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Criminal Law: 2007-2010 Survey of Florida Law

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CRIMINAL LAW: 2007–2010 SURVEY OF FLORIDA LAW

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I. INTRODUCTION

This article surveys selected criminal law decisions of the Supreme Court of Florida and the Florida District Courts of Appeal published between July 31, 2007 and July 31, 2010. The survey covers cases of first impression, decisions involving or identifying conflicts between the Florida District

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Courts of Appeal, questions certified to the Supreme Court of Florida as being of great public importance and cases that clarify or expand upon existing principles of law. It also summarizes an important decision of the Supreme Court of the United States concerning the punishment of juvenile, non-homicide offenders in Florida.¹ Cases discussing procedural and evidentiary issues, the death penalty, and Florida's sentencing guidelines are beyond the scope of this article, which focuses on substantive principles of criminal law.

II. ASSAULT AND BATTERY

Under section 784.045(1)(a)(2) of the *Florida Statutes*, aggravated battery occurs when a deadly weapon is used in committing a battery.² In *Severance v. State*,³ the issue was whether the aggravated battery statute requires the defendant to touch the victim with the deadly weapon.⁴ In this case, the defendant had choked and hit the victim, threatened to kill her with a knife, but never touched her with the knife.⁵ On appeal of his conviction, he contended that, under *Munoz-Perez v. State*,⁶ "the [jury] instruction improperly allowed the jury to convict him of aggravated battery if it found that he, while committing the battery, used a knife without touching the victim."⁷ The Fourth District Court of Appeal disagreed.⁸ Receding from *Munoz-Perez*, the panel held that "the plain meaning of the aggravated battery statute is that in committing the battery, the defendant used a deadly weapon, which includes holding a deadly weapon without actually touching the victim with the weapon."⁹ In other words, if a deadly weapon is used in any manner, the battery is aggravated.¹⁰ Affirming the conviction, the court noted that the absence of any limitations on the manner or method of use of the deadly weapon means instead that the legislature intended that it cover all uses.¹¹

The Florida District Courts of Appeal also reviewed what constitutes a deadly weapon under both the aggravated battery and aggravated assault

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1. *Graham v. Florida*, 130 S. Ct. 2011, 2033 (2010).
 2. FLA. STAT. § 784.045(1)(a)(2) (2010).
 3. 972 So. 2d 931 (Fla. 4th Dist. Ct. App. 2007) (en banc).
 4. *Id.* at 933.
 5. *Id.* at 932.
 6. 942 So. 2d 1025 (Fla. 4th Dist. Ct. App. 2006).
 7. *Severance*, 972 So. 2d at 933.
 8. *Id.*
 9. *Id.* at 934.
 10. *Id.*
 11. *Id.* at 933–34.

statutes.¹² In *State v. Williams*,¹³ after the defendant hit the victim on her temple with a firearm, the victim sustained a bleeding gash, fainted, and suffered from migraines and memory loss.¹⁴ Over the State's objection, "the trial court reduced the aggravated battery to simple battery and offered the defendant a plea, which he accepted."¹⁵ The basis for the court's action was its finding that, on the facts of the case, "the firearm was not a deadly weapon as a matter of law" because it had not been "used or threatened to be used in a manner likely to cause great bodily injury," nor had it been discharged or used to put the victim in fear.¹⁶ On appeal by the State, the Third District Court of Appeal examined the aggravated battery statute,¹⁷ the definition of "deadly weapon" in the corresponding jury instruction,¹⁸ and the definition of "firearm" under section 790.001(6).¹⁹ The court concluded that "[a] firearm is, by definition, a deadly weapon because it is designed to expel a projectile by the action of an explosive which is likely to cause death or great bodily injury."²⁰ If it is discharged or "used to put the victim in fear" of an aggravated assault or a robbery, then "it is a deadly weapon as a matter of law. . . regardless of whether the firearm is loaded or capable of being fired."²¹ The court ordered the trial court to allow Williams to withdraw his guilty plea as to simple battery and to reinstate the aggravated battery charge.²²

The issue in *Cambell v. State*²³ was whether Florida case law imposes an additional element on the State in proving aggravated assault with a deadly weapon,²⁴ requiring the State to prove a defendant's intent "to do physical

12. See *Cambell v. State*, 37 So. 3d 948, 950 (Fla. 5th Dist. Ct. App. 2010); *State v. Williams*, 10 So. 3d 1172, 1174 (Fla. 3d Dist. Ct. App. 2009).

13. 10 So. 3d 1172 (Fla. 3d Dist. Ct. App. 2009).

14. *Id.* at 1174.

15. *Id.*

16. *Id.* at 1173–74.

17. *Id.* at 1174; FLA. STAT. § 784.045(1)(a)(2) (2007).

18. *Williams*, 10 So. 3d at 1174; FLA. STD. JURY INSTR. (CRIM.) 8.4 (2009).

19. *Williams*, 10 So. 3d at 1174; FLA. STAT. § 790.001(6) (2007).

20. *Williams*, 10 So. 3d at 1174.

21. *Id.* In other cases, the Florida District Courts of Appeal found that bleach was a deadly weapon within the meaning of the aggravated battery statute, when it was thrown into the victim's face, *Smith v. State*, 969 So. 2d 452, 453 (Fla. 1st Dist. Ct. App. 2007), and that a bicycle thrown by a juvenile at his mother during an argument was not a deadly weapon under the aggravated assault statute, *D.B.B. v. State*, 997 So. 2d 484, 485–86 (Fla. 2d Dist. Ct. App. 2008).

22. *Williams*, 10 So. 3d at 1175.

23. 37 So. 3d 948 (Fla. 5th Dist. Ct. App. 2010).

24. *Id.* at 949; FLA. STAT. § 784.021(1) (2008).

harm to the victim.”²⁵ Here, a police officer had testified he was afraid when Mr. Cambell pointed a firearm at him in a threatening manner.²⁶ In affirming Cambell’s conviction, the Fifth District Court of Appeal wrote to express its opinion on “some confusion . . . with respect to the elements of the crime of aggravated assault with a deadly weapon.”²⁷ The court examined dicta in two recent appellate cases,²⁸ which suggested that the State is required to prove the defendant’s intent to harm the victim physically.²⁹ The court concluded, however, that “[t]he only intent inherent in the statutes is the intention to make a threat to do violence,” and pointed out that courts generally lack the authority to extend or modify the express elements of a statutory crime.³⁰

III. HOMICIDE

A. *Manslaughter by Act*

During the survey period, the Florida courts struggled with the jury instruction for the offense of manslaughter by act under section 782.07(1) of the *Florida Statutes*. The jury instruction, which required the State to prove that the defendant intentionally caused the death of the victim,³¹ was at odds with the statutory definition of manslaughter, which required only an intent to commit an act that was not justified or excusable.³² In *State v. Montgomery*,³³ the Supreme Court of Florida endeavored to put the matter to rest.³⁴

In Montgomery’s trial for first-degree murder, the trial court instructed the jury on second-degree murder and manslaughter by act as lesser-included offenses of the charged crime.³⁵ The problematic instruction provided, in relevant part, that the State was required to prove that the defendant “intentionally caused the death of the victim” but that it was “not necessary for the State to prove that the defendant had a premeditated intent to cause death.”³⁶

25. *Cambell*, 37 So. 3d at 949.

26. *Id.*

27. *Id.*

28. *Id.* at 950; see *Denard v. State*, 30 So. 3d 595, 596 (Fla. 5th Dist. Ct. App. 2010); *Swift v. State*, 973 So. 2d 1196, 1199 (Fla. 2d Dist. Ct. App. 2008).

29. *Cambell*, 37 So. 3d 948, 950 (citing *Denard*, 30 So. 3d at 596; *Swift*, 973 So. 2d at 1199).

30. *Id.* at 950.

31. *Id.*; FLA. STD. JURY INSTR. (CRIM.) 7.7 (2006).

32. See FLA. STAT. § 782.07(1) (2005).

33. 39 So. 3d 252 (Fla. 2010).

34. See *id.* at 254.

35. *Id.*

36. *Id.* at 257 (quoting FLA. STD. JURY INSTR. (CRIM.) 7.7 (2006)).

The jury found Montgomery guilty of second-degree murder, and he appealed.³⁷ The First District Court of Appeal reversed his conviction and remanded for a new trial, holding that the trial court fundamentally erred in giving this jury instruction because “manslaughter by act does not require an intent to kill.”³⁸ The court certified conflict with the decision of the Fifth District Court of Appeal in *Barton v. State*³⁹ and certified the following question of great public importance: “Is the State required to prove that the defendant intended to kill the victim in order to establish the crime of manslaughter by act?”⁴⁰

The Supreme Court of Florida agreed that the standard jury instruction for manslaughter by act was fundamentally erroneous because it required the State to prove that the defendant “intentionally caused the death of the victim,” even though intent to kill was not an element of the offense.⁴¹ In other words, this instruction “impose[d] a more stringent finding of intent upon manslaughter than upon second-degree murder.”⁴² The Court further held that the offense of manslaughter by act requires only “the intent to commit an act that was not justified or excusable, which caused the death of the victim.”⁴³ The Court answered the certified question in the negative and concluded that the trial court’s use of the standard manslaughter instruction constituted fundamental error and necessitated a new trial.⁴⁴

Nevertheless, the Florida District Courts of Appeal wasted no time interpreting *Montgomery*. First, the case was distinguished in *Singh v. State*,⁴⁵ where the defendant was charged with first-degree murder.⁴⁶ The standard jury instruction on the lesser included offense of manslaughter required the

37. *Id.* at 254.

38. *Montgomery*, 39 So. 3d at 254.

39. 507 So. 2d 638 (Fla. 5th Dist. Ct. App. 1987) (en banc) (per curiam).

40. *Montgomery*, 39 So. 3d at 254. The Supreme Court of Florida did not reach the certified conflict, given its resolution of the certified question. *See id.*

41. *Id.* at 257.

42. *Id.* at 256.

43. *Id.* at 260.

44. *Montgomery*, 39 So. 3d at 260. The manslaughter jury instruction has been amended twice since the *Montgomery* trial. *Williams v. State*, 40 So. 3d 72, 74 (Fla. 4th Dist. Ct. App. 2010). “The [December] 2008 amendment added a clause . . . emphasizing [that] the intent requirement [is] related to the commission of an act which caused death.” *Id.*; *see also In re Standard Jury Instructions in Criminal Cases—Report No. 2007-10*, 997 So. 2d 403, 403 (2008) (per curiam). “The [April] 2010 amendment [authorized, on an interim basis,] delet[ion] [of] the word ‘intentionally’ before the phrase ‘caused the death.’” *Williams*, 40 So. 3d at 74; *see In re Amendments to Standard Jury Instructions in Criminal Cases—Instruction 7.7*, 41 So. 3d 853, 854 (Apr. 8, 2010) (per curiam).

45. 36 So. 3d 848 (Fla. 4th Dist. Ct. App. 2010).

46. *Id.* at 849.

jury to find that the defendant caused the death either “intentionally” or by “culpable negligence.”⁴⁷ The defendant was convicted of second-degree murder, which necessarily included a finding that he had not intended to kill his victim.⁴⁸ The Fourth District Court of Appeal refused to find fundamental error, however, because the culpable negligence option allowed the jury to return a manslaughter verdict without finding an intent to kill.⁴⁹ The instant case was therefore distinguishable from *Montgomery*, where the absence of an instruction on culpable negligence required a verdict of second-degree murder upon finding an absence of intent to kill.⁵⁰

Second, in *Rushing v. State*,⁵¹ the First District Court of Appeal applied *Montgomery* to the standard jury instruction for attempted manslaughter by act, holding that the instruction improperly includes an intent-to-kill element.⁵² In this case, Rushing appealed his conviction for attempted second-degree murder based on the trial court’s use of the standard jury instruction on the lesser included offense of attempted voluntary manslaughter.⁵³ The appellate court held that the use of this jury instruction constituted fundamental error because it may have led the jury to believe Rushing could not be convicted of attempted voluntary manslaughter unless the jury first found the element of intent to kill.⁵⁴ If so, then the jury would have felt compelled to convict him of “attempted second-degree murder, which has no such element of intent.”⁵⁵ Thus, according to the court, the jury instruction for attempted manslaughter by act “suffers from the very same infirmities as the instruction in *Montgomery*.”⁵⁶ The First District reversed Rushing’s conviction and remanded the case for new trial.⁵⁷

This decision comported with the First District’s earlier decision in *Lamb v. State*.⁵⁸ There, the court held that giving the standard jury instruction for attempted manslaughter by act constituted fundamental error because that instruction improperly requires “that the defendant ‘committed an act

47. *Id.* at 849–50.

48. *See id.* at 849.

49. *Id.*

50. *Singh*, 36 So. 3d at 851. The Third District Court of Appeal used the same reasoning to affirm a defendant’s conviction for second-degree murder based on similar jury instructions in *Cubelo v. State*, 41 So. 3d 263, 267–68 (Fla. 3d Dist. Ct. App. 2010).

51. 35 Fla. L. Weekly D1376 (1st Dist. Ct. App. June 21, 2010).

52. *Id.* at D1377.

53. *Id.* at D1376.

54. *Id.* at D1377.

55. *Id.*

56. *Rushing*, 35 Fla. L. Weekly at D1377.

57. *Id.*

58. 18 So. 3d 734 (Fla. 1st Dist. Ct. App. 2009) (per curiam).

intended to cause the death' of the victim when attempted manslaughter by act requires only an intentional unlawful act."⁵⁹

As a result of the First District's reasoning in *Lamb*, the Fourth District Court of Appeal certified conflict in *Williams v. State*.⁶⁰ In *Williams*, the defendant appealed his conviction for attempted second-degree murder.⁶¹ Williams argued that the Supreme Court of Florida's decision in *Montgomery* prohibited this instruction.⁶² The Fourth District disagreed and affirmed his conviction on the ground that the instant case concerned an inchoate crime not at issue in *Montgomery*.⁶³ In other words, the error that occurred in *Montgomery*, where the jury was instructed that "'an intent to kill' is an element of manslaughter," does not exist when the jury is instructed that attempted voluntary manslaughter requires "an act which was intended to cause the death of the victim."⁶⁴ Furthermore, the attempted second-degree murder conviction meant that the jury necessarily found that he had intended to commit an unlawful act that would have resulted in the victim's death.⁶⁵ Affirming the conviction, the Fourth District Court of Appeal certified conflict with the First District Court of Appeal's contrary decision in *Lamb* and certified two questions of great public importance: "(1) Does the standard jury instruction on attempted manslaughter constitute fundamental error? (2) Is attempted manslaughter a viable offense in light of *State v. Montgomery*?"⁶⁶

B. Felony Murder

The state appellate courts have revisited *Brooks v. State*,⁶⁷ in which the Supreme Court of Florida found that the underlying felony of aggravated child abuse could not serve as the predicate felony crime in a first-degree felony murder charge if only a single act led to the child's death.⁶⁸ In that situation, the *Brooks* court held, the felony would merge into the homicide.⁶⁹ In *Lewis v. State*,⁷⁰ however, where the defendant was convicted of first-

59. *Id.* at 735.

60. 40 So. 3d 72, 76 (Fla. 4th Dist. Ct. App. 2010).

61. *Id.* at 73.

62. *Id.* at 73–74.

63. *Id.* at 74.

64. *Id.* at 75.

65. *Williams*, 40 So. 3d at 75 (citing FLA. STD. JURY INSTR. (CRIM.) 6.4 (2010)).

66. *Id.* at 75–76.

67. 918 So. 2d 181 (Fla. 2005) (per curiam).

68. *Id.* at 198–99.

69. *Id.* at 199.

70. 34 So. 3d 183 (Fla. 1st Dist. Ct. App. 2010).

degree felony murder and the predicate felony of aggravated child abuse in the drowning death of her seven-year-old daughter, the First District Court of Appeal held that the merger doctrine did not apply even if the death was caused by a single act of abuse.⁷¹

The *Lewis* court articulated three reasons for this conclusion.⁷² First, because the felony murder conviction was ultimately affirmed in *Brooks*, the Supreme Court of Florida's statement about the merger doctrine was dictum.⁷³ Second, aggravated child abuse is expressly named in the felony murder statute as a predicate offense for felony murder, demonstrating that "the legislature intended that a defendant who kills a child during the perpetration of the crime of aggravated child abuse may be charged and convicted of both aggravated child abuse and felony murder, regardless of the number of acts of abuse which caused the child's death."⁷⁴ Finally, the defendant's actions in holding her daughter under water "long enough to produce unconsciousness and then death, cannot be considered a single act [of abuse]."⁷⁵ Nevertheless, in affirming the defendant's felony murder conviction, the First District Court certified the following question as one of great public importance: "Whether *Brooks v. State* holds that aggravated child abuse cannot serve as the underlying felony in a felony murder charge if only a single act of abuse led to the child's death."⁷⁶

Likewise, in *Rosa v. State*,⁷⁷ the defendant relied on *Brooks* in his appeal of a conviction for first-degree felony murder of a thirteen-year-old strangulation victim based on the predicate felony of aggravated child abuse.⁷⁸ The Second District Court of Appeal refused to set aside his conviction, finding that the merger doctrine did not preclude using aggravated child abuse as the underlying felony where the victim suffered multiple injuries in addition to the strangulation that caused her death.⁷⁹ Moreover, the court was inclined not to view the strangulation as a single act of abuse.⁸⁰ Agreeing in part with the opinion in *Lewis*, the court observed that because the language in *Brooks* does not refer to the felony murder statute and seems to conflict with the plain language of section 782.04, it cannot be reconciled

71. *Id.* at 184.

72. *See id.* at 186–87.

73. *Id.* at 186.

74. *Id.* at 186–87.

75. *Lewis*, 34 So. 3d at 187.

76. *Id.* (citation omitted).

77. 35 Fla. L. Weekly D1361 (2d Dist. Ct. App. July 18, 2010).

78. *Id.* at D1361.

79. *Id.*

80. *Id.*

with that statute.⁸¹ The *Rosa* court also certified the issue as a question of great public importance.⁸²

C. *Second-Degree Depraved Mind Murder*

Under section 782.04(2), second-degree, depraved mind murder is “[t]he unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual.”⁸³ To prove that an act is imminently dangerous and demonstrates a depraved mind, one of the conditions that the State must prove is that “a person of ordinary judgment would know [it] is reasonably certain to kill or do serious bodily injury to another.”⁸⁴

The issue that arose in *Billie v. State*⁸⁵ was whether courts should use a subjective or objective standard to assess this condition.⁸⁶ In this case, Kirk Douglas Billie was convicted of second-degree murder after a jury found that he had sunk his former girlfriend’s truck into a canal, killing two of their children.⁸⁷ On appeal, Billie argued that the trial court erred in refusing to modify the standard jury instruction to include a subjective intent element.⁸⁸ The added language would have instructed the jury that to prove the Billie guilty of second-degree murder, the State was required to prove that he had actual knowledge that his two children were asleep in the back of the truck before he let it slip into the canal.⁸⁹

The Third District Court of Appeal held, however, that the standard instruction adequately captured Billie’s theory of defense.⁹⁰ First, by requiring the defendant’s act to be directed toward another person, the standard instruction included victims and therefore, by definition, included the question of whether Billie knew his children were in the car.⁹¹ Second, by requiring the defendant’s act to demonstrate “‘a depraved mind without regard for human life,’ the instruction permits the jury to consider the particular circum-

81. *Id.*

82. *Rosa*, 35 Fla. L. Weekly at D1361.

83. FLA. STAT. § 782.04(2) (2010).

84. FLA. STD. JURY INSTR. (CRIM.) 7.4 (2006).

85. 963 So. 2d 837 (Fla. 3d Dist. Ct. App. 2007).

86. *Id.* at 841 & n.4.

87. *Id.* at 838–39.

88. *Id.* at 840.

89. *Id.*

90. *Billie*, 963 So. 2d at 841.

91. *Id.*

tances and context of the defendant's charged conduct."⁹² Finally, the court rejected Billie's claim that a second-degree murder conviction requires the jury to find that he performed the act "with the subjective knowledge of its danger to another person."⁹³ Instead, the court stated that the jury instruction sufficiently expresses the degree to which a defendant must know that his actions are "reasonably certain to kill . . . another."⁹⁴ The court concluded that "[b]ecause the standard jury instruction adequately conveys the law of Florida and is neither confusing nor misleading, Billie [could not] 'overcome the presumption of its correctness.'"⁹⁵

D. *Lesser Included Homicide Offense*

In *Coicou v. State (Coicou II)*,⁹⁶ a case of first impression, the Supreme Court of Florida addressed the lesser-included offense of attempted first-degree felony murder.⁹⁷ In this case, the defendant was convicted of attempted first-degree felony murder based on an attempted robbery with a firearm, with the jury specifically finding that he had committed a robbery and used a firearm.⁹⁸ On appeal, Coicou argued, and the Third District Court of Appeal agreed, that Florida law prohibits using the same act—the shooting of the victim—to prove both the attempted felony murder and the underlying felony offense.⁹⁹ Therefore, the State failed to prove the attempted felony murder charge.¹⁰⁰ However, instead of reversing the conviction and discharging the defendant, the appellate court remanded with instructions to enter a verdict of attempted second-degree murder because the evidence contained in the record supported a conviction for that permissive lesser-included offense.¹⁰¹ The court certified the following question as one of great public importance: "May an appellate court direct the entry of a con-

92. *Id.* (quoting FLA. STD. JURY INSTR. (CRIM.) 7.4 (2006)).

93. *Id.* at 841 n.4.

94. *Id.* at 841 (quoting FLA. STD. JURY INSTR. (CRIM.) 7.4)).

95. *Billie*, 963 So. 2d at 841 n.4 (quoting *Sloss v. State*, 925 So. 2d 419, 424 (Fla. 5th Dist. Ct. App. 2006)).

96. 39 So. 3d 237 (Fla. 2010).

97. *Id.* at 239.

98. *Id.*

99. *Coicou v. State (Coicou I)*, 867 So. 2d 409, 411 (Fla. 3d Dist. Ct. App. 2003), *certifying question to* 39 So. 3d 237 (Fla. 2010).

100. *Id.* at 412 ("The use of force, the shooting, was itself an essential element of the underlying robbery and was not an independent act as required by section 782.051(1).").

101. *Id.*

viction for attempted second-degree murder where the jury's verdict does not reflect a finding that the defendant acted with a depraved mind?"¹⁰²

The certified question required the Supreme Court of Florida "to determine whether attempted second-degree murder is either a necessary or permissive lesser-included offense of attempted first-degree felony murder."¹⁰³ The Court first concluded "that attempted second-degree murder is *not* a necessarily lesser-included offense of attempted first-degree felony murder" because the former "contains an element, a depraved mind, that is not an element of the greater offense."¹⁰⁴ For the same reason, second-degree murder cannot be "a necessarily lesser-included offense of first-degree felony murder."¹⁰⁵ Receding from *Linehan v. State*¹⁰⁶ and *Scurry v. State*,¹⁰⁷ the Court directed the Committee on Standard Jury Instructions in Criminal Cases to consider revising the Florida Standard Jury Instructions.¹⁰⁸

The Court next addressed permissive lesser-included offenses, stating that in order for attempted second-degree murder to be a permissive lesser-included offense of attempted first-degree felony murder, the latter offense must be charged in a manner demonstrating a depraved mind, "the required mental element of attempted second-degree murder."¹⁰⁹ Concluding that a case-by-case determination is necessary when deciding this issue, the Supreme Court of Florida then reviewed the facts at hand in Coicou's case.¹¹⁰

Here, the charging document for attempted first-degree felony murder alleged only that "Coicou had intentionally committed an act that could have resulted, but did not result, in someone's death." However, it failed to allege "an act that was 'imminently dangerous' or that 'demonstrated a depraved

102. *Coicou II*, 39 So. 3d at 238.

103. *Id.* at 242.

104. *Id.* at 243.

105. *Id.*

106. 476 So. 2d 1262, 1265 (Fla. 1985) (holding that "second-degree murder [is] a necessarily lesser included offense of first-degree felony-murder"), *overruled in part by Coicou II*, 39 So. 3d at 243.

107. 521 So. 2d 1077, 1078 (Fla. 1988) (holding "that second-degree murder is a necessarily lesser-included offense of first-degree felony murder"), *overruled in part by Coicou II*, 39 So. 3d at 243.

108. *Coicou II*, 39 So. 3d at 243.

109. *Id.* Attempted first-degree felony murder requires the act to be "committed during the course of committing a felony," *id.* at 241, (citing FLA. STAT. § 782.051 (2001)), while attempted second-degree murder requires the act to be "imminently dangerous to another and evincing a depraved mind regardless of human life." *Id.* (quoting FLA. STAT. § 782.04 (2001) (amended 2002)).

110. *Id.* at 241.

mind without regard for human life.”¹¹¹ Because the allegations and the evidence did not support a finding that Coicou acted with a depraved mind, and the record did not indicate that the jury found the “depraved mind element,” attempted second-degree murder was not a permissive lesser-included offense of attempted first-degree felony murder.¹¹² Therefore, it was improper for the Third District Court of Appeal to direct entry of a conviction for that crime.¹¹³ The appropriate action would have been to “remand . . . for retrial on any lesser offenses contained in the charging instrument and instructed on at trial.”¹¹⁴ Answering the certified question in the negative, the Supreme Court of Florida quashed the Third District’s decision, and remanded the case for proceedings consistent with its opinion.¹¹⁵

IV. DEFENSES

A. Florida’s “Stand Your Ground” Law

Florida’s “Stand Your Ground” Law,¹¹⁶ which was signed into law on April 26, 2005, permits the use of deadly or non-deadly force, “without fear of prosecution or civil action,”¹¹⁷ against an individual who unlawfully and forcibly enters the dwelling, residence, or occupied vehicle of another person.¹¹⁸ The new statutory scheme eliminated the common law duty to retreat before using deadly or non-deadly force in self-defense or defense of others, so long as the person is being attacked in a place where he or she has a lawful right to be.¹¹⁹ Despite the controversy surrounding this law, in the five years since its enactment, there have been few appellate decisions interpreting its provisions.

The first issue that arose was whether the new law applied retroactively to cases pending at the time of its effective date on October 1, 2005.¹²⁰ The

111. *Coicou II*, 39 So. 3d at 243 (quoting *State v. Florida*, 894 So. 2d 941, 945–46 (Fla. 2005) (per curiam), *overruled in part by* *Valdes v. State*, 3 So. 3d 1067, 1077 (Fla. 2009)).

112. *Id.*

113. *Id.*

114. *Id.* at 244 (quoting *State v. Wilson*, 680 So. 2d 411, 412 (Fla. 1996)).

115. *Id.* at 244.

116. The term “Stand Your Ground Law” refers to sections 776.012–.013 and 776.031–.032 of the *Florida Statutes* collectively. *Montanez v. State*, 24 So. 3d 799, 801 (Fla. 2d Dist. Ct. App. 2010); *see, e.g.,* FLA. STAT. §§ 776.012–.013, .031–.032 (2010).

117. Act effective Oct. 1, 2005, ch. 2005-27, § 5, 2005 Fla. Laws 199, 202 (codified as amended at FLA. STAT. §§ 776.012–.013, .031–.032 (2010)). *Compare* FLA. STAT. §§ 776.012, .031 (2004), *with* FLA. STAT. §§ 776.012–.013, .031–.032 (2010).

118. FLA. STAT. § 776.013(1)(a) (2010).

119. *Id.* § 776.013(2)(a).

120. *See* ch. 2005-27, § 5, 2005 Fla. Laws at 202.

Supreme Court of Florida, in *Smiley v. State*,¹²¹ held that because Florida's "Stand Your Ground" Law had effected a substantive change in the statutory law, rather than a procedural change, it did not apply retroactively to pending cases.¹²²

The second issue involved jury instructions in the case of an unarmed assailant.¹²³ In *McWhorter v. State*,¹²⁴ the defendant was convicted of battery on his unarmed attacker.¹²⁵ Although the jury instructions no longer expressly refer to a "duty to retreat," the trial judge included language stating that a defendant should endeavor to avoid the danger before employing force.¹²⁶ The Fourth District Court of Appeal found that this language would cause the jury to believe, mistakenly, that McWhorter could not use force in self-defense unless he had first used "every reasonable means within his power to avoid the danger."¹²⁷ However, as the court noted, section 776.013(3) allows individuals who are attacked to stand their ground and meet force with force, as long as they are neither involved in unlawful activity nor present in a place where they did not have a right to be.¹²⁸ In other words, they may use deadly force in this situation if they feel threatened with death or great bodily harm, even if other means of self-protection are available, and, in McWhorter's case, even if the attacker is unarmed.¹²⁹ Because the jury instructions misstated the law applicable to self-defense, the Fourth District Court of Appeal reversed the defendant's battery conviction and remanded the case for a new trial.¹³⁰

The third issue under Florida's "Stand Your Ground" Law involved the statutory immunity accorded to individuals who use force defending them-

121. 966 So. 2d 330 (Fla. 2007).

122. *Id.* at 336-37; *see also* Williams v. State, 982 So. 2d 1190, 1193-94 (Fla. 4th Dist. Ct. App. 2008) (reversing a conviction for second-degree murder with a firearm on the ground that the trial court had committed fundamental error in instructing the jury on the duty to retreat, where the law had changed two days before the offense in question); Mitchell v. State, 965 So. 2d 246, 252 (Fla. 4th Dist. Ct. App. 2007) (affirming a first-degree murder conviction on the ground that the new self-defense law did not apply to pending cases); Johnson v. State, 958 So. 2d 1152, 1152 (Fla. 1st Dist. Ct. App. 2007) (*per curiam*) (affirming a conviction for second-degree murder while armed with a firearm on the ground that the new self-defense law did not apply to an offense committed in 2003).

123. McWhorter v. State, 971 So. 2d 154, 154 (Fla. 4th Dist. Ct. App. 2007).

124. 971 So. 2d 154 (Fla. 4th Dist. Ct. App. 2007).

125. *Id.* at 154-55.

126. *Id.* at 157.

127. *Id.*

128. *Id.* (citing FLA. STAT. § 776.013(3) (2005)).

129. *See* McWhorter, 971 So. 2d at 157.

130. *Id.*

selves or others.¹³¹ Section 776.032 states that when a person is justified in using force under the statutory scheme, he or she “is immune from [both] criminal prosecution and civil action for the use of such force.”¹³² The preamble to the legislation declares that “it is proper for law-abiding people to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action.”¹³³ Two appellate cases dealt with the applicability of this immunity when the victim is in retreat.¹³⁴ In *Hair v. State*,¹³⁵ the First District Court of Appeal held that the “Stand Your Ground” Law makes no exception from immunity when the victim is in retreat at the time defensive force is used.¹³⁶ In *State v. Heckman*,¹³⁷ however, the Second District Court of Appeal concluded that the statutory immunity did not apply because the victim was retreating from Heckman’s garage when Heckman shot him.¹³⁸ The difference between the cases appears to be that the victim in *Hair* “was still inside the vehicle when he was shot” and had not completed his retreat, whereas the victim in *Heckman* “had left the [defendant’s] garage and was retreating to his truck.”¹³⁹

The remaining decisions demonstrate conflict as to the correct procedure to be used in statutory immunity cases. The issue is whether factual disputes should be resolved at a pretrial evidentiary hearing or at trial.¹⁴⁰ In *Peterson v. State*,¹⁴¹ the defendant sought a writ of prohibition to review the denial of his motion to dismiss attempted first-degree murder charges.¹⁴² In his motion, Peterson argued that he was entitled to statutory immunity for justifiable use of force.¹⁴³ After a pretrial evidentiary hearing, the trial court denied the motion on the ground “that immunity had not been established as

131. See FLA. STAT. § 776.032(1).

132. *Id.*

133. Act effective Oct. 1, 2005, ch. 2005-27, 2005 Fla. Laws 199, 200 (codified as amended at FLA. STAT. §§ 776.012–.013, .031–.032 (2010)).

134. See *Hair v. State*, 17 So. 3d 804, 806 (Fla. 1st Dist. Ct. App. 2009) (per curiam); *State v. Heckman*, 993 So. 2d 1004, 1006 (Fla. 2d Dist. Ct. App. 2007).

135. 17 So. 3d 804 (Fla. 1st Dist. Ct. App. 2009) (per curiam).

136. *Id.* at 806. Because the trial court should have granted the motion to dismiss, the appellate court issued a writ of prohibition. *Id.*

137. 993 So. 2d 1004 (Fla. 2d Dist. Ct. App. 2007).

138. *Id.* at 1006. The appellate court reversed the trial court’s order granting defendant’s motion to dismiss the information that charged him with aggravated battery. *Id.*

139. *Hair*, 17 So. 3d at 806; *Heckman*, 993 So. 2d at 1005.

140. See *Peterson v. State*, 983 So. 2d 27, 28 (Fla. 1st Dist. Ct. App. 2008). This issue is the central procedural issue facing the Florida courts and will be examined in case discussions to follow. See *id.* at 29.

141. 983 So. 2d 27 (Fla. 1st Dist. Ct. App. 2008).

142. *Id.* at 28.

143. *Id.*

a matter of fact or law.”¹⁴⁴ Finding that the trial court had applied the correct standard, the First District Court of Appeal stated that the statute does not establish an affirmative defense but rather a true immunity.¹⁴⁵ The immunity claim should be resolved by the trial court after a pretrial evidentiary hearing at which the defendant has the burden of proof by a preponderance of the evidence.¹⁴⁶ In other words, the standard in Rule 3.190(c)(4) of the Florida Rules of Criminal Procedure, which provides for a dismissal when “[t]here are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt against the defendant,” is inappropriate for a motion or petition to determine immunity under section 776.032.¹⁴⁷ According to the First District, the trial court may not deny a motion to dismiss simply because factual disputes exist.¹⁴⁸

Although the Second,¹⁴⁹ Third¹⁵⁰ and Fifth District¹⁵¹ Courts of Appeal have followed the *Peterson* decision, the Fourth District Court of Appeal has disagreed and certified conflict in *Velasquez v. State*.¹⁵² In *Velasquez*, the court ruled that the proper device for testing this statutory immunity is a sworn motion to dismiss under Rule 3.190(c)(4) of the Florida Rules of Criminal Procedure and that whenever the State traverses and properly disputes the facts contained in the defense motion, the motion must be denied and the issue determined at trial.¹⁵³ More recently, in *Wonder v. State*,¹⁵⁴ the Fourth District certified conflict again and certified the following question as one of great public importance:

144. *Id.*

145. *Id.* at 29.

146. *Peterson*, 983 So. 2d at 29.

147. FLA. R. CRIM. P. 3.190(c)(4); see FLA. STAT. § 776.032 (2010).

148. *Peterson*, 983 So. 2d at 29.

149. *McDaniel v. State*, 24 So. 3d 654, 656–57 (Fla. 2d Dist. Ct. App. 2009); *Horn v. State*, 17 So. 3d 836, 839 (Fla. 2d Dist. Ct. App. 2009); see also *Montanez v. State*, 24 So. 3d 799, 801 n.2 (Fla. 2d Dist. Ct. App. 2010) (noting that a homicide defendant whose motion for immunity was denied could still “present self-defense as an affirmative defense at trial”).

150. *State v. Yaqubie*, 35 Fla. L. Weekly D1342, D1342 (3d Dist. Ct. App. June 16, 2010). The *Yaqubie* court certified conflict with *Velasquez v. State*, 9 So. 3d 22 (Fla. 4th Dist. Ct. App. 2009). *Yaqubie*, 35 Fla. L. Weekly at D1344.

151. *Gray v. State*, 13 So. 3d 114, 115 (Fla. 5th Dist. Ct. App. 2009).

152. 9 So. 3d 22, 23 (Fla. 4th Dist. Ct. App. 2009). Conflict was also certified in *Govoni v. State*, 17 So. 3d 809, 810 (Fla. 4th Dist. Ct. App. 2009) (per curiam), *reh’g granted*, 2009 Fla. App. LEXIS 15644 (4th Dist. Ct. App. Oct. 7, 2009) and in *McTigue v. State*, 24 So. 3d 584, 584 (Fla. 4th Dist. Ct. App. 2009) (per curiam).

153. See *Velasquez*, 9 So. 3d at 24; FLA. R. CRIM. P. 3.190(c)(4).

154. 35 Fla. L. Weekly D1829 (4th Dist. Ct. App. Aug. 11, 2010) (per curiam).

Whether section 776.032, *Florida Statutes*, (2009) (the “Stand Your Ground” Law), requires a trial court, upon motion to dismiss, to hold an evidentiary hearing prior to trial and resolve disputed factual issues to determine whether a defendant has established by a preponderance of the evidence his/her entitlement to statutory immunity from prosecution.¹⁵⁵

B. *The Forcible Felony Exception to a Claim of Self-Defense*

The defense of justified use of force in self-defense “is not available to a person who: (1) Is attempting to commit, committing, or escaping after the commission of, a forcible felony; or (2) Initially provokes the use of force.”¹⁵⁶ While this defense seems simple enough in concept, Florida’s courts have struggled with the accompanying jury instruction.¹⁵⁷ The confusion centers on whether a trial court commits a fundamental error by erroneously reading the forcible felony instruction when a defendant has not committed an independent forcible felony.¹⁵⁸ The Supreme Court of Florida addressed this issue in *Martinez v. State*.¹⁵⁹ In that case, after stabbing his girlfriend multiple times, Martinez was charged with attempted premeditated murder and aggravated battery with a deadly weapon.¹⁶⁰ He claimed self-defense.¹⁶¹ The trial court instructed the jury, without objection, that they could not find that Martinez acted in self-defense if he “was attempting to commit, committing, or escaping after the commission of an Attempted Murder and/or Aggravated Battery.”¹⁶² The court also instructed the jury on the initial aggressor exception to self-defense in section 776.041(2) of the *Florida Statutes*.¹⁶³ Martinez was convicted, and he appealed.¹⁶⁴ The Third District Court of Appeal affirmed on the ground that, although the instruction was erroneous because Martinez was not charged with an independent forcible felony, the error did not rise to the level of fundamental error.¹⁶⁵

The Supreme Court of Florida accepted review based upon express and direct conflict with several cases in which district courts have held that a trial

155. *Id.* (citations and emphasis omitted).

156. FLA. STAT. § 776.041 (2010).

157. See FLA. STD. JURY INSTR. (CRIM) 3.6(f), (g) (2010).

158. *Martinez v. State (Martinez I)*, 981 So. 2d 449, 450–51 (Fla. 2008) (per curiam).

159. 981 So. 2d 449, 450–51 (Fla. 2008) (per curiam).

160. *Id.* at 450.

161. *Id.*

162. *Id.* at 450 (quoting *Martinez v. State (Martinez I)*), 933 So. 2d 1155, 1157 (Fla. 3d Dist. Ct. App. 2006), *aff’d on other grounds*, 981 So. 2d 449 (Fla. 2008).

163. *Id.* at 453.

164. *Martinez II*, 981 So. 2d at 450.

165. *Martinez I*, 933 So. 2d at 1158.

court commits fundamental error by “giv[ing] the forcible-felony instruction when the defendant has committed only one forcible act.”¹⁶⁶ The Court agreed that the instruction was erroneous because the defendant’s self-defense claim rested upon the same act that formed the basis of the charges against him.¹⁶⁷ In other words, the forcible-felony instruction is appropriate only when the defendant is charged with a forcible felony separate and apart from the act for which he or she claims self-defense.¹⁶⁸ Any other result, the Court reasoned, would render the initial aggressor exception in section 776.041(2) of the *Florida Statutes* superfluous and negate a claim of justifiable use of deadly force.¹⁶⁹ The effect in this case was that, even if the jury had concluded that Martinez acted in self-defense when he committed aggravated battery or attempted murder, a finding of self-defense was precluded if the jury found that he committed attempted murder or aggravated battery.¹⁷⁰ This “circular logic” would be equivalent to directing a verdict on the affirmative defense.¹⁷¹ Thus, the Court agreed with Martinez that the trial court erred in giving the forcible felony instruction to the jury.¹⁷² The analysis did not end there, however.¹⁷³

The Court then pointed out that, in the absence of an objection at trial, this instructional error could not be raised on appeal unless fundamental error occurred.¹⁷⁴ When, as here, an affirmative defense is involved, fundamental error does not occur unless the instruction is so deficient that it deprives the defendant of a fair trial.¹⁷⁵ In the instant case, however, the Court found no fundamental error and identified two reasons for this conclusion.¹⁷⁶ First, because the defendant had pursued other strategies besides self-defense, the error “did not deprive Martinez of his sole, or even his primary, defense strategy.”¹⁷⁷ Second, his “claim of self-defense was extremely weak.”¹⁷⁸ The Court disapproved of those district court decisions holding that “an erroneous reading of the forcible-felony instruction *always* constitutes funda-

166. *Martinez II*, 981 So. 2d at 451.

167. *Id.* at 453.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Martinez II*, 981 So. 2d at 453.

172. *Id.* at 454.

173. *See id.*

174. *Id.* at 455 (citing *State v. Delva*, 575 So. 2d 643, 644 (Fla. 1991) (per curiam)).

175. *Id.* (citing *Smith v. State*, 521 So. 2d 106, 108 (Fla. 1988)).

176. *Martinez II*, 981 So. 2d at 456.

177. *Id.*

178. *Id.*

mental error” and expressly deferred rendering a decision as to whether the error “could constitute fundamental error in some circumstances.”¹⁷⁹

C. *Imperfect Self-Defense*

In *Hill v. State*,¹⁸⁰ the Third District Court of Appeal held that Florida does not recognize imperfect self-defense.¹⁸¹ The appellate court concluded that the requested jury instruction, defining imperfect self-defense as “[a]n honest but unreasonable belief in the necessity to defend oneself against imminent peril to life or great bodily injury,”¹⁸² is contrary to the self-defense statute, “which requires a reasonable belief in the necessity to use deadly force.”¹⁸³

D. *Statute of Limitations*

In *State v. Suarez*,¹⁸⁴ a case of first impression, the Third District Court of Appeal held that the statute of limitations on charges for third-degree grand theft and burglary of an unoccupied dwelling was not tolled while the defendant was incarcerated in federal prison within the State of Florida.¹⁸⁵ Because the statute of limitations refers to geographic location, not the state’s jurisdiction over the defendant, the court found that the defendant had satisfied the requirement that he be physically located within the state.¹⁸⁶ The limitations period had expired before the arrest warrant was served, and so the trial court had properly dismissed the charges.¹⁸⁷

V. CONSTITUTIONAL CLAIMS

A. *Cruel and Unusual Punishment*

In *Graham v. Florida*,¹⁸⁸ the Supreme Court of the United States held, in a five-to-four decision, that the Eighth Amendment’s Cruel and Unusual Punishment Clause prohibits the imposition of a life-without-parole sentence

179. *Id.* at 457.

180. 979 So. 2d 1134 (Fla. 3d Dist. Ct. App. 2008) (per curiam).

181. *Id.* at 1135.

182. *Id.* at 1135 n.2.

183. *Id.* at 1135 (citing FLA. STAT. § 776.012 (2000)).

184. 13 So. 3d 72 (Fla. 3d Dist. Ct. App. 2009).

185. *Id.* at 73.

186. *Id.* (citing FLA. STAT §§ 775.15(5), 812.035(10) (2001)).

187. *Id.* at 74.

188. 130 S. Ct. 2011 (2010).

on a juvenile offender for a non-homicide offense.¹⁸⁹ Graham committed armed burglary when he was sixteen.¹⁹⁰ Under a plea agreement, the Florida trial court sentenced him to probation, with the first year to be served in jail, and withheld adjudication of guilt.¹⁹¹ Following his release from jail, Graham committed additional crimes, which the trial court found to have violated the terms of his probation.¹⁹² Consequently, Graham was found guilty of the original charges and sentenced to life imprisonment for the armed burglary.¹⁹³ Because parole has been abolished in Florida, Graham's life sentence meant that he would never be eligible for release without executive clemency.¹⁹⁴ After Graham's Eighth Amendment challenge to his sentence was rejected by the trial court and the First District Court of Appeal, the Supreme Court of Florida denied review.¹⁹⁵ The Supreme Court of the United States granted certiorari.¹⁹⁶

Writing for the Court, Justice Kennedy noted that Eighth Amendment challenges "addressing the proportionality of sentences fall within two general classifications. The first [concerns] challenges to the length of term-of-years sentences"¹⁹⁷ In these cases, the Court employs a case-specific analysis.¹⁹⁸ The second "use[s] categorical rules to define Eighth Amendment standards," generally in capital cases.¹⁹⁹ *Graham*, however, presented a novel issue in that it entailed "a categorical challenge to a term-of-years sentence."²⁰⁰ Because the case involved "a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes," Justice Kennedy concluded that it should be analyzed as a categorical challenge under the second category, borrowing from the Court's approach in capital cases.²⁰¹

Applying this categorical analysis, Justice Kennedy first determined that both a national and global consensus existed against imposing life-

189. *Id.* at 2030.

190. *Id.* at 2018.

191. *Id.*

192. *Id.* at 2019.

193. *Graham*, 130 S. Ct. at 2020.

194. *Id.* (citing FLA. STAT. § 921.002(1)(e) (2003) (amended 2010)). Florida got rid of the parole system as found in the language of section 921.002(1)(e) of the *Florida Statutes*. See FLA. STAT. § 921.002(1)(e) (2010).

195. *Graham*, 130 S. Ct. at 2020.

196. *Id.*

197. *Id.* at 2021.

198. See *id.*

199. *Id.* at 2022.

200. *Graham*, 130 S. Ct. at 2022.

201. *Id.* at 2022–23.

without-parole sentences for juvenile non-homicide offenders.²⁰² Second, he concluded penological theory is inadequate to justify this type of sentence for this type of offender.²⁰³ Because of their “lack of maturity and an underdeveloped sense of responsibility,” juvenile offenders are less culpable and less deserving of the most severe punishments than an adult offender.²⁰⁴ In light of these developmental factors and the severity of the sentence, the Court held that the Eighth Amendment prohibits states from making the judgment that a juvenile offender is irredeemably depraved and from depriving that offender “of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential.”²⁰⁵ While the “[s]tate is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime, [it] must provide . . . ‘some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.’”²⁰⁶

Justice Stevens filed a brief concurring opinion in which Justices Ginsburg and Sotomayor joined.²⁰⁷ Chief Justice Roberts concurred in the judgment and filed an opinion asserting that, while he agreed the sentence in the present case violated the Eighth Amendment, he saw “no need to invent a new constitutional rule of dubious provenance in reaching that conclusion.”²⁰⁸

Justice Thomas filed a dissenting opinion in which Justice Scalia joined and Justice Alito joined in part.²⁰⁹ Justice Thomas wrote that the ultimate question was not whether the punishment fits the offense or the offender “but to whom the Constitution assigns that decision.”²¹⁰ In his view, that the majority had rejected the judgments of legislatures, judges, and juries regarding the appropriateness of the sentence under consideration “simply illustrates how far beyond any cognizable constitutional principle the Court has reached to ensure that its own sense of morality and retributive justice pre-empts that of the people and their representatives.”²¹¹

In a separate dissenting opinion, Justice Alito pointed out that the Court's opinion does not affect “the imposition of a sentence to a term of years without the possibility of parole.”²¹²

202. *Id.* at 2023.

203. *Id.* at 2030.

204. *Graham*, 130 S. Ct. at 2038 (Roberts, C.J., concurring).

205. *Id.* at 2030–32.

206. *Id.* at 2057 (Thomas, J., dissenting).

207. *Id.* at 2036 (Stevens, J., concurring).

208. *Id.* (Roberts, C.J., concurring).

209. *Graham*, 130 S. Ct. at 2043 (Thomas, J., dissenting).

210. *Id.* at 2058 (Thomas, J., dissenting).

211. *Id.*

212. *Id.* (Alito, J., dissenting).

B. Double Jeopardy

Although the rule of double jeopardy “prohibits subjecting a person to multiple prosecutions, convictions, and punishments for the same criminal offense . . . no constitutional prohibition [exists] against multiple punishments for [separate] offenses arising out of the same criminal transaction, [provided] the Legislature intends to authorize separate punishments.”²¹³ Absent clear legislative intent, however, courts utilize section 775.021(4)(b) of the *Florida Statutes* to determine whether separate offenses exist.²¹⁴ Section 775.021(4)(b) sets out three exceptions to the general rule that the Legislature intends “to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent.”²¹⁵ The second exception precludes multiple convictions for offenses that are “degrees of the same offense as provided by statute.”²¹⁶ In the past, the Supreme Court of Florida has required a two-step inquiry to construe this provision.²¹⁷ The first step was to determine “whether the crimes constitute separate offenses under *Blockburger v. United States*,²¹⁸ as codified in section 775.021(4)(a).”²¹⁹ The second step was to determine “whether the crimes are ‘degree variants’ or aggravated forms of the same core offense.”²²⁰ This second step involved the “primary evil” test, which focused on whether the offenses are designed to combat the same evil.²²¹

More recently, however, in *Valdes v. State*,²²² the Supreme Court of Florida acknowledged that the district courts have struggled to apply the primary evil test and that the Court itself has strained “to craft a consistent

213. *Valdes v. State*, 3 So. 3d 1067, 1069 (Fla. 2009).

214. *Hayes v. State* 803 So. 2d 695, 700 (Fla. 2001). Section 775.021(4)(b) prohibits multiple convictions and punishments for “(1) Offenses which require identical elements of proof, (2) Offenses which are degrees of the same offense as provided by statute, [and] (3) [o]ffenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.” FLA. STAT. § 775.021(4)(b)(1)–(3) (2010).

215. *Valdes*, 3 So. 3d at 1072; FLA. STAT. § 775.021(4)(b).

216. FLA. STAT. § 775.021(4)(b)(2).

217. *Gordon v. State*, 780 So. 2d 17, 21 (Fla. 2001) (per curiam), *overruled in part by Valdes*, 3 So. 3d at 1077 (Fla. 2009).

218. 284 U.S. 299 (1932).

219. *Gordon*, 780 So. 2d at 21.

220. *Id.*

221. *Id.* at 23 (citing *Carawan v. State*, 515 So. 2d 161, 173 (Fla. 1987) (Shaw, J., dissenting), *superseded by statute*, Act effective July 1, 1988, ch. 88-131, § 7, 1988 Fla. Laws 709, *as recognized in Valdes v. State*, 3 So. 3d 1067, 1072 (Fla. 2009)).

222. 3 So. 3d 1067 (Fla. 2009).

interpretation that would provide guidance to trial and district courts.”²²³ The Court, therefore, abandoned the test in favor of a simpler approach.²²⁴ According to the new test, section 775.021(4)(b) includes only those offenses that are included in the same charging statute and are explicitly provided by that statute to be degrees of the same offense.²²⁵ In other words, separate punishments for crimes arising from the same criminal transaction are prohibited only when the statute itself provides for multiple degrees of the same offense.²²⁶ Applying this test, the Court held that the rule against double jeopardy was not violated by the defendant’s dual convictions for discharging a firearm from a vehicle within 1000 feet of another person and shooting into an occupied vehicle because “the two offenses are found in separate statutory provisions; neither offense is an aggravated form of the other; and they are clearly not degree variants of the same offense.”²²⁷

Shortly after *Valdes* was decided, the Fourth District Court of Appeal issued a two sentence opinion in *Shazer v. State*,²²⁸ holding that “dual convictions for robbery with a deadly weapon and grand theft violate double jeopardy rights because the same property formed the basis for both convictions.”²²⁹ *Shazer*’s conviction for grand theft was reversed and the case was remanded with directions to the trial court to vacate his conviction and sentence.²³⁰ However, in *McKinney v. State*,²³¹ the Fifth District Court of Appeal disagreed, holding that section 775.021(4)(b)(2) did not bar dual convictions for “grand theft and robbery with a firearm [arising out of] a single taking of cash and a cell phone at gunpoint.”²³² Reasoning that “robbery is not a degree of theft nor is theft a degree of robbery,” the court upheld *McKinney*’s convictions and certified express and direct conflict with *Shazer v. State*.²³³

Two Florida District Courts of Appeal found that *Valdes*, which addressed degrees of the same offense, did not apply to dual convictions for resisting an officer with and without violence.²³⁴ In both cases, the appellate

223. *Id.* at 1075.

224. *See id.* at 1077.

225. *Id.*

226. *Id.* at 1075–76.

227. *Valdes*, 3 So. 3d at 1077.

228. 3 So. 3d 453 (Fla. 4th Dist. Ct. App. 2009) (per curiam).

229. *Id.* at 454.

230. *Id.*

231. 24 So. 3d 682 (Fla. 5th Dist. Ct. App. 2009).

232. *Id.* at 683.

233. *Id.* at 684; *see Shazer*, 3 So. 3d at 454.

234. *See Brown v. State*, 36 So. 3d 826, 828 (Fla. 5th Dist. Ct. App. 2010); *Ruiz-Alegria v. State*, 14 So. 3d 1276, 1277 (Fla. 2d Dist. Ct. App. 2009).

courts found that the convictions violated double jeopardy.²³⁵ In *Brown v. State*,²³⁶ the Fifth District Court of Appeal held that *Valdes* does not apply to “lesser offenses,” such as resisting without violence, “that are subsumed by a greater offense,” such as resisting with violence.²³⁷ In *Ruiz-Alegria v. State*,²³⁸ the Second District Court of Appeal found that *Valdes* does not apply to the situation that occurs when conduct begins as resisting without violence and then evolves into resisting with violence, provided that the conduct occurs in a single criminal episode.²³⁹

When a defendant commits two or more distinct criminal acts, however, multiple convictions and punishments are not proscribed by the rule against double jeopardy.²⁴⁰ Florida’s sexual battery laws are especially susceptible to the distinct acts exception because the statutes may be violated in myriad ways.²⁴¹ In *State v. Meshell (Meshell II)*,²⁴² the defendant was convicted of two counts of lewd and lascivious battery pursuant to section 800.04(4), one count by vaginal penetration, and one count by oral penetration.²⁴³ The Fifth District Court of Appeal concluded that the dual convictions violated double jeopardy because the record did not demonstrate a “temporal break” sufficient for the defendant to have formed a new criminal intent.²⁴⁴ Because there was a split among the Florida appellate courts, however, the court certified the following question to the Supreme Court of Florida as one of great public importance: “Are the sex acts proscribed by sections 794.011 and 800.04(4), *Florida Statutes*, properly viewed as ‘distinct criminal acts’ for double jeopardy purposes, so that a defendant can be separately convicted for each distinct act committed during a single criminal episode?”²⁴⁵

The Supreme Court of Florida limited review of this certified question to section 800.04(4), which was the only section at issue before the appellate

235. *Id.*

236. 36 So. 3d 826 (Fla. 5th Dist. Ct. App. 2010).

237. *Id.* at 832.

238. 14 So. 3d 1276 (Fla. 2d Dist. Ct. App. 2009).

239. *See id.* at 1277.

240. *Hayes v. State*, 803 So. 2d 695, 700 (Fla. 2001) (citing *Blockburger v. United States*, 284 U.S. 299, 302–04 (1932)).

241. *See Saavedra v. State*, 576 So. 2d 953, 956–57 (Fla. 1st Dist. Ct. App. 1991), *approved by* 622 So. 2d 952 (Fla. 1993).

242. 2 So. 3d 132 (Fla. 2009), *cert. denied*, 130 S. Ct. 110 (2009).

243. *Id.* at 133; *see* FLA. STAT. § 800.04(4) (2006) (amended 2008).

244. *Meshell v. State (Meshell I)*, 980 So. 2d 1169, 1171 (Fla. 5th Dist. Ct. App. 2008), *certifying question to* 2 So. 3d 132 (Fla. 2009).

245. *Id.* at 1175 (citations omitted); *see* FLA. STAT. §§ 794.011, 800.04(4) (2006) (amended 2008).

court, and answered the certified question affirmatively.²⁴⁶ Finding that vaginal and oral penetration were two distinct acts “of a separate character and type requiring different elements of proof,” the Court concluded that the Florida Legislature intended multiple punishments.²⁴⁷ To arrive at this conclusion, the Court first compared the lewd and lascivious battery statute, under which Meshell was charged, to the sexual battery statute, noting that the same sexual acts were proscribed under both statutes.²⁴⁸ Accordingly, the Court determined that the double jeopardy analysis applicable to the sexual battery statute should apply to the lewd and lascivious battery statute.²⁴⁹ Under the sexual battery analysis, no temporal break is required, and double jeopardy considerations do not prohibit separate convictions for distinct acts of sexual battery that are committed in the course of a single episode.²⁵⁰ Applying this analysis to the case at hand, the Court held that the oral and vaginal acts of penetration with which Meshell was charged under section 800.04(4) were distinct criminal acts “of a separate character and type requiring different elements of proof.”²⁵¹ Therefore, the rule against double jeopardy was not violated by punishments for these distinct acts.²⁵² Quashing the Fifth District’s decision in *Meshell I*, the Court remanded the case with directions to reinstate the original convictions and sentences.²⁵³

In *Meshell II*, the Supreme Court of Florida expressly limited its review of the double jeopardy issue to the lewd and lascivious battery statute, section 800.04(4).²⁵⁴ For this reason, in *Brown v. State*,²⁵⁵ the Second District Court of Appeal declined to apply the reasoning of *Meshell II* to a defendant’s conviction of two counts of lewd and lascivious molestation pursuant to section 800.04(5)(a).²⁵⁶ After Brown’s convictions were affirmed on appeal, he filed a petition alleging ineffective assistance of appellate counsel for failure to raise the double jeopardy issue.²⁵⁷ The Second District distinguished *Meshell II* on the ground that the acts of lewd and lascivious touching proscribed by section 800.04(5)(a) differ from those acts proscribed by

246. *Meshell II*, 2 So. 3d at 134; see FLA. STAT. § 800.04(4).

247. *Meshell II*, 2 So. 3d at 135–36.

248. *Id.* at 136 (comparing FLA. STAT. § 800.04(4) with FLA. STAT. § 794.011 (2006)).

249. *Id.*

250. *Id.* at 135–36.

251. *Id.* at 136; see FLA. STAT. § 800.04(4) (2006) (amended 2008).

252. *Meshell II*, 2 So. 3d at 136.

253. *Id.*

254. *Id.* at 134.

255. 25 So. 3d 78 (Fla. 2d Dist. Ct. App. 2009) (per curiam).

256. *Id.* at 80; see also FLA. STAT. § 800.04(5)(a) (defining “[l]ewd or [l]ascivious [m]olestation”).

257. *Brown*, 25 So. 3d at 78.

the sexual battery statute.²⁵⁸ “Because the supreme court has not addressed the double jeopardy issue in the context of section 800.04(5)(a),” the court ordered a new appeal on Brown’s double jeopardy claim.²⁵⁹

Meshell II was also distinguished in *J.M. v. State*,²⁶⁰ where the Fifth District Court of Appeal found that the lewd or lascivious touching by the defendant did not involve “sexual activity.”²⁶¹ In fact, the court observed that “[w]ith only one exception, not relevant to this appeal, lewd or lascivious conduct only requires the intentional touching of someone under age 16 in a lewd and lascivious manner without regard to where the victim is touched.”²⁶² Both touching incidents in this case involved the same victim and occurred sequentially on the school bus with “no meaningful spatial or temporal break during which J.M. could pause, reflect and form a new criminal intent.”²⁶³ Therefore, the Fifth District held that J.M.’s convictions for two counts of lewd or lascivious conduct under section 800.04(6)(c) violated double jeopardy.²⁶⁴

In *Partch v. State*,²⁶⁵ the First District Court of Appeal held that defendant’s dual convictions under sections 794.011(4) and 794.011(5) of the *Florida Statutes*, for sexual battery by vaginal penetration and attempted sexual battery on a person helpless to resist, violated principles of double jeopardy.²⁶⁶ The court declined to follow *Meshell II* because ambiguities in the charging document and the jury verdict made it impossible to determine whether Partch had been convicted for two distinct acts of sexual battery or one act.²⁶⁷ Instead, the court’s decision was based on a statutory trigger in section 794.011(6) that “would render the two offenses degrees of one another” under *Valdes*.²⁶⁸ The court reversed the conviction for attempted sexual battery on a person helpless to resist and remanded for resentencing on the sexual battery charge.²⁶⁹

258. *Id.* at 80. Compare FLA. STAT. § 800.04(5)(a), with FLA. STAT. § 800.04(4).

259. *Brown*, 25 So. 3d at 80.

260. 4 So. 3d 703 (Fla. 5th Dist. Ct. App. 2009).

261. *Id.* at 704 n.1.

262. *Id.*

263. *Id.* at 704.

264. *Id.* However, the Fifth District Court of Appeal followed *Meshell II* in *State v. Gonzalez*, 24 So. 3d 595 (Fla. 5th Dist. Ct. App. 2009) (per curiam), in holding that the defendant’s dual convictions for lewd and lascivious battery did not violate double jeopardy. *Gonzalez*, 24 So. 3d at 595.

265. 43 So. 3d 758 (Fla. 1st Dist. Ct. App. 2010).

266. *Id.* at 759; see FLA. STAT. § 794.011(4)–(5) (2008).

267. *Partch*, 43 So. 3d at 762.

268. *Id.* at 764.

269. *Id.*

The issue facing the First District Court of Appeal in *Roberts v. State*²⁷⁰ was whether double jeopardy principles were violated by the defendant's convictions for two counts of sexual battery of a person less than twelve years of age and two counts of lewd or lascivious molestation of a victim less than twelve years of age.²⁷¹ The victim's testimony established that Roberts had committed lewd or lascivious molestation twice during the sexual battery episode: once by vaginal penetration and once by oral penetration.²⁷² Applying *Meshell II*, the court held that the defendant's dual convictions for sexual battery and lewd or lascivious molestation did not violate principles of double jeopardy because they were based on discrete criminal acts committed during a single criminal episode.²⁷³

The meaning of criminal punishment in the context of Florida's chemical castration statute was considered by the Fourth District Court of Appeal in *Tran v. State*.²⁷⁴ At the defendant's sentencing hearing for a second sexual battery conviction, the trial court ordered administration of medroxyprogesterone acetate (MPA) injections but reserved ruling on the duration of treatment pending determination by a psychiatrist as to whether the defendant was an appropriate candidate for chemical castration.²⁷⁵ Four months after Tran began serving his prison sentence, the trial court ordered that he receive MPA treatment for a period of five years after his release from prison.²⁷⁶ Because section 794.0235(2)(a) of the *Florida Statutes* requires that the court's sentencing order specify the duration of treatment, the appellate court found that this delayed order "amounted to a more onerous punishment."²⁷⁷ As such, it violated double jeopardy principles and was not a valid portion of the defendant's original sentence.²⁷⁸ Rejecting the State's contention that the MPA statute is intended for remedial treatment purposes, the appellate court noted that the statute is located within Florida's criminal code

270. 39 So. 3d 372 (Fla. 1st Dist. Ct. App. 2010).

271. *Id.* at 373. Compare FLA. STAT. § 794.011(2)(a) (2008) with FLA. STAT. § 800.04(5)(b) (2006) (amended 2008).

272. *Roberts*, 39 So. 3d at 373.

273. *Id.* at 374. The court's opinion appears to refer to Justice Canady's concurring opinion in *Meshell II*, where he noted that the decision did not deny that "separate instances of the same type of criminal sex act in a single episode may be punishable as separate offenses." See *Meshell II*, 2 So. 3d 132, 137 (Fla. 2009) (Canady, J., concurring), *cert. denied*, 130 S. Ct. 110 (2009).

274. 965 So. 2d 226, 229 (Fla. 4th Dist. Ct. App. 2007); see FLA. STAT. § 794.0235 (2006).

275. *Tran*, 965 So. 2d at 228.

276. *Id.*

277. *Id.* at 229.

278. *Id.* at 230.

and not within its public health code.²⁷⁹ Moreover, “[t]he language of the entire statute speaks of MPA in terms of a sentence and a penalty” and “the administration of MPA is imposed as part of a criminal sentence.”²⁸⁰ Thus, the Fourth District held that a sentence to administration of MPA injections constitutes criminal punishment for purposes of double jeopardy.²⁸¹

The Florida District Courts of Appeal also considered double jeopardy claims when charges were based on a single item of property or on its component parts.²⁸² In *Dyson v. State*,²⁸³ where the defendant stole a motorcycle, the Fifth District Court of Appeal held that double jeopardy was violated by defendant’s convictions for both robbery and carjacking of the same item.²⁸⁴ Because carjacking is a subset of robbery, and the convictions were based on “identical elements of proof,” the appellate court ordered the robbery conviction to be vacated.²⁸⁵

In other decisions, the courts considered whether double jeopardy was violated when multiple charges were based on the component parts of a single item of property.²⁸⁶ In *Boyd v. State*,²⁸⁷ for example, the Fourth District Court of Appeal held that double jeopardy was violated by dual convictions for possession of a firearm by a convicted felon and possession of ammunition by a convicted felon, even though the firearm was not loaded with the ammunition.²⁸⁸ The decision turned on the wording in section 790.23, which provides, in relevant part, that it is unlawful for a convicted felon “to own or to have in his or her care, custody, possession, or control *any* firearm, ammunition, or electric weapon or device.”²⁸⁹ The court found “that because the word ‘any’ precedes the list of” contraband items, double jeopardy precludes multiple convictions where, during a single episode, the defendant possessed more than one item in that list.²⁹⁰ The Fifth District Court of Appeal followed *Boyd* in *Francis v. State*,²⁹¹ which also involved dual convictions

279. *Id.* at 229.

280. *Tran*, 965 So. 2d at 229.

281. *Id.* at 228.

282. *Dyson v. State*, 10 So. 3d 650, 651 (Fla. 5th Dist. Ct. App. 2009).

283. 10 So. 3d 650 (Fla. 5th Dist. Ct. App. 2009).

284. *Id.* at 651.

285. *Id.*

286. *See e.g.*, *Francis v. State*, 41 So. 3d 975, 976 (5th Dist. Ct. App. 2010); *Hanfield v. State*, 40 So. 3d 905, 906 (4th Dist. Ct. App. 2010); *Boyd v. State*, 17 So. 3d 812, 815 (Fla. 4th Dist. Ct. App. 2009).

287. 17 So. 3d 812 (Fla. 4th Dist. Ct. App. 2009).

288. *Id.* at 818.

289. *Id.*; FLA. STAT. § 790.23(1) (1995) (amended 1998) (emphasis added).

290. *Boyd*, 17 So. 3d at 818.

291. 41 So. 3d 975 (Fla. 5th Dist. Ct. App. 2010).

for possession of a firearm and ammunition by a convicted felon.²⁹² In *Francis*, however, the ammunition was fully encased within the firearm.²⁹³ Similarly, in *Hanfield v. State*,²⁹⁴ the defendant was convicted of armed robbery of the keys to the car for which she was also convicted of carjacking.²⁹⁵ Holding that the taking of the car keys cannot be considered as a separate property item to warrant conviction for armed robbery, the Fourth District Court of Appeal directed the trial court to vacate that conviction.²⁹⁶

C. *Due Process*

1. Entrapment

The Fifth District Court of Appeal held that an objective entrapment test should have been used to determine whether the defendant's due process rights had been violated by government misconduct in *Hernandez v. State*.²⁹⁷ Hernandez, a cocaine addict, testified that he had only agreed to locate a seller for a cocaine purchase because the confidential informant who approached him "promised him a portion of the product."²⁹⁸ He also testified that the informant knew of his addiction and had sold him cocaine in the past.²⁹⁹ The seller and Hernandez were arrested when they met to complete the sale, and Hernandez was charged with trafficking in cocaine.³⁰⁰ In a motion to dismiss, defense counsel argued that, under the objective entrapment test, Hernandez's due process rights had been violated by the informant's improper conduct in enticing Hernandez, a known addict, by the promise of payment in drugs.³⁰¹ Applying what appeared to be a subjective test, the trial court denied the motion to dismiss, holding that no entrapment had occurred because "the testimony suggest[ed] a propensity to commit a sale and delivery of cocaine."³⁰²

On appeal of the denial of his motion to dismiss, the Third District Court of Appeal noted that, although the trial court may have properly decided that the defendant was not entitled to relief under section 777.201,

292. *Id.* at 976.

293. *Id.* at 976–77.

294. 40 So. 3d 905 (Fla. 4th Dist. Ct. App. 2010).

295. *Id.* at 906.

296. *Id.* at 907–08.

297. 17 So. 3d 748, 751 (Fla. 5th Dist. Ct. App. 2009).

298. *Id.* at 749.

299. *Id.*

300. *Id.* at 749–50.

301. *Id.* at 750.

302. *Hernandez*, 17 So. 3d at 750.

Florida's entrapment statute, Hernandez had not sought relief under that statute.³⁰³ The trial court had therefore failed to address the issue raised by the defendant's motion to dismiss.³⁰⁴ Although it is not "a *per se* due process violation for a government informant to offer illegal drugs to a known drug addict as an inducement to enter into an illegal activity," the appellate court stated that the trial court must nevertheless "evaluate all relevant circumstances and then determine whether the government conduct 'so offends decency or a sense of justice that judicial power may not be exercised to obtain a conviction.'"³⁰⁵ Therefore, on remand, the trial court was directed to apply an objective entrapment test to determine whether the alleged governmental misconduct violated the defendant's due process rights.³⁰⁶

The Fifth District Court of Appeal addressed a similar claim in *Bist v. State*.³⁰⁷ In this case, a police department enlisted the help of an independent nonprofit organization, Perverted Justice, which provided decoys for a pedophile sting operation to be filmed for a network television program, *To Catch a Predator*.³⁰⁸ Here, Bist initiated an online conversation with "Jenna," a Perverted Justice decoy, believing her to be a thirteen-year-old girl.³⁰⁹ After engaging in graphic sexual conversations online, he traveled to meet Jennah for a tryst.³¹⁰ Once at the designated location, however, he found himself being filmed.³¹¹ When he tried to leave, he was arrested and charged with attempted lewd and lascivious battery, computer pornography, and child exploitation.³¹² In his motion to dismiss, Bist argued that law enforcement's conduct was so egregious that it amounted to objective entrapment in violation of his due process rights.³¹³ After his motion was denied, Bist pled no contest, reserving his right to appeal the trial court's ruling.³¹⁴

The Fifth District Court of Appeal held that law enforcement's methods were not "so outrageous that due process considerations would bar prosecution."³¹⁵ In support of this conclusion, the court noted first that Bist had not

303. *Id.*; FLA. STAT. § 777.201 (2007).

304. *Hernandez*, 17 So. 3d at 750.

305. *Id.* at 751 (quoting *State v. Blanco*, 896 So. 2d 900, 901 (Fla. 4th Dist. Ct. App. 2005) (en banc) (citing *Campbell v. State*, 935 So. 2d 614, 619 (Fla. 3d Dist. Ct. App. 2006)).

306. *Id.*

307. 35 So. 3d 936, 938 (Fla. 5th Dist. Ct. App. 2010).

308. *Id.*

309. *Id.*

310. *Id.* at 939.

311. *Id.*

312. *Bist*, 35 So. 3d at 939.

313. *Id.*

314. *Id.*

315. *Id.* at 941.

been “solicited, induced, or otherwise lured into seeking a sexual liaison with a Perverted Justice decoy.”³¹⁶ To the contrary, he had contacted the decoy on his own initiative.³¹⁷ Additionally, the electronic recording and storage of all communications between the defendant and the decoy allayed any concern that Perverted Justice had a financial “incentive to manufacture crime or commit perjury.”³¹⁸ It also insured the integrity of a process that, in spite of being unsupervised and unmonitored, did not result in unscrupulous conduct.³¹⁹ For these reasons, the appellate court rejected Bist’s objective entrapment defense and held that due process considerations did not bar prosecution.³²⁰

2. Vagueness

The statute prohibiting racing on highways³²¹ was subject to constitutional challenge in two cases.³²² In the first case, *State v. Wells*,³²³ the Fourth District Court of Appeal held that the statute was unconstitutionally vague, both on its face and as applied to the defendant.³²⁴ In this case, after Wells was charged with racing on the highway, he filed a motion to dismiss challenging the constitutionality of the statute.³²⁵ The trial court granted the motion on the ground that section 316.191 was unconstitutionally vague and overbroad, and the State appealed.³²⁶

The language in question involved the statutory definition of racing, which includes “the use of one or more motor vehicles in an attempt to outgain or outdistance another motor vehicle.”³²⁷ Because this part of the definition does not include an element of competition, the appellate court in *Wells* noted that it “could encompass passing, accelerating from a stop,” and

316. *Id.* at 940.

317. *Bist*, 35 So. 3d at 940.

318. *Id.*

319. *Id.* at 941.

320. *Id.* The court also held that Bist’s entrance into what he thought was a thirteen-year-old girl’s home, in possession of “flowers, chocolate, lubricant and condoms,” constituted an overt act “sufficient to prove a prima facie case of attempted lewd and lascivious battery.” *Id.* at 942.

321. FLA. STAT. § 316.191 (2010).

322. *See* *Reaves v. State*, 979 So. 2d 1066, 1068 (Fla. 1st Dist. Ct. App. 2008) (per curiam); *State v. Wells*, 965 So. 2d 834, 836 (Fla. 4th Dist. Ct. App. 2007) (per curiam).

323. 965 So. 2d 834 (Fla. 4th Dist. Ct. App. 2007) (per curiam).

324. *Id.* at 837.

325. *Id.* at 836.

326. *Id.*

327. FLA. STAT. § 316.191(1)(c) (2005), *invalidated by Wells*, 965 So. 2d at 834 (amended 2009).

myriad otherwise legal and even illegal maneuvers that drivers routinely employ.³²⁸ Furthermore, the statute was vague as applied because it did not clearly prohibit the defendant's alleged conduct and it was unclear whether Wells was trying to "outgain or outdistance" the other driver or merely exceeding the speed limit.³²⁹ The statute was not unconstitutional for overbreadth, however, because it did not affect a fundamental right.³³⁰ The Fourth District concluded that the trial court properly found section 316.191 to be unconstitutionally vague both facially and as applied.³³¹ The court reversed the conviction and "remanded in part for the trial court to strike the overbreadth findings . . . from its order."³³²

In the second case, *Reaves v. State*,³³³ the First District Court of Appeal disagreed with the Fourth District's conclusion that the statute was vague because the definition of "racing" lacked an element of competition.³³⁴ Instead, the court reasoned that the definition should be read together with related statutory provisions, which in turn provide the element of competition.³³⁵ For example, section 316.191(2)(a)(1) expressly prohibits the conduct of engaging in "any race, speed *competition* or *contest*, drag race or acceleration *contest*" on a public road against another vehicle.³³⁶ Section 316.191(1)(b) in turn defines "drag race" as the operation of two vehicles engaged "in a *competitive* attempt to outdistance each other."³³⁷ The court concluded that, when these provisions are read together as a coherent whole, the statute could be applied only when vehicles are competing with each other.³³⁸ Thus, the First District found section 316.191 facially constitutional and affirmed the defendant's conviction for racing on a highway.³³⁹

328. *Wells*, 965 So. 2d at 839.

329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.*

333. 979 So. 2d 1066 (Fla. 1st Dist. Ct. App. 2008) (per curiam).

334. *Id.* at 1072.

335. *Id.*

336. *Id.* (quoting FLA. STAT. § 316.191(2)(a)(1) (2005), *invalidated by Wells*, 965 So. 2d at 834 (amended 2009)).

337. *Id.* (quoting FLA. STAT. § 316.191(1)(b) (2005), *invalidated by Wells*, 965 So. 2d at 834 (amended 2009)).

338. *Reaves*, 979 So. 2d at 1072.

339. *Id.* *Reaves* also sought to withdraw his plea of guilty to vehicular homicide, arguing that the other racer, Street, was the sole proximate cause of the victim's death. *Id.* at 1069. The trial court denied the motion, and *Reaves* appealed. *Id.* The First District Court of Appeal found no abuse of discretion in the trial court's denial of *Reaves*' motion to withdraw his guilty plea. *Id.* at 1070. This part of the decision is discussed *infra*, Section VII.

3. Lack of Specificity in the Charging Document

In a case of first impression, the First District Court of Appeal addressed the question of whether a fundamental error amounting to a denial of due process occurs when a charging document omits both: (1) The essential elements of the offense allegedly committed by an accessory after the fact or the principal, and (2) Any “reference to the statute that proscribes that offense.”³⁴⁰ In *Baker v. State*,³⁴¹ the defendant’s failure to preserve the issue at trial meant that he could raise the error for the first time on appeal “only if it constitutes ‘fundamental error.’”³⁴² However, the court identified a conflict between the fundamental error exception to the contemporaneous objection rule and the district courts’ practice of following dictum from the Supreme Court of Florida in *State v. Gray*.³⁴³ That dictum states that when a charging document “completely fails to charge a crime,” the ensuing conviction violates due process, “a defect that can be raised at any time—before trial, after trial, on appeal, or by habeas corpus.”³⁴⁴ After reviewing the record, the appellate court found that *Gray* and its progeny did not apply here, because the charging document adequately alleged the accessory’s offense.³⁴⁵ Moreover, because Baker not only “fully understood the charge against him, [but also] was able to mount a defense to that charge . . . the information was not fundamentally defective,” and due process was not denied.³⁴⁶ Nevertheless, “because a broad reading of the dicta in *Gray* might be determined to lead to the opposite result,” the court certified the following question as one of great public importance:

When charging the offense of accessory after the fact, does fundamental error occur if, although the indictment or information alleges the elements of the offense as set out in section 777.03 and identifies the offense allegedly committed by the principal or accessory before the fact, it fails also either to allege the elements of the offense allegedly committed by the principal or accessory before the fact, or to cite the statute that proscribes that offense?³⁴⁷

340. *Baker v. State*, 4 So. 3d 758, 759 (Fla. 1st Dist. Ct. App. 2009).

341. 4 So. 3d 758 (Fla. 1st Dist. Ct. App. 2009).

342. *Id.* at 760 (citing *Jackson v. State*, 983 So. 2d 562, 568 (Fla. 2008)).

343. *Id.* at 760–61; *State v. Gray*, 435 So. 2d 816, 818 (Fla. 1983).

344. *Gray*, 435 So. 2d at 818.

345. *Baker*, 4 So. 3d at 761.

346. *Id.*

347. *Id.*

4. Nonexistent Crimes

Two district courts rendered decisions that reversed convictions for nonexistent crimes on the ground of fundamental error.³⁴⁸ In *James v. State*,³⁴⁹ where the defendant was charged with “carrying a concealed weapon by a convicted felon,” the Fourth District Court of Appeal held that it was fundamental error for the trial court to instruct the jury on the nonexistent offense of “possession of a concealed weapon by a convicted felon.”³⁵⁰ The court’s definitions for actual and constructive possession compounded that error because those definitions were irrelevant to the offense charged.³⁵¹ The Fourth District reversed the conviction and sentence and “remand[ed] for a new trial on the charged crime of carrying a concealed weapon by a convicted felon.”³⁵² Similarly, in *Mathis v. State*,³⁵³ the Third District Court of Appeal held that it was fundamental error for the trial court to omit a necessary element from the jury instruction.³⁵⁴ In this case, Mathis was charged with “possession with intent to sell cocaine within 1000 feet of a child care facility.”³⁵⁵ The jury instructions omitted the requirement that possession be “with the intent to sell” the contraband, resulting in Mathis’s conviction of “simple possession of contraband within 1000 feet of a child care facility.”³⁵⁶ As this was a nonexistent crime, the appellate court found fundamental error and reduced the conviction to simple possession.³⁵⁷ Because the sentence imposed by the trial court fell within the sentencing guidelines for simple possession, no new trial was necessary.³⁵⁸

D. *Ex Post Facto* Laws

During the survey period, the Supreme Court of Florida decided two cases involving *ex post facto* challenges.³⁵⁹ In *Griffin v. State*,³⁶⁰ the Court

348. See *James v. State*, 16 So. 3d 322, 325 (Fla. 4th Dist. Ct. App. 2009); *Mathis v. State*, 21 So. 3d 865, 866 (Fla. 3d Dist. Ct. App. 2009).

349. 16 So. 3d 322 (Fla. 4th Dist. Ct. App. 2009).

350. *Id.* at 325.

351. *Id.* at 326.

352. *Id.* at 327.

353. 21 So. 3d 865 (Fla. 3d Dist. Ct. App. 2009).

354. *Id.* at 866.

355. *Id.*

356. *Id.*

357. *Id.*

358. *Mathis*, 21 So. 3d at 866.

359. See *Griffin v. State*, 980 So. 2d 1035, 1037 (Fla. 2008) (per curiam); *Lescher v. Fla. Dep’t of Highway Safety & Motor Vehicles*, 985 So. 2d 1078, 1086 (Fla. 2008).

360. 980 So. 2d 1035 (Fla. 2008) (per curiam).

held that the prohibition against ex post facto laws was not violated by the retroactive application of section 939.185 of the *Florida Statutes*, which authorized costs to be assessed against a defendant whose conviction occurred before the statute's enactment.³⁶¹ On appeal from the trial court's order, the Second District Court of Appeal reversed the imposition of costs and certified conflict with *Ridgeway v. State*,³⁶² a First District Court of Appeal case.³⁶³ However, the Supreme Court of Florida agreed with the decision in *Ridgeway* and adopted that opinion as its own.³⁶⁴ In doing so, the Court applied a two-prong test to determine whether a measure constitutes a criminal penalty, stating that a law violates the ex post facto clause if (1) it is retrospective in effect, and (2) it "alters the definition of criminal conduct or increases the penalty" imposed for the offense.³⁶⁵ The Court found that section 939.185 meets the first prong because it applies to offenses committed before the statute's effective date.³⁶⁶ However, the statute fails to meet the second prong because the imposition of costs "neither alters the definition of the criminal conduct nor increases" the penalty for the crime.³⁶⁷ As such, section 939.185 does not constitute a criminal penalty and thus does not violate the prohibition against ex post facto laws.³⁶⁸ Accordingly, the Court quashed *Griffin* in part, approved *Ridgeway*, and remanded to the district court.³⁶⁹

In *Lescher v. Florida Department of Highway Safety & Motor Vehicles*,³⁷⁰ the Supreme Court of Florida addressed the question of whether the prohibition against ex post facto laws was violated by a statutory amendment eliminating hardship licenses for drivers whose licenses had been permanently revoked.³⁷¹ In this case, after his fourth DUI conviction in 2000, Lescher's license was revoked pursuant to section 322.28(2)(e) of the *Florida Statutes*.³⁷² At the time of this revocation he could have applied for a hardship

361. *Id.* at 1037.

362. 892 So. 2d 538, 539–40 (Fla. 1st Dist. Ct. App. 2005) (holding that the retroactive application of section 939.185 did not violate the prohibition against ex post facto laws where the defendant pled nolo contendere on the same day that the statute became effective).

363. *Griffin*, 980 So. 2d at 1036.

364. *Id.*

365. *Id.*

366. *Id.* at 1037; see FLA. STAT. § 939.185 (2004).

367. *Griffin*, 980 So. 2d at 1037.

368. *Id.*

369. *Id.*, followed by *Love v. State*, 992 So. 2d 823, 824 (Fla. 2d Dist. Ct. App. 2008), cited by *Broadnax v. State*, 987 So. 2d 160, 161 (Fla. 2d Dist. Ct. App. 2008).

370. 985 So. 2d 1078 (Fla. 2008).

371. *Id.* at 1079.

372. *Id.*; see FLA. STAT. § 322.28(2)(e) (2000).

license, under former section 322.271(4), but did not do so until 2005.³⁷³ His application was denied, and the denial was upheld by the circuit court.³⁷⁴ The Fourth District Court of Appeal then denied his petition for certiorari and certified the following question to the Supreme Court of Florida as one of great public importance: “Does the amendment to section 322.271(4), *Florida Statutes*, which eliminated hardship driver's licenses effective July 1, 2003, violate the prohibition against ex post facto laws as to persons who could have applied for a hardship license before the amendment became effective?”³⁷⁵

The Supreme Court of Florida answered the certified question in the negative and approved the Fourth District Court of Appeal's decision.³⁷⁶ The Court determined that the amendment eliminating hardship licenses imposed a civil penalty, not criminal punishment.³⁷⁷ The first step in this analysis was to ascertain legislative intent, which the Court concluded was “to protect the public through a regulatory regime governing driver's licenses.”³⁷⁸ The second step was to determine the civil or criminal effect of the statute under a seven-factor test.³⁷⁹ Applying these factors, the Court concluded that Lescher had failed to show that the provisions in question were so punitive that they negated the legislature's intent of imposing a civil sanction.³⁸⁰ As a

373. *Lescher*, 985 So. 2d at 1079–80; see FLA. STAT. § 322.271(4) (1997). The language from that section permitting reinstatement after four DUI convictions had been eliminated by chapter 98-223, section 9, Florida Laws, which later was held unconstitutional for violating the single subject requirement in Article III, section 6 of the Florida Constitution. Fla. Dep't of Highway Safety & Motor Vehicles v. Critchfield, 842 So. 2d 782, 783 (Fla. 2003) (per curiam); see FLA. CONST. art. III, § 6. The legislature cured the constitutional defect by reenacting the provision as an amendment to section 322.271(4), effective July 1, 2003. *Critchfield*, 842 So. 2d at 785. Thus, there was a window during which Lescher could have, but did not, request a hardship license; but that period closed when the amendment was reenacted. See *Lescher*, 985 So. 2d at 1080.

374. *Lescher*, 985 So. 2d at 1080.

375. See *id.* at 1080–81.

376. *Id.* at 1086.

377. *Id.*; see also *Bolware v. State*, 995 So. 2d 268, 275 (Fla. 2008) (per curiam). In *Bolware*, resolving a conflict among intermediate appellate courts, the Supreme Court of Florida held that although the revocation of a driver's license is a personal hardship, it does not constitute “punishment.” *Bolware*, 995 So. 2d at 275. Therefore, it is not a direct consequence of a guilty plea and there is no requirement that defendant be informed in order for the plea to be voluntary. *Id.* However, the Court also found that the suspension or revocation of a driver's license constitutes such a serious consequence that a defendant should be informed of it during a plea colloquy. *Id.* at 276. The Court therefore directed that Florida Rule of Criminal Procedure 3.172(c) be amended accordingly. *Id.*; see FLA. R. CRIM. P. 3.172(c).

378. *Lescher*, 985 So. 2d at 1081–82.

379. *Id.* at 1082.

380. *Id.* at 1086.

civil remedy, the elimination of the availability of hardship licenses from section 322.271(4) for drivers with four DUI convictions did not constitute an ex post facto law.³⁸¹

E. *Federal Preemption*

The Fifth District Court of Appeal decided a claim of federal preemption in *Menefee v. State*.³⁸² This was an appeal from a judgment and sentence for the offense of misdemeanor stalking in violation of section 784.048(3).³⁸³ The defendant was accused of using his ham radio to make repeated threats over the radio airwaves to kill the victim.³⁸⁴ In a pretrial motion to dismiss, Menefee argued that the State was preempted from prosecuting him because the federal government regulates ham radio broadcasts.³⁸⁵ After the trial court denied the motion, a jury found Menefee guilty of misdemeanor stalking.³⁸⁶

On appeal of the denial of his motion to dismiss, Menefee argued that licensed amateur radio communications were governed exclusively by federal law and that the State was therefore precluded by the Supremacy Clause of the United States Constitution³⁸⁷ from regulating such matters.³⁸⁸ The Fifth District Court of Appeal rejected this argument on the ground that, in prosecuting Menefee, the State sought to punish him for criminal conduct, not “to regulate the air waves.”³⁸⁹ The court could find no statutory language expressly or impliedly preempting the states from punishing individuals who use the radio airways to harass a victim criminally.³⁹⁰ Moreover, the court determined that the stalking statute was not enacted to regulate ham radio operators but rather “to protect victims from intentional threatening conduct that causes substantial emotional distress in the form of a reasonable fear for one’s safety.”³⁹¹ Because the prosecution was not federally preempted, the appellate court affirmed the judgment and sentence.³⁹²

381. *Id.*; see FLA. STAT. § 322.271(4) (1998).

382. 980 So. 2d 569, 570 (Fla. 5th Dist. Ct. App. 2008).

383. *Id.* at 570–71; see FLA. STAT. § 784.048(3) (2004).

384. *Menefee*, 980 So. 2d at 570–71.

385. *Id.* at 571.

386. *Id.*

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

388. *Menefee*, 980 So. 2d at 571.

389. *Id.*

390. *Id.* at 574.

391. *Id.*

392. *Id.* at 574–75.

F. Separation of Powers

The First District Court of Appeal addressed an issue involving invalid rulemaking by the legislature.³⁹³ Formerly, Rule 3.250 of the Florida Rules of Criminal Procedure permitted a defendant to make the concluding argument to the jury if the only testimony offered by the defendant in his or her behalf was the defendant's own.³⁹⁴ Section 918.19 of the *Florida Statutes* repealed that part of Rule 3.250 relating to closing arguments and substituted a different procedure that allowed the prosecutor to make the concluding argument.³⁹⁵ However, in *Grice v. State*,³⁹⁶ the First District Court of Appeal found section 918.19 to be constitutionally infirm because its adoption of a new procedural rule constituted invalid rulemaking by the legislature.³⁹⁷ As the repeal itself was constitutionally valid, the court examined the common law to determine the proper procedure.³⁹⁸ The common law rule provided that the State was entitled to conduct initial and concluding closing arguments because the State carried the burden of proof.³⁹⁹ Because the trial court's decision was correct but for the wrong reason, the appellate court affirmed under the "tipsy coachman" rule.⁴⁰⁰

VI. STATUTORY INTERPRETATION

In *Kasischke v. State*,⁴⁰¹ the Supreme Court of Florida was called upon to resolve a district split regarding interpretation of a statute prohibiting sexual offenders from possessing pornography.⁴⁰² The statute in question provided that sexual offenders sentenced to probation or community control would be prohibited from "viewing, owning, or possessing any obscene, pornographic, or sexually stimulating visual or auditory material, including telephone, electronic media, computer programs, or computer services that

393. See *Grice v. State*, 967 So. 2d 957, 961 (Fla. 1st Dist. Ct. App. 2007).

394. *Id.* at 959.

395. *Id.*; see FLA. STAT. § 918.19 (2006); FLA. R. CRIM. P. 3.250 (2006) (amended 2007).

396. 967 So. 2d 957 (Fla. 1st Dist. Ct. App. 2007).

397. *Id.* at 961 (discussing FLA. STAT. § 918.19 (2006)).

398. *Grice*, 967 So. 2d at 961.

399. *Id.*

400. *Id.* at 961–62 (citing *Robertson v. State*, 829 So. 2d 901, 906–07 (Fla. 2002)). In *Robertson v. State*, the Supreme Court of Florida explained the "tipsy coachman" doctrine as "allow[ing] an appellate court to affirm a trial court that 'reaches the right result, but for the wrong reasons' so long as 'there is any basis which would support the judgment in the record.'" *Robertson*, 829 So. 2d at 906.

401. 991 So. 2d 803 (Fla. 2008).

402. *Id.* at 805.

are relevant to the offender's deviant behavior pattern."⁴⁰³ The issue was whether this section enacted a complete ban against all pornographic material or only those materials that are "relevant to the offender's deviant behavior."⁴⁰⁴ The Court agreed with the district court in that the plain language of the statute was ambiguous because it was "susceptible to multiple and irreconcilable interpretations" as to which prohibited materials had to be relevant to the defendant's deviant conduct.⁴⁰⁵ After examining several rules of statutory construction, the Court applied the rule of lenity and held that the qualifying language relating to relevance qualifies each of the prohibitions in the statute.⁴⁰⁶ Thus, an offender does not violate the statute unless the "'obscene, pornographic, or sexually stimulating material'" at issue is "relevant to 'deviant behavior pattern.'"⁴⁰⁷

In a case of first impression, the Second District Court of Appeal considered whether the language "willfully and unlawfully cage a child," as contained in the aggravated child abuse statute, encompassed the defendant's "act of chaining his sixteen-year-old stepson at [his] place of work and in the stepson's bedroom."⁴⁰⁸ In *Blow v. State*,⁴⁰⁹ the court held that the plain meaning of the statutory language limits its application to confinement "in some type of wire or bar boxlike structure or a small restrictive enclosure."⁴¹⁰ In support of this conclusion, the court noted, "The noun 'cage' is defined as . . . 'a box or enclosure having some openwork, (as of wires or bars), esp[ecially] for confining or carrying birds or animals,' [while] the verb 'cage' is defined as . . . 'confine, shut in, keep in or as if in a cage' and 'enclose in or with a strong structure to prevent escape.'"⁴¹¹ Because "[t]he plain meaning of the term 'cage' does not include the act of chaining or handcuffing," the court found that the State had not presented a prima facie case of aggravated child abuse by caging.⁴¹²

403. *Id.* at 805–06 (quoting FLA. STAT. § 948.03(5)(a)7 (1999) (amended 2000)).

404. *Kasischke*, 991 So. 2d at 805.

405. *Id.* at 807.

406. *Id.* at 815.

407. *Id.*

408. *Blow v. State*, 993 So. 2d 540, 540–41 (Fla. 2d Dist. Ct. App. 2007), *overruled in part* by *M.N. v. State*, 16 So. 3d 280, 282 (Fla. 2d Dist. Ct. App. 2009) (en banc) (citing FLA. STAT. § 827.03(2) (2005)).

409. 993 So. 2d 540 (Fla. 2d Dist. Ct. App. 2007), *overruled in part* by *M.N. v. State*, 16 So. 3d 280, 282 (Fla. 2d Dist. Ct. App. 2009) (en banc).

410. *Id.* at 541.

411. *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 313 (1986)).

412. *Id.* at 542.

In *Duan v. State*,⁴¹³ the defendant appealed his conviction for extortion on the ground that the victim's mental injury failed to satisfy the elements of that offense.⁴¹⁴ Duan's conviction rested on his threat to testify falsely in order to extort money from the victim.⁴¹⁵ The extortion statute prohibits communication that "maliciously threatens an injury to the person, property or reputation of another" for the purpose of compelling that person to act or to refrain from acting "against his or her will."⁴¹⁶ The issue on appeal was whether the trial court erred in instructing the jury that the extortion statute encompassed threats to a person's mental well-being and did not require physical injury.⁴¹⁷ Affirming Duan's conviction, the First District Court of Appeal found that the language of the statute itself suggests the Legislature intended to criminalize threats to mental or emotional well-being.⁴¹⁸ For example, section 836.05 expressly prohibits threats to reveal private secrets, or divulge information that "would damage the victim's reputation, or . . . expose the victim to disgrace."⁴¹⁹ Such threats, if carried out, could "cause the victim mental or emotional stress."⁴²⁰ Moreover, because "the phrase 'injury to the person' is not further modified as a 'bodily injury' or 'physical injury,'" it includes "both physical and mental injuries."⁴²¹ Thus, the appellate court held that, as a matter of apparent first impression in Florida, the extortion statute prohibits threats to cause mental or psychological injuries.⁴²²

The question facing the Fifth District Court of Appeal in *Beam v. State*⁴²³ was whether an uncle by marriage could be convicted of incest involving a niece whom he had adopted.⁴²⁴ The court held that he could not.⁴²⁵ In support of this conclusion, the court examined the plain language of the incest statutes, holding that it limits the legal definition of incest to persons who are related by consanguinity.⁴²⁶ Because the definition did not include relationships of affinity and adoption, and because Beam did not have the requisite biological relationship with his victim, the court reversed in part,

413. 970 So. 2d 903 (Fla. 1st Dist. Ct. App. 2007) (per curiam).

414. *Id.* at 905.

415. *Id.*

416. *Id.* at 906 (quoting FLA. STAT. § 836.05 (2006)).

417. *Duan*, 970 So. 2d at 906.

418. *Id.* at 908.

419. *Id.* at 907.

420. *Id.*

421. *Id.*

422. *Duan*, 970 So. 2d at 907–08.

423. 1 So. 3d 331 (Fla. 5th Dist. Ct. App. 2009).

424. *Id.* at 331–32.

425. *Id.* at 335.

426. *Id.* at 332–33.

remanded, and directed the trial court to vacate Beam's conviction for incest.⁴²⁷

VII. MISCELLANEOUS

The issue of parental kidnapping was the subject of the Third District Court of Appeal's decision in *Davila v. State*.⁴²⁸ The defendant was convicted of three counts of kidnapping, among other charges.⁴²⁹ Davila appealed the denial of his motion for post conviction relief under Rule 3.850 of the Florida Rules of Criminal Procedure.⁴³⁰ He argued that the three counts of kidnapping should be vacated because, as the victim's parent, it was impossible for him to kidnap his own child.⁴³¹ The Third District Court of Appeal rejected this argument.⁴³² The court recognized the general rule that "a parent cannot be convicted of kidnapping his own child" when there is no court order awarding custody to the parent from whom the child was taken.⁴³³ However, the court relied on its own judicial exception to the statutory rule.⁴³⁴ Under this exception, a parent can be convicted of kidnapping when the defendant "does not simply exercise his rights to the child, but takes her for an ulterior and unlawful purpose which is specifically forbidden by the kidnapping statute itself."⁴³⁵ Denying the requested relief, the court acknowledged that this exception was at variance with the Second District Court of Appeal's holding in *Muniz v. State*⁴³⁶ and certified conflict.⁴³⁷

The First District Court of Appeal resolved a question of causation in a drag-racing case.⁴³⁸ In *Reaves v. State*,⁴³⁹ the defendant sought to withdraw

427. *Id.* at 334–35. The court affirmed, without discussion, Beam's conviction and sentence for the offense of sexual battery upon a person over the age of twelve by use of threats of retaliation. *Beam*, 1 So. 3d at 331.

428. 26 So. 3d 5, 6 (Fla. 3d Dist. Ct. App. 2009), *reh'g granted*, 36 So. 3d 83 (Fla. 2010).

429. *Id.* at 6.

430. *Id.*; see also FLA. R. CRIM. P. 3.850 (specifying the grounds constituting claims for post-conviction relief).

431. *Davila*, 26 So. 3d at 7.

432. See *id.*

433. *Id.* (citing *Johnson v. State*, 637 So. 2d 3, 4 (Fla. 3d Dist. Ct. App. 1994)).

434. *Id.*

435. *Id.* (quoting *Lafleur v. State*, 661 So. 2d 346, 349 (Fla. 3d Dist. Ct. App. 1995)).

436. 764 So. 2d 729, 729 (Fla. 2d Dist. Ct. App. 2000) (holding that when a parent or legal guardian confines a child under the age of thirteen, no crime is committed under the kidnapping statute unless a court order has deprived the parent or legal guardian of authority over that child.).

437. *Davila*, 26 So. 3d at 7.

438. *Reaves v. State*, 979 So. 2d 1066 (Fla. 1st Dist. Ct. App. 2008) (per curiam).

439. 979 So. 2d 1066 (Fla. 1st Dist. Ct. App. 2008) (per curiam).

his plea of guilty to vehicular homicide.⁴⁴⁰ In support of his argument that he had not caused the victim's death, he proffered two alternate theories.⁴⁴¹ First, he suggested that the victim, a passenger in the other car, had caused her own death because she participated voluntarily in the race.⁴⁴² Second, he claimed that the other racer, Street, was the sole proximate cause of the passenger's death because he refused to decelerate and merge upon approaching the median.⁴⁴³

On appeal, the First District Court of Appeal found no abuse of discretion in the trial court's denial of Reaves' motion to withdraw his guilty plea.⁴⁴⁴ The court rejected his first theory based on the rule that "[c]ases where the decedent is held responsible involve circumstances where the deceased's conduct *alone* led to his or her death."⁴⁴⁵ In this case, there was no evidence that the passenger had "played an active role in the race, or . . . even acquiesced to Street's decision to participate in the race."⁴⁴⁶ Without evidence that the passenger's conduct was the singular cause of the accident the court held that she was not the proximate cause of her own death.⁴⁴⁷ The court also rejected the second theory of causation on the ground that it was natural and foreseeable that Street would accelerate and attempt to pass Reaves.⁴⁴⁸ Moreover, the evidence showed that Reaves refused to allow the other vehicle to merge as both cars approached the median.⁴⁴⁹ Thus, both drivers were the proximate cause of the victim's death.⁴⁵⁰

VIII. CONCLUSION

During the survey period, the Supreme Court of the United States rendered an important decision in *Graham*, concerning the punishment of juvenile, non-homicide offenders in Florida.⁴⁵¹ At the same time, the Supreme Court of Florida settled several conflicts among Florida's District Courts of Appeal and interpreted a number of statutes, defenses, common

440. *Id.* at 1069.

441. *Id.*

442. *Id.*

443. *Id.*

444. *Reaves*, 979 So. 2d at 1070.

445. *Id.* at 1069.

446. *Id.* at 1070.

447. *Id.*

448. *Id.*

449. *Reaves*, 979 So. 2d at 1070.

450. *See id.*

451. *Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010).

law doctrines, and constitutional principles.⁴⁵² Some of these decisions, including *Montgomery*,⁴⁵³ concerning the element of intent in the offense of manslaughter by act, raised as many issues as they resolved. Florida's District Courts of Appeal were active as well, certifying several conflicts and questions of great public importance to the Supreme Court of Florida.⁴⁵⁴

452. See, e.g., *Kasischke v. State*, 991 So. 2d 803 (Fla. 2008); *Lescher v. Fla. Dep't of Highway Safety & Motor Vehicles*, 985 So. 2d 1078 (Fla. 2008); *Griffin v. State*, 980 So. 2d 1035 (Fla. 2008) (per curiam).

453. *State v. Montgomery*, 39 So. 3d 252 (Fla. 2010).

454. See, e.g., *Rosa v. State*, 35 Fla. L. Weekly D1361 (2d Dist. Ct. App. July 18, 2010); *Williams v. State*, 40 So. 3d 72 (Fla. 4th Dist. Ct. App. 2010); *Coicou I*, 867 So. 2d 409 (Fla. 3d Dist. Ct. App. 2003).