosecutor's closing argument, the State stressed that in order for her actions to be considered justifiable self-defense, Weiland must have used all possible means to avoid the killing, including leaving the couple's home.²⁴⁸ Weiland was convicted of second-degree murder and sentenced to eighteen years in prison.²⁴⁹ The Second District Court of Appeal initially affirmed Weiland's conviction.²⁵⁰ On rehearing, the appellate court certified the question of the jury instruction concerning the duty of retreat to the Supreme Court of Florida as one of great public importance.²⁵¹ The supreme court accepted and rephrased the certified question to address the correctness of the jury instructions on retreat and self-defense in a case like this.²⁵²

According to the supreme court, the trial court's instruction was technically correct as the instruction followed the supreme court's opinion in *State v. Bobbitt*.²⁵³ Prior to *Bobbitt*, the supreme court held that a lawful resident had the privilege of nonretreat from her home when the resident was attacked by her lover who was lawfully in the home as an invitee at the time of the killing.²⁵⁴ *Bobbitt* examined whether the privilege should apply when the person killed is not only lawfully present but is also a co-occupant of the home.²⁵⁵ *Bobbitt* and her husband were living together when she killed him during his unprovoked attack on her.²⁵⁶ The *Bobbitt* trial court failed to instruct the jury that as the attack was unlawful and happened in her home,

247. *Id.*

248. *Id.*

249. *Weiland*, 732 So. 2d at 1049.

250. *Weiland v. State*, 701 So. 2d 562, 563 (Fla. 2d Dist. Ct. App. 1997). This opinion concerned issues not pertinent to the "castle doctrine" and the duty to retreat.

251. The original question certified by the Second District was:

SHOULD THE RULE OF *STATE V. BOBBITT*, 415 So. 2d 724 (Fla. 1982), BE CHANGED TO ALLOW THE CASTLE DOCTRINE INSTRUCTION IN CASES WHERE THE DEFENDANT RELIES ON BATTERED-SPOUSE SYNDROME EVIDENCE (AS NOW AUTHORIZED BY *STATE V. HICKSON*, 630 So. 2d 172 (Fla. 1994)] TO SUPPORT A CLAIM OF SELF-DEFENSE AGAINST AN AGGRESSOR WHO WAS A COHABITANT OF THE RESIDENCE WHERE THE INCIDENT OCCURRED?

Weiland, 732 So. 2d at 1046-47.

252. *Id.* at 1047.

253. 415 So. 2d 724 (Fla. 1982), *receded from by* *Weiland v. State*, 732 So. 2d 1044 (Fla. 1999).

254. *Hedges v. State*, 172 So. 2d 824, 827 (Fla. 1965). The court rejected the argument that the "castle doctrine" only applied when the person killed was a trespasser as was the case in *Pell v. State*. *Id.* (discussing *Pell v. State*, 122 So. 110 (Fla. 1929)).

255. *Bobbitt*, 415 So. 2d at 724.

256. *Id.* at 725.

the defendant had no duty to retreat to the maximum extent possible.²⁵⁷ Instead, the jury was instructed about the defendant's general duty to retreat when attacked before a killing could be considered self-defense.²⁵⁸ The supreme court approved this instruction and also approved the failure to further instruct the jurors on the "castle doctrine."²⁵⁹ The court noted its earlier decision finding that the doctrine applied when one is attacked at home by an invitee who is lawfully present but not living in the home as well.²⁶⁰ However, the court felt the *Bobbitt* situation was distinguishable.²⁶¹ Thus, the *Bobbitt* court held that:

[T]he privilege not to retreat, premised on the maxim that every man's home is his castle which he is entitled to protect from invasion, does not apply here where both Bobbitt and her husband had equal rights to be in the "castle" and neither had the legal right to eject the other.²⁶²

Implicit in this decision was the distinction between trespassers, invitees, and co-occupants. Trespassers have no legal right to be in an occupant's home while invitees do, by virtue of the lawful occupant's invitation. However, the supreme court evidently considered this invitation implicitly revoked because of the invitee's unprovoked attack, thus reducing the invitee's status to that of a trespasser. The same could not be said of co-occupants who had equal legal rights to be on the premises when the attack began. Ironically, one result of *Bobbitt* was that it functionally changed this equality of the right to remain. The attacker was considered legally on the premises, but the attacked victim's right to remain was reduced by the

257. *Id.* The trial court declined to give the requested jury instruction which was: One unlawfully attacked in his own home or on his own premises has no duty to retreat and may lawfully stand his ground and meet force with force, including deadly force, if necessary to prevent imminent death or great bodily harm to himself or another, or to prevent the commission of a forcible felony.

Id.

258. *Id.*

259. *Bobbitt*, 415 So. 2d at 726.

260. *Id.*

261. *Id.*

262. *Id.* In so doing, the court approved language from *Conner* that a mother attacked in her home by a son living there also had the general duty to retreat and could not claim the benefit of the "castle doctrine." *Id.* at 726 (reviewing *Connor v. State*, 361 So. 2d 774 (Fla. 4th Dist. Ct. App. 1978)). The *Conner* court claimed this did not make the mother defenseless as she could still use deadly force if retreating from the home would increase her chances of death or great bodily harm. *Connor v. State*, 361 So. 2d 774, 776 (Fla. 4th Dist. Ct. App. 1978).

victim's obligation to retreat fully if, by doing so, the victim could avoid using deadly force without endangering the victim.

Justice Overton dissented from the majority's opinion in *Bobbitt*.²⁶³ His dissent criticized the artificial distinctions made based solely upon the status of the attacker.²⁶⁴ One result of *Bobbitt* that he correctly pointed out was that it "places the wife in the same position as if the altercation had occurred in a public place."²⁶⁵ He criticized the different applications of the duty to retreat between an attack by one family member on another member when both live in the home and when only one member lives in the home.²⁶⁶ Justice Overton claimed that "the majority's rule is in fact a minority position which does not recognize the realities of life."²⁶⁷ Instead of the State or defense's positions, Justice Overton argued for the establishment of a limited duty to retreat rule when the victim is attacked by one legally in the home regardless of the attacker's status.²⁶⁸ This rule would place upon the victim attacked a duty to retreat within the home, if possible, but not require the victim to actually leave the home.²⁶⁹ Victims could meet force with equal force, even deadly force, if such force were needed to prevent their death or great bodily harm.²⁷⁰

In *Weiland*, the supreme court receded from its position in *Bobbitt* and adopted Justice Overton's suggestion to adopt a limited duty to retreat when both the person attacked and the attacker are lawfully in the home.²⁷¹ The court did so for two reasons. First, *Bobbitt* was found to rely on considerations of "property law and possessory rights" that are inconsistent with the "castle doctrine."²⁷² That doctrine is grounded, not in a notion of

263. *Bobbitt*, 415 So. 2d at 726 (Overton, J., dissenting).

264. *Id.* at 729.

265. *Id.* at 727.

266. *Id.* at 728.

267. *Id.*

268. *Bobbitt*, 415 So. 2d at 728. This limited rule would apply "when the assailant in one's home is an invitee, a cotenant, or a family member." *Id.* Thus, by implication it would not change the "castle doctrine" when the attacker is a trespasser.

269. *See id.*

270. *Id.* Justice Overton proposed the following instruction on this limited duty: If the defendant was attacked in [his/her] own home, or on [his/her] own premises, by a cotenant, family member, or invitee, [he/she] has a duty to retreat to the extent reasonably possible but is not required to flee [his/her] home and has the lawful right to stand [his/her] ground and meet force with force even to the extent of using force likely to cause death or great bodily harm if it was necessary to prevent death or great bodily harm to [himself/herself] or another.

Id.

271. *Weiland v. State*, 732 So. 2d 1044, 1051 (Fla. 1999).

272. *Id.*

superior property rights of one against another, but in the realistic, "time-honored principle that the home is the ultimate sanctuary."²⁷³ Second, increased awareness and understanding of domestic violence showed that there were sound policy reasons to recede from *Bobbitt*.²⁷⁴ The court noted that studies showed that "[d]omestic violence is the single major cause of injury to women."²⁷⁵ Other studies showed that attempted retreat by a battered spouse can actually increase the chances of the spouse being killed or seriously harmed, as the retreat often served to further provoke the attacker.²⁷⁶ The court also believed that an instruction requiring the battered spouse to leave the home (as opposed to retreating in it, if possible) perpetuated the "common myth that the victims of domestic violence are free to leave the battering relationship any time they wish to do so."²⁷⁷

Weiland recognized the argument that eliminating a duty to retreat from the home when the parties involved are co-occupants could ultimately increase the number of violent encounters, as more violence in the home is likely to occur between co-occupants than between occupants and trespassers or invitees.²⁷⁸ However, the court found that this argument was not supported by any empirical studies.²⁷⁹ Instead, the court determined that forcing complete retreat, when possible, could actually increase the number of domestic violence incidents.²⁸⁰ Furthermore, the court noted that even when an attacked co-occupant does not have to completely retreat from the home, that occupant is not absolutely privileged to use deadly force.²⁸¹ The general rule that defensive force must be proportionate to the offensive force still exists under the limited duty rule.²⁸² Thus, attacked occupants cannot kill unless they reasonably use all means to avoid doing so. The limited duty to retreat rule merely recognizes that one of the means the law of self-defense cannot reasonably expect people to use is to leave their homes when attacked. *Weiland* thus approved of Justice Overton's suggested jury instruction, with some minor changes in language.²⁸³

273. *Id.* at 1052.

274. *Id.* at 1051.

275. *Id.* at 1053.

276. *Weiland*, 732 So. 2d at 1054.

277. *Id.*

278. *Id.* at 1056.

279. *Id.*

280. *Id.*

281. *Weiland*, 732 So. 2d at 1056.

282. *See id.*

283. *Id.* The exact instruction approved in *Weiland* is as follows:

If the defendant was attacked in [his/her] own home, or on [his/her] own premises, by a co-occupant [or any other person lawfully on the premises] [he/she] had a duty to retreat to the extent reasonably possible without

Weiland brings Florida in line with the majority of courts that have considered this question.²⁸⁴ Moreover, it eliminates irrational outcomes based on minor distinctions in how an attacker is lawfully in the home. While the court's decision spends much time discussing domestic violence against women, its rule is equally applicable when the husband/male lover is the one attacked.²⁸⁵ Additionally, at least one commentator has argued that even though Florida recognized the battered spouse syndrome as part of the law of self-defense "as a matter of law, self-defense was still nearly impossible for a battered spouse to prove because of the [*Bobbitt*] duty to retreat."²⁸⁶ After *Weiland*, this should certainly be a different case.

VII. CONSTITUTIONAL ISSUES

A. Separation of Powers

During the past year, the Supreme Court of Florida addressed a problem that has drawn frequent public attention and criticism: the efficiency and fairness of Florida's death penalty appellate process. During a special legislative session, the Florida Legislature attempted to expedite the process through the Death Penalty Reform Act of 2000 ("DPRA").²⁸⁷ The DRPA attempted to significantly alter the state's post conviction process in capital cases with several specific revisions, particularly with its creation of a "dual-track" process in which post conviction claims could be filed almost contemporaneously with a direct appeal.²⁸⁸

While expressing sympathy with the legislature's desire to improve the efficiency and speed of the process, the Supreme Court of Florida asserted its prerogative under the Florida Constitution to exclusively control the power to adopt judicial rules of practice and procedure in *Allen v.*

increasing [his/her] own danger of death or great bodily harm. However, the defendant was not required to flee [his/her] home and had the lawful right to stand [his/her] ground and meet force with force even to the extent of using force likely to cause death or great bodily harm if it was necessary to prevent death or great bodily harm to [himself/herself].

Id. at 1057.

284. *Id.* at 1051.

285. The rule would presumably also be applicable in same-sex domestic relationships.

286. Douglas A. Orr, *Weiland v. State and Battered Spouse Syndrome: The Toothless Tigress Can Now Roar*, 74 FLA. B.J. 14, 16 (2000). This article provides a good, concise discussion of the battered spouse syndrome and the duty to retreat in Florida before and after *Weiland*.

287. Ch. 2000-3, §§ 1-22, 2000 Fla. Laws 4, 4-23.

288. *Allen v. Butterworth*, 756 So. 2d 52, 55 (Fla. 2000).

Butterworth,²⁸⁹ where it found that most sections of the DPRA violated the provisions of the Florida Constitution that guarantee separation of powers of the branches of state government.²⁹⁰ Using its mandamus authority,²⁹¹ the court held that the statute interfered with its power to “adopt rules for the practice and procedure in all courts,” including the time for seeking appellate review.²⁹² The court rejected the State’s contention that the law’s deadlines for filing post conviction motions were statutes of limitations that would have fallen within the legislature’s substantive lawmaking powers.²⁹³ While recognizing that habeas corpus petitions are technically civil in nature, the court declared that they were actually quasi-criminal because they are heard and disposed of in criminal courts.²⁹⁴ The fact that the writ of habeas corpus is explicitly provided for in the text of the Florida Constitution²⁹⁵ was also deemed significant by the court.²⁹⁶ The court also distinguished an Eleventh Circuit decision that permitted Congress to impose a deadline on filing habeas corpus actions in federal courts.²⁹⁷ The court noted that unlike the federal Constitution, which provides that the United States Supreme Court derives its appellate jurisdiction from congressional authority,²⁹⁸ the authority for original and appellate jurisdiction in Florida courts is entirely derived from Article V of the Florida Constitution.²⁹⁹ Despite the DPRA’s severability provision, the court also found most of the sections so “inextricably intertwined” as to preclude severance.³⁰⁰

Nevertheless, the court’s shared concern for efficiency prompted it to propose amendments to Rules 3.851 and 3.852 of the *Florida Rules of Criminal Procedure*.³⁰¹ The court noted that the amendments were meant to balance the need to carry out a sentence of death “in a manner that is fair, just, and humane and that conforms to constitutional requirements” with the

289. 756 So. 2d 52 (Fla. 2000).

290. *Id.* at 52; see FLA. CONST. art. II, § 3. The court did not strike sections 11, 14, 15, and 16 of the DPRA. *Allen*, 756 So. 2d at 65. Although the court also found that some provisions violated equal protection and due process doctrines, its holding was based on its separation of powers analysis. *Id.* at 58.

291. *Id.* at 54 (relying on FLA. CONST. art. V, § 3(b)(8)).

292. *Id.* (citing FLA. CONST. art. V, § 2(a)).

293. *Id.* at 62.

294. *Allen*, 756 So. 2d at 61.

295. FLA. CONST. art. I, § 13.

296. *Allen*, 756 So. 2d at 61.

297. *Weekley v. Moore*, 204 F.3d 1083 (11th Cir. 2000).

298. U.S. CONST. art. III, § 2.

299. *Allen*, 756 So. 2d at 63.

300. *Id.* at 65.

301. *Id.*; see also Amendments to Fla. R. Crim. P. 3.851, 3.852, 3.993, 25 Fla. L. Weekly S285 (Fla. Apr. 14, 2000).

need for promptness and efficiency in administering justice.³⁰² Arguably, the timing of these amendments may also reflect an attempt by the court to circumvent more attempts by the state legislature to interfere with the court's powers.

The court also informed the legislature in its opinion that Florida's public records laws³⁰³ had to be amended in order for the dual-track system to work.³⁰⁴ Because Florida statutes currently exempt criminal intelligence and investigation information from disclosure during appeals, defendants could not pursue all potential remedies until such exemptions end. The court noted that the dual-track system could not work until these exemptions are removed by the legislature.³⁰⁵

Finally, in this clash between the judicial and legislative branches, the court also seized the opportunity to plead for more funding.³⁰⁶ In its conclusion, the court noted that a reliable justice system requires funding at all levels.³⁰⁷ The court argued that funding was needed for the attorneys litigating death penalty cases as well as for the courts.³⁰⁸ This case probably correctly reflects the appropriate roles for the legislative and judicial branches to undertake in this politically sensitive area. With new public attention focused on cases in other states where wrongly accused defendants have proven their innocence through DNA evidence, the need to proceed cautiously in reviewing cases where the death penalty has been imposed seems even more critical. In addition, the court's decision underlines the importance of maintaining an independent judiciary that retains control over its practice and procedures. In an area where the state decides to end someone's life, it is arguably important that the process be deliberate and cautious. Nevertheless, if the court's proposed procedural reforms do not actually reduce delays in the process, one can expect further attempts from the other two branches to continue to change the process. This case seems to indicate, however, that the court will be diligent in protecting its authority from encroachment by the other branches.

B. *Due Process*

The Supreme Court of Florida also had the opportunity to consider due process challenges to a pair of criminal statutes during the past year. In *State*

302. *Allen*, 756 So. 2d at 65.

303. FLA. STAT. § 119 (1999).

304. *Allen*, 756 So. 2d at 65.

305. *Id.* at 65-66 (discussing FLA. STAT. § 119.07(3)(b), (3)(l), .011(3)(d)(2) (2000)).

306. *Id.* at 67.

307. *Id.*

308. *Id.*

v. O.C.,³⁰⁹ a juvenile defendant challenged the constitutionality of section 874.04 of the *Florida Statutes*, a provision that enhanced criminal penalties for members of criminal street gangs.³¹⁰ O.C., a juvenile, was found guilty of attempted aggravated battery and misdemeanor battery.³¹¹ The State then moved for a penalty enhancement pursuant to the aforementioned statutory section.³¹² On appeal, the Fifth District Court of Appeal concluded that the law was unconstitutional because it enhanced punishment for “mere association.”³¹³ The problematic language of the challenged section permitted enhancement for belonging to a criminal street gang.³¹⁴ The Supreme Court of Florida first noted that both the Fourteenth Amendment to the United States Constitution and Article I, section 9 of the Florida Constitution provide that citizens have the right to be protected from deprivations of their legally protected interests without due process of law.³¹⁵ The clauses permit legitimate interference with one’s legal rights, but only if the means chosen “shall have a reasonable and substantial relation to the object sought to be attained and shall not be unreasonable, arbitrary or capricious.”³¹⁶ The court reviewed previous decisions³¹⁷ that overturned statutes criminalizing otherwise innocent activities without a showing of criminal intent or behavior.³¹⁸ Because this statute made simple association with others who may not even be criminals a ground for penalty enhancement, without also requiring a showing that there was a nexus between the criminal act committed by the defendant and his membership in the organization, it seems that the court was correct. To permit a penalty enhancement for merely belonging to an organization, the definition of which is relatively broad in the statute, raises a number of constitutional

309. 748 So. 2d 945 (Fla. 1999).

310. *Id.* at 945.

311. *Id.* at 946.

312. *Id.*

313. *Id.* at 947.

314. Section 874.04 of the *Florida Statutes* states as follows:

Upon a finding by the court at sentencing that the defendant is a member of a criminal street gang, the penalty for any felony or misdemeanor, or any delinquent act or violation of law which would be a felony or misdemeanor if committed by an adult, may be enhanced if the offender was a member of a criminal street gang at the time of the commission of such offense.

FLA. STAT. § 874.04 (2000).

315. O.C., 748 So. 2d at 948.

316. *Id.* (emphasis omitted).

317. Wyche v. State, 619 So. 2d 231 (Fla. 1993); State v. Walker, 461 So. 2d 108 (Fla. 1984).

318. O.C., 748 So. 2d at 949.

questions.³¹⁹ The court distinguished a decision by the Supreme Court of California³²⁰ that rejected a challenge to a criminal gang statute permitting enhancement where the defendant committed the crime, “for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.”³²¹ This decision seems correct in striking a statute that was too broad in its sweep at addressing a perceived societal harm.

The court also considered a due process challenge to the criminal statute that punishes neglect of the elderly and disabled³²² in *Sieniarecki v. State*.³²³ Patricia Sieniarecki lived in an apartment with her boyfriend and mother.³²⁴ Although in her fifties, the elder Sieniarecki became despondent and disoriented after the combination of her husband’s death and a surgery on her hip.³²⁵ Mrs. Sieniarecki was found dead on a mattress soiled with

319. Section 874.03(2)(a)–(h) of the *Florida Statutes* lists eight criteria for classifying a person as being a member of a “Criminal Street Gang” as follows:

(2) “Criminal street gang member” is a person who is a member of a criminal street gang as defined in subsection (1) and who meets two or more of the following criteria:

(a) Admits to criminal street gang membership.

(b) Is identified as a criminal street gang member by a parent or guardian.

(c) Is identified as a criminal street gang member by a documented reliable informant.

(d) Resides in or frequents a particular criminal street gang’s area and adopts their style of dress, their use of hand signs, or their tattoos, and associates with known criminal street gang members.

(e) Is identified as a criminal street gang member by an informant of previously untested reliability and such identification is corroborated by independent information.

(f) Has been arrested more than once in the company of identified criminal street gang members for offenses which are consistent with usual criminal street gang activity.

(g) Is identified as a criminal street gang member by physical evidence such as photographs or other documentation.

(h) Has been stopped in the company of known criminal street gang members four or more times.

§ 874.03(2)(a)–(h).

320. *People v. Gardeley*, 927 P.2d 713 (Cal. 1996).

321. *O.C.*, 748 So. 2d at 950 (quoting *Gardeley*, 927 P.2d at 720). The court did not reach the First Amendment challenge to the statute. *Id.*

322. *FLA. STAT.* § 825.102(3) (1997).

323. 756 So. 2d 68 (Fla. 2000).

324. *Id.* at 70.

325. *Id.*

urine and feces wearing only a polo shirt and one tennis shoe.³²⁶ She weighed only sixty-eight pounds.³²⁷ The cause of death was septicemia, caused by decubitus ulcers as well as bladder and vaginal infections.³²⁸ Dehydration and malnutrition also contributed to the cause of death.³²⁹ Found guilty of neglect, the defendant argued on appeal that the statute violated her due process rights by imposing an affirmative duty upon her while penalizing a failure to comply, and that the statute was unconstitutionally vague and interfered with her mother's right to privacy.³³⁰

The due process challenge included an argument that the statute failed to contain a specific intent requirement.³³¹ The court compared this challenge to similar ones previously decided by the court in regard to the state's child protection statutes.³³² Although the court had struck child neglect statutes that penalized persons for mere negligence, it had also upheld a statutory provision in the child neglect area that required willfulness or culpable negligence.³³³ Similarly, because section 825.102(3) of the *Florida Statutes* also requires willfulness or culpable negligence by the caregiver, it was therefore found to pass constitutional muster.³³⁴

In response to the vagueness challenge, the court noted that the test for vagueness in Florida is "whether the statute gives a person of ordinary intelligence fair notice of what constitutes forbidden conduct."³³⁵ The court held that pursuant to the facts of this case, the victim was sufficiently impaired to be considered disabled under the statute.³³⁶ It also felt that the

326. *Id.* at 71.

327. *Id.* at 70.

328. *Sieniarecki*, 756 So. 2d at 71.

329. *Id.*

330. *Id.* at 72.

331. *Id.* at 73.

332. *Id.* at 73–74 (citing *State v. Mincey*, 672 So. 2d 524 (Fla. 1996) and invalidating FLA. STAT. § 827.05 (1991) because the amended statute continued to criminalize simple negligence); *State v. Winters*, 346 So. 2d 991 (Fla. 1977) (overturning FLA. STAT. § 827.05 (1975) for vagueness and overbreadth). For a discussion of the *Mincey* decision, see Dobson, *supra* note 5, at 127–31.

333. *Sieniarecki*, 756 So. 2d at 74 (citing *State v. Joyce*, 361 So. 2d 406 (Fla. 1978)).

334. *Id.*

335. *Id.* (citing *Brown v. State*, 629 So. 2d 841, 842–43 (Fla. 1994)).

336. *Id.* at 75. Section 825.101(4) of the *Florida Statutes* defines "Disabled Adult" as: [A] person 18 years of age or older who suffers from a condition of physical or mental incapacitation due to a developmental disability, organic brain damage, or mental illness, or who has one or more physical or mental limitations that restrict the person's ability to perform the normal activities of daily living.

FLA. STAT. § 825.101(4) (2000).

facts were sufficient so that the defendant had adequate notice of the fact that she could be deemed a caregiver as defined by the statute.³³⁷

The court also found that the defendant lacked standing to raise a facial vagueness challenge or the victim's alleged privacy rights.³³⁸ This decision clearly seems consistent with the court's prior decisions on the child neglect statute.³³⁹ In addition, the facts of this case did make it very difficult for this defendant to plausibly argue that she did not understand that her mother's physical and mental state fit within the definition of disability³⁴⁰ or that the defendant's conduct satisfied the definition of caregiver.³⁴¹ In addition, the state of the victim indicated that the care provided fell below that of mere inattentiveness.³⁴² It is not difficult to find a culpable state of mind by the defendant in this case. Whether the statute is sufficiently clear could be tested in other cases where the neglect is less egregious. Arguably, the heightened *mens rea* imposed by the court may save the statute in those cases as well.

C. Federalism

The Supreme Court of Florida also rejected a variety of federalism challenges to criminal charges brought against a defendant for acts that occurred on a cruise ship in waters beyond the state's territorial boundaries in *State v. Stepansky*.³⁴³ Matthew Stepansky was charged in Brevard County with burglary and attempted sexual battery of a thirteen-year-old on a cruise ship.³⁴⁴ Although both the victim and defendant were United States citizens,

337. *Sierniarecki*, 756 So. 2d at 75.

338. *Id.* at 76.

339. Some other states have even upheld constitutional attacks against statutes that provided criminal penalties for "mere" negligence. Dobson, *supra* note 5, at n.141.

340. *Sierniarecki*, 756 So. 2d at 70-71. The evidence indicated that the victim would not walk, required adult diapers, and generally refused to eat. *Id.* In addition, the defendant's boyfriend told the apartment manager, who inquired about the victim's ability to reach the upstairs apartment into which the family was moving, that the victim "would not ever be coming back down the stairs anymore." *Id.* at 70. The boyfriend carried the victim into the apartment when the family moved in. *Id.* at 70-71.

341. *Id.* at 70. The evidence indicated that when the children of the victim discussed with which child the mother would live, the family agreed she would live with the defendant because she did not work and would be able to take care of her mother unlike her two brothers who worked long hours and would not have as much time to spend with her. *Sierniarecki*, 756 So. 2d at 70.

342. *Id.* at 75.

343. 761 So. 2d 1027 (Fla. 2000).

344. *Id.* at 1029.

neither was a Florida resident at the time of the alleged attack.³⁴⁵ No other jurisdiction had attempted to prosecute the crime.³⁴⁶ The special maritime criminal jurisdiction statute that was challenged in this case extended the state's jurisdiction to acts committed on ships outside the state's territorial waters, if the "act or omission occurs during a voyage on which over half of the revenue passengers on board the ship originally embarked and plan to finally disembark" in Florida.³⁴⁷ Stepansky moved to dismiss the action on the basis that Florida lacked jurisdiction.³⁴⁸ Upon denial of the motion, he sought a writ of prohibition from the Fifth District Court of Appeal, which issued the writ.³⁴⁹

A number of issues were raised by this case. First, the state's jurisdiction over criminal acts generally extends to those committed wholly or partly within its geographical boundaries. Florida's boundary extends three miles from its coast.³⁵⁰ From an international law perspective, a vessel on the high seas is generally regarded as part of the territory of the nation of its owners.³⁵¹ In this case, the alleged acts occurred 100 nautical miles from the Atlantic coastline of Florida.³⁵² The ship was registered in Liberia and belonged to a cruise line from the British West Indies.³⁵³ In addition, although the states are generally responsible for defining and prosecuting crimes, they are precluded in some circumstances from asserting authority where the federal government has primary authority and has preempted that area of law.³⁵⁴ The Supreme Court of Florida first considered Article I, section 8, clause 10 of the United States Constitution, which grants Congress the right to define piracies and felonies on the high seas.³⁵⁵ The court held that this provision did not preclude the state from criminalizing the same act.³⁵⁶

Next, the court considered whether the prosecution violated the "flag state rule" of the Geneva Convention on the High Seas, and therefore interfered with the national government's treaty powers.³⁵⁷ The "flag state rule" states that a ship shall sail under the flag of one state and that state

345. *Id.*

346. *Id.* at 1030.

347. FLA. STAT. § 910.006(3)(d) (1995).

348. *Stepansky*, 761 So. 2d at 1030.

349. *Id.*

350. FLA. CONST. art. II, § 1(a).

351. 21 AM. JUR. 2D *Criminal Law* § 491 (1998).

352. *Stepansky*, 761 So. 2d at 1029.

353. *Id.* at 1030.

354. *Id.* at 1030-31.

355. *Id.* at 1031.

356. *Id.*

357. *Stepansky*, 761 So. 2d at 1032.

shall have exclusive jurisdiction over the ship absent exceptional cases expressly provided for in international treaties.³⁵⁸ The defendant conceded that he “lack[ed] standing to raise a violation of an international treaty that is not self-executing.”³⁵⁹ The court held that the treaty was not self-executing and did not limit the jurisdiction asserted by the United States over foreign vessels.³⁶⁰

The defendant also conceded that the United States could prosecute him for his conduct.³⁶¹ In 1994, the federal government, by statute, did assert maritime jurisdiction over offenses committed on the high seas by or against United States nationals on board foreign vessels scheduled to depart from or arrive in the United States.³⁶² The court held that this federal statute did not preclude the state from exercising concurrent jurisdiction over the activity.³⁶³

Having held that the statute did not interfere with the aforementioned provisions of the United States Constitution or federal statutes, the court next considered whether the State could exercise jurisdiction over an act committed outside its territory.³⁶⁴ The court cited the “effects” doctrine that permits jurisdiction over acts “intended to produce and producing detrimental effects” within the state.³⁶⁵ The court accepted the State’s argument that its tourism industry would suffer a significant adverse effect if it could not prosecute crimes on cruise ships where neither the federal or foreign governments prosecute.³⁶⁶ Justice Wells filed a dissenting opinion arguing that the legislature lacked authority to extend jurisdiction conducted outside the territorial boundaries of the state over the acts of nonresidents.³⁶⁷ He argued that jurisdiction over this act could only be properly asserted by the United States or other relevant foreign governments.³⁶⁸

Arguably the dissent and the Fifth District Court of Appeal have more correctly analyzed the issues in this case. Even if the 1994 legislation did not preempt the field of maritime law, it does not therefore follow that the State of Florida retains the authority to extend its criminal jurisdiction over acts occurring in a location that a valid treaty entered into by the national

358. Geneva Convention on the High Seas, Apr. 29, 1958, art. VI, 13 U.S.T. 2313, 2315, 450 U.N.T.S. 82, 86.

359. *Stepansky*, 761 So. 2d at 1032.

360. *Id.* at 1037.

361. *Id.* at 1033.

362. 18 U.S.C. § 7(8) (1994).

363. *Stepansky*, 761 So. 2d at 1033–34.

364. *Id.* at 1035.

365. *Id.*

366. *Id.* at 1036.

367. *Id.* at 1037 (Wells, J., dissenting).

368. *Stepansky*, 761 So. 2d at 1037.

government has deemed to be under the jurisdiction of a foreign government. As stated by the district court of appeal:

Although there is authority for the United States to assert extraterritorial jurisdiction over its nationals, there simply is no basis for such an extension by a political subdivision of the United States in regard to the territory of a foreign country—and the flagship of another country is just that. The State of Florida is constitutionally prohibited from entering into a treaty with Liberia in respect to jurisdiction of crimes on the high seas.³⁶⁹

The Supreme Court of Florida's broad interpretation of its "effects" doctrine causes one to ponder how far it would be willing to extend its jurisdiction to acts occurring outside of its boundaries. As noted by the concurring opinion of Judge Harris of the Fifth District Court of Appeal, the statute would seemingly permit the State to prosecute a person who commits a criminal act against another even if both persons are nationals of the ship's flag State and have physically entered Florida soil so long as the ship stopped at a Florida port and picked up over half of its revenue passengers there with an intent to return them to Florida.³⁷⁰ Contrary to the conclusions of the majority opinion of the Supreme Court of Florida, this statutory scheme does not appear to be narrowly drawn or consistent with the federal Constitution, which specifically grants the power to make treaties to the President and the Senate.³⁷¹ In addition, the Constitution makes properly executed treaties the supreme law of the land, binding upon the states.³⁷² The power of the national government in this area has been considered to be so unquestioned as to raise debate about whether a treaty was even subject to constitutional limitations.³⁷³ The United States Supreme Court has rejected attempts by the states to impose Tenth Amendment limits upon the national government's treaty power.³⁷⁴ This assertion of jurisdiction by Florida seems to contravene the Geneva Convention on the High Seas, and therefore constitutional limitations as well.

369. *Stepansky v. State*, 707 So. 2d 877, 879 (Fla. 5th Dist. Ct. App. 1995), *rev'd*, 761 So. 2d 1027 (Fla. 2000).

370. *Id.* at 880.

371. U.S. CONST. art. II, § 2, cl. 1.

372. U.S. CONST. art. VI, cl. 2.

373. See discussion in NOWAK & ROTUNDA, CONSTITUTIONAL LAW §6.6 (5th ed. 1995).

374. *Missouri v. Holland*, 252 U.S. 416 (1920); *Hauenstein v. Lynham*, 100 U.S. 483 (1879).