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Committee on Criminal Justice

CONSTITUTIONAL PROHIBITIONS AFFECTING CRIMINAL LAWS

Statement of the Issue

The purpose of this interim project brief is to provide legislators with information they may use to assess whether legislation is susceptible to various constitutional challenges and to craft legislation to avoid those challenges. Successful constitutional challenges can have serious consequences, such as invalidating criminal laws or provisions, vacating or reducing sentences, or releasing offenders from prison earlier than projected.

Discussion

Federal and State Court Jurisdiction

Controlling law regarding the constitutionality of a state criminal law may or may not emanate from the highest state or federal court. Lower court decisions on constitutional questions may be controlling law and may necessitate legislation to correct a constitutional defect. Federal and state courts have concurrent jurisdiction over federal constitutional questions involving state statutes.¹ The United States Supreme Court is the “final arbiter of federal constitutional law,” if it exercises its discretionary jurisdiction.² “The court of last resort of each sovereign state is the final arbiter as to whether ... [a state statute] conforms to its own constitution[.]”³ However, while the Florida Supreme Court is the highest state court and its decisions are binding on all of the Florida state courts, not every constitutional question reaches the Florida Supreme Court. “[D]ecisions of the district courts of appeal represent the law of Florida unless and until they are overruled” by the Florida Supreme Court.⁴ Further, absent interdistrict conflict or being overruled by the Florida Supreme Court, the decision of a single district court of appeal is controlling law on all state trial courts⁵ and state agencies.⁶

“Facial” Challenge and “As Applied” Challenge

Some constitutional challenges are directed at state criminal laws as enacted. If successful, such challenges may invalidate the laws unless the constitutional defect is corrected or correctable by the Legislature. This type of challenge is often described as a “facial” challenge. “A determination that a statute is facially unconstitutional means that no set of circumstances exists under which the statute would be valid. A facial challenge considers only the text of the statute, not its application to a particular set of circumstances, and the challenger must demonstrate that the statute’s provisions pose a present total and fatal conflict with applicable constitutional standards.”⁷

Other constitutional challenges are directed at particular applications of state criminal laws. If successful, such challenges do not invalidate the laws and legislative action is not necessarily required, unless the Legislature determines that the laws could be written so as to avoid future unconstitutional applications. This type of

¹ *Lloyd v. Page*, 474 So.2d 865, 867 (Fla. 1st DCA 1985).

² *In re Advisory Opinion to the Governor*, 509 So.2d 292, 302 (Fla.1987).

³ *Liquor Store v. Continental Distilling Corp.*, 40 So.2d 371, 375 (Fla.1949).

⁴ *Stanfill v. State*, 384 So.2d 141, 143 (Fla.1980).

⁵ *Pardo v. State*, 596 So.2d 665, 666 (Fla.1992).

⁶ *Mikolsky v. Unemployment Appeals Com’n*, 721 So.2d 738, 740 (Fla. 5th DCA 1998).

⁷ *Duval County School Bd. v. State, Bd. of Educ.*, 998 So.2d 641, 643 (Fla. 1st DCA 2008) (internal quotation and citations omitted).

challenge is often referred to as an “as applied” challenge. An “as applied” challenge is to the constitutionality of the fact-specific application of a statute to the person challenging the statute.⁸

Single Subject Requirements

Avoiding single subject problems: Limit use of broad subjects like “criminal justice,” especially when the broad subject is the result of floor amendments and the reason for the expansion of the subject appears to be the inclusion of new provisions unrelated to other provisions of the bill. Review provisions of a bill at all stages of the legislative process to ensure that they are properly connected to the subject of the bill. Be cautious of bills that make substantive changes to the criminal law but do not predominately address substantive criminal law or that combine civil and criminal provisions.

Discussion: Article III, section 6 of the Florida Constitution, “[t]he single subject clause[,] contains three requirements. First, each law shall ‘embrace’ only ‘one subject.’ Second, the law may include any matter ‘properly connected’ with the subject. The third requirement, related to the first, is that the subject shall be ‘briefly expressed in the title.’”⁹ The purposes of the single subject clause are “(1) to prevent hodge podge or ‘log rolling’ legislation, i.e., putting two unrelated matters in one act; (2) to prevent surprise or fraud by means of provisions in bills of which the titles gave no intimation, and which might therefore be overlooked and carelessly and unintentionally adopted; and (3) to fairly apprise the people of the subjects of legislation that are being considered, in order that they may have opportunity of being heard thereon.”¹⁰

“[T]he single subject of an act is derived from the short title”¹¹ or “relating clause” (e.g., “An Act relating to theft”). However, the short title “cannot be so broad as to purportedly cover unrelated topics, and thus provide no real guidance as to what the body of the act contains.”¹² While there is no constitutional requirement to index the provisions of an act in the act’s title, “the full title ... must be so worded as not to mislead a person of average intelligence as to the scope of the enactment and [be] sufficient to put that person on notice and cause him to inquire into the body of the statute itself.”¹³

Provisions of an act must be “properly connected” to the act’s single subject. “A connection between a provision and the subject is proper (1) if the connection is natural or logical, or (2) if there is a reasonable explanation for how the provision is (a) necessary to the subject or (b) tends to make effective or promote the objects and purposes of legislation included in the subject.”¹⁴ Notably, the Florida Supreme Court regards two combinations of statutory provisions “with caution: substantive changes to the criminal law that are contained in acts that do not predominately address the substantive criminal law, and chapter laws that combine civil and criminal provisions.”¹⁵

Single subject problem: The single subject clause was violated when the Legislature, shortly before passage of a bill relating to “career criminals,” amended the bill’s subject to “justice system” and added provisions on civil

⁸ See e.g., *State v. Rygwelski*, 899 So.2d 498, 503 (Fla. 2d DCA 2005).

⁹ *Franklin v. State*, 887 So.2d 1063, 1072 (Fla.2002). Multiple-subject problems arising from inclusion by amendment of provisions outside the subject of a bill may be avoided by the legislative procedure referred to as the “rule of germanity,” which requires that a proposed amendment relate to the same subject as the original measure, be a natural and logical expansion of the subject matter of the original proposal, and not raise a new, independent issue. *Rules and Manual of the Senate of the State of Florida, 2008-2010* (as adopted November 18, 2008), at p. 97 (“Germanity Standards”). However, the enforcement of the germanity standards is contingent upon a point of order being raised (and lack of germanity being successfully shown). *Id.*

¹⁰ *State ex rel. Flink v. Canova*, 94 So.2d 181, 184 (Fla.1957) (citation omitted).

¹¹ *Franklin, supra*, at p. 1075. A citation name for an act is “not synonymous with the single subject.” *Id.*

¹² *Id.*, at p. 1076.

¹³ *Williams v. State*, 370 So.2d 1143, 1144 (Fla.1979) (citations omitted).

¹⁴ *Franklin, supra*, at p. 1078. Although not discussed in *Franklin*, the court previously rejected a single subject challenge to an act containing seemingly disparate subject matter because the act was comprehensive legislation intended to address a “crime rate crisis” and each of the areas addressed by the legislation had a logical relationship to controlling crime. *Burch v. State*, 558 So.2d 1, 2 (Fla.1990).

¹⁵ *Id.*, at p. 1079.

remedies for domestic violence.¹⁶ These provisions had failed to pass on their own and were unrelated to other provisions involving violent career criminal sentencing.

No single subject problem: A bill involving civil commitment and treatment of sexually violent predators did not violate single subject by including a provision that made it a crime to escape from a civil commitment facility.¹⁷ The crime was properly connected to the subject of the bill because it promoted the purpose of the bill, which was to protect the public from sexually violent predators.

Ex Post Facto Laws and Florida's Savings Clause

Avoiding ex post facto and savings clause problems: Avoid retroactively enhancing criminal penalties and retroactively criminalizing conduct that was not criminal at the time it was committed. Legislators may want to have staff research case law regarding other retroactive changes, such as those involving gain-time or the rules of evidence, because of the complexity of the law. A retroactive change that does not disadvantage an offender is not an ex post facto violation but may be a savings clause violation if it affects prosecution or punishment for a crime previously committed. An example of such a change is the retroactive reduction of a criminal penalty.

Discussion: Article I, section 10, clause 1 of the United States Constitution prohibits states from passing ex post facto laws. Article I, section 10 of the Florida Constitution prohibits ex post facto laws. This prohibition “applies only to criminal or penal provisions.”¹⁸ “[C]entral to the ex post facto prohibition is a concern for the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.”¹⁹ “In Florida, a law or its equivalent violates the prohibition against ex post facto laws if two conditions are met: (a) it is retrospective in effect; and (b) it diminishes a substantial substantive right the party would have enjoyed under the law existing at the time of the alleged offense.”²⁰ The general rule is that there is no ex post facto violation if the statutory change “is merely procedural and does not increase the punishment, nor change the ingredients of the [offense] or the ultimate facts necessary to establish guilt.”²¹

“There are four general categories of ex post facto laws proscribed by the federal and Florida constitutions: 1) a law that makes conduct criminal that was not criminal before the law was enacted; 2) a law that aggravates a crime or makes it more severe; 3) a law that increases the punishment for an offense; 4) a law that alters the legal

¹⁶ *State v. Thompson*, 750 So. 2d 643 (Fla.1999). Laws that violate the single subject clause generally are “cured” by the biennial adoption of the Florida Statutes, and may be “cured” by separating dissimilar provisions and reenacting them into law separately. See *Salter v. State*, 758 So.2d 667, 669-71 (Fla.2000).

¹⁷ *Whitsett v. State*, 913 So.2d 1208 (Fla. 4th DCA 2005).

¹⁸ *Lescher v. Florida Dept. of Highway Safety and Motor Vehicles*, 985 So.2d 1078, 1081 (Fla.2008). “The invalidation of retroactive civil legislation which impairs vested rights, creates new obligations[,] or imposes new penalties ordinarily is based on the conclusion that the legislation violates due process.... Where contract rights are involved, the invalidation of the retroactive application of civil legislation may be based on the conclusion that the legislation impairs the obligation of contract.” *R.A.M. of South Florida, Inc. v. WCI Communities, Inc.*, 869 So.2d 1210, 1217 (Fla. 2d DCA 2004) (internal quotations and citations omitted), review denied, 895 So.2d 406 (Fla.2005).

¹⁹ *Miller v. Florida*, 482 U.S. 423, 430 (1987) (internal quotation and citation omitted).

²⁰ *Dugger v. Williams*, 593 So.2d 180, 181 (Fla.1991) (citations omitted). “There is no requirement that the substantive right be ‘vested’ or absolute, since the ex post facto provision can be violated even by the retroactive diminishment of access to a purely discretionary or conditional advantage. Such might occur, for example, if the legislature diminishes a state agency’s discretion to award an advantage to a person protected by the ex post facto provision. This is true even when the person has no vested right to receive that advantage and later may be denied the advantage if the discretion otherwise is lawfully exercised. In other words, the error occurs not because the person is being denied the advantage (since there is no absolute right to receive it in the first place), but because the person is denied the same level of access to the advantage that existed at the time the criminal offense was committed.” *Id.* In *Dugger*, the Florida Supreme Court held that retroactive application of a statute making defendants convicted of capital felonies ineligible for mandatory recommendations for executive clemency by the Department of Corrections violated Florida’s ex post facto provision.

²¹ *Miller, supra*, at p. 430 (internal quotation and citation omitted). See *Morrow v. State*, 914 So.2d 1085, 1086 (Fla. 4th DCA 2005) (retroactive application of statute requiring blood and saliva samples for DNA testing “does not alter the elements of Morrow’s criminal conduct or increase the penalty for his crime”).

rules of evidence by permitting less or different testimony to obtain a conviction than was permitted when the particular offense was committed.”²²

An ex post facto law may also violate Florida’s savings clause, Article X, section 9 of the Florida Constitution, which provides that “[r]epeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed.” This constitutional provision operates as a savings clause to preserve laws in effect at the time of a defendant’s crime that affect prosecution or punishment of the defendant for that crime. It applies to “statutes that effect a substantive change in the law,” not to statutes that “are merely procedural or remedial.”²³

Ex post facto and savings clause problems: Retroactively applying amendments to statutes of limitation is an ex post facto violation if it allows for prosecution of offenses time-barred under the pre-amended statute.

A retroactive penalty enhancement or reduction is a savings clause violation because it affects punishment of crimes previously committed.²⁴

No ex post facto or savings clause problems: Retroactively applying amendments to statutes of limitation is not an ex post facto violation if it is done before prosecution is time-barred under the pre-amended statute and it is clearly indicated that the amended statute is to apply retroactively to “cases pending” when it becomes effective.²⁵ The term “cases pending” has been construed to mean “criminal offenses that had not been time-barred by the applicable statute of limitations.”²⁶

A statute which established the Parole Commission’s authority over control release did not violate the savings clause as applied to permit use of control release for offenders who committed their offenses prior to the enactment of the control release statute.²⁷ Control release is a temporary administrative mechanism intended to relieve prison overcrowding and is procedural in nature.

Scienter or Mens Rea

Avoiding scienter or mens rea problems: If legislators intend that a crime not include a guilty knowledge requirement or criminal intent requirement, best practice is to clearly indicate that intent. However, in some instances the exclusion of a knowledge or intent requirement may violate due process. For example, due process may be violated by punishing a failure to act without requiring a showing of knowledge of duty to act. Where a statute is silent on the issue of scienter, the recent trend is to read a guilty knowledge requirement into the law, at least in felony cases.

Discussion: “The term ‘scienter’ means ‘knowingly’ and is frequently used to signify the defendant’s guilty knowledge. The term ‘mens rea’ refers to a guilty mind, a guilty or wrongful purpose, a criminal intent. Both of these terms require that a defendant have some degree of guilty knowledge, or some degree of blameworthiness or culpability, in order to be criminally liable.”²⁸ “Scienter is often necessary to comport with due process

²² *State v. Dione*, 814 So.2d 1087, 1092 (Fla. 5th DCA 2002) (citations omitted), review granted, 841 So.2d 466 (Fla.2003), case dismissed, 865 So.2d 1258 (Fla.2004). “A statute is not punitive, for purposes of determining whether it violates the ex post facto clause, merely because it can be applied in the context of a criminal case.” *Griffin v. State*, 980 So.2d 1035, 1037 (Fla.2008) (citation omitted). For example, the retroactive cancellation of overcrowding credits for a group of offenders who had received the credits was not an ex post facto violation because there was no right for the offenders to receive the credits at the time they committed their offenses. *Winkler v. Moore*, 831 So.2d 63, 68 (Fla.2002).

²³ *Grice v. State*, 967 So.2d 957, 960 (Fla.1st DCA 2007) (citations omitted), review denied, 980 So.2d 489 (Fla.2008).

²⁴ See *Castle v. State*, 305 So.2d 794, 796 (Fla. 4th DCA 1974), affirmed, 330 So.2d 10 (Fla.1976) (Florida’s savings clause prohibited retroactive application of reduced penalty for arson to reduce the sentence of a defendant sentenced under the prior arson statute).

²⁵ *Scharfschwerdt v. Kanarek*, 553 So.2d 218, 220 (Fla. 4th DCA 1989), review denied, 563 So.2d 633 (Fla.1990).

²⁶ *State v. Calderon*, 951 So.2d 1031, 1034 (Fla. 3d DCA 2007).

²⁷ *State v. Florida Parole Com’n*, 624 So.2d 324, 327 (Fla. 1st DCA 1993), review denied, 634 So.2d 627 (Fla.1994).

²⁸ *Women’s Medical Professional Corp. v. Voinovich*, 911 F.Supp. 1051, 1081 (S.D. Ohio 1995) (internal quotations and citations omitted), affirmed, 130 F.3d 187 (6th Cir. 1997), certiorari denied, 523 U.S. 1036 (1998).

requirements[.]”²⁹ For example, due process “may come into play where the statute imposes an affirmative duty to act and then penalizes the failure to comply. In such an instance, if the failure to act otherwise amounts to essentially innocent conduct, the failure of the penal statute to require some specific intent may violate due process.”³⁰

“Criminal statutes are presumed to include broadly applicable scienter requirements in the absence of express contrary intent[.]”³¹ “Where the statute is silent on the issue of scienter, the recent trend is to read a guilty knowledge requirement into the law, at least in felony cases.”³² Crimes in which “criminal liability is imposed in the absence of any mens rea whatsoever”³³ are often referred to as “strict liability” crimes. “While strict-liability offenses are not unknown to the criminal law and do not invariably offend constitutional requirements, they are generally viewed with disfavor.”³⁴

Guilty knowledge: Where the Legislature was silent as to whether a felony offense for failure to register contained a knowledge requirement, a knowledge requirement was inferred: The State must prove the defendant actually knew of the requirement to register or prove the probability of such knowledge.³⁵

No guilty knowledge: In creating the crime of sexual activity by a person 24 years of age or older with a person 16 or 17 years of age, the Legislature “left no doubt as to its intention” to make this crime a strict liability crime.³⁶ Further, this crime involved underage victims and fell within a category of crimes for which the Legislature could dispense with scienter.

Separation of Powers and Delegation

Avoiding separation of powers and delegation problems: Separation of powers problems often arise when there is uncertainty as to whether what the Legislature has enacted is within its constitutional powers. For example, it is not always a simple matter determining whether a law or provision of a law is substantive criminal law in the Legislature’s domain or a procedural matter that encroaches upon the Florida Supreme Court’s authority to adopt court rules and procedures. Legislators may want to have staff research case law to determine if any cases provide guidance on whether legislation may be susceptible to a separation of powers challenge.

Delegation problems often arise in the context of legislative delegations to administrative agencies. Legislators need to provide sufficient standards to guide the agency on how a law is to be administered. For example, standards are insufficient if an agency is effectively defining what is criminal.

²⁹ *State v. Giorgetti*, 868 So.2d 512, 518 (Fla.2004). See discussion, *infra*, in this brief regarding scienter and vagueness and overbreadth issues.

³⁰ *State v. Oxx*, 417 So.2d 287, 290 (Fla. 5th DCA 1982).

³¹ *Cashatt v. State*, 873 So.2d 430, 436 (Fla. 1st DCA 2004). In determining legislative intent, “[a]n express provision dispensing with guilty knowledge will always control, of course, since in that instance the Legislature will have made its intent clear.” *Giorgetti*, at p. 516.

³² *Hodge v. State*, 866 So.2d 1270, 1272 (Fla. 4th DCA 2004) (citation omitted).

³³ *U.S. v. Bailey*, 444 U.S. 394, 404, n. 4 (1980).

³⁴ *State v. Rubio*, 917 So.2d 383, 394 (Fla. 5th DCA 2005) (citation omitted), affirmed in part and reversed in part, 967 So.2d 768 (Fla.2007). For example, some “public welfare offenses” are strict liability offenses. The United States Supreme Court has stated these offenses do not threaten the security of the state but “may be regarded as offenses against its authority, for their occurrence impairs the efficiency of controls deemed essential to the social order as presently constituted. In this respect, whatever the intent of the violator, the injury is the same, and the consequences are injurious or not according to fortuity. Hence, legislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element. The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities. Also, penalties commonly are relatively small, and conviction does no grave damage to an offender’s reputation.” *Morissette v. U.S.*, 342 U.S. 246, 256 (1952). See *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So.2d 1011, 1017, n. 6 (Fla. 2d DCA 2005) (indicating that statute regulating sale and use of fireworks “creates a misdemeanor to protect citizens, primarily children, from what is sometimes described as a public welfare offense” and “is either a strict liability crime or one requiring minimal mens rea”).

³⁵ *Giorgetti*, *supra*, at p. 520.

³⁶ *Hodge*, *supra*, at p. 1272.

Discussion: Article II, section 3 of the Florida Constitution, prohibits one branch from encroaching upon the powers of another branch.³⁷ It also prohibits a branch of government from delegating its constitutionally assigned powers to another branch. For example, delegation issues sometimes arise over legislative delegations to administrative agencies. “Generally, the Legislature may not delegate the power to enact a law or the right to exercise unrestricted discretion in applying the law. However, the Legislature may enact a law, complete in itself, designed to accomplish a general public purpose, and may expressly authorize designated officials within definite valid limitations to provide rules and regulations for the complete operation and enforcement of the law within its expressed general purpose.”³⁸ The Legislature must provide the agency with “sufficient standards to guide the agency in the administration of the law.”³⁹ “[T]he sufficiency of adequate standards depends on the complexity of the subject matter and the degree of difficulty involved in articulating finite standards.”⁴⁰

Separation of powers and delegation problems: Legislation which enacted deadlines for postconviction motions by inmates sentenced to death impermissibly encroached upon the Florida Supreme Court’s rulemaking powers.⁴¹ The court had adopted a rule that functionally embraced claims formerly raised by a petition for writ of habeas corpus. The Legislature effectively prescribed the “course, form, manner, means, method, mode, order, process or steps by which a capital inmate’s habeas corpus rights are asserted in Florida courts.”⁴²

The Legislature unconstitutionally delegated to the former Department of Health and Rehabilitative Services (HRS) the power to define the elements of a crime when it created a third degree felony offense of escape from a residential commitment facility in restrictiveness level VI or above, and gave the HRS complete discretion to define restrictiveness levels.⁴³ This vested the HRS with “complete power to define the crime”: “[H]ad HRS exercised the discretion granted to it by simply numbering the restrictiveness levels 1-4, no crime would have been committed under the statute. HRS might well not have given the numbers ‘VI or above’ to any of the facilities.”⁴⁴

No separation of powers or delegation problems: A statutory provision relevant to the time for filing a complaint for extraordinary relief from disciplinary action taken by the Department of Corrections was not an intrusion upon the Florida Supreme Court’s authority to adopt court rules and procedures but rather a “technical matter not outside the purview of the legislature.”⁴⁵

A statute authorizing the Department of Environmental Protection (DEP) to create special conditions on permits, the violation of which was a misdemeanor, was not an unconstitutional delegation. The Legislature did not leave to the DEP “the decision to determine which acts constitute a crime” and did not grant to the agency “authority to pick and choose which rule, regulation, or permit condition shall be prosecuted upon its violation.”⁴⁶ The “DEP utilize[d] its expertise and special knowledge to flesh out the Legislature’s stated intent” regarding pollution prevention and control.⁴⁷ The statute also provided clear notice of the acts prohibited.

³⁷ *Simms v. State Dep’t of Health and Rehab. Servs.*, 641 So.2d 957, 960 (Fla. 3d DCA 1994), review denied, 649 So.2d 870 (Fla.1994). “[S]eparation of powers does not mean that every governmental activity is classified as belonging exclusively to a single branch of government.” *Id.* For example, the fact that the Florida Supreme Court has inherent power to enjoin the unlicensed practice of law and issue contempt citations against people engaged in this practice does not exclude the Legislature from criminalizing the unlicensed practice of law. *State v. Palmer*, 791 So.2d 1181, 1184 (Fla. 1st DCA 2001), review denied, 817 So.2d 849 (Fla.2002).

³⁸ *Sims v. State*, 754 So.2d 657, 668 (Fla.2000) (internal quotation and citations omitted), certiorari denied, 467 U.S. 1246 (1984).

³⁹ *Metropolitan Dade County v. P.J. Birds, Inc.*, 654 So.2d 170, 175 (Fla. 3d DCA 1995) (citations omitted).

⁴⁰ *Avatar Development Corp. v. State*, 723 So.2d 199, 207 (Fla.1998) (internal quotation and citation omitted).

⁴¹ *Allen v. Butterworth*, 756 So.2d 52 (Fla.2000).

⁴² *Id.*, at p. 64 (internal quotation and citation omitted).

⁴³ *B.H. v. State*, 645 So.2d 987 (Fla.1994), certiorari denied, 515 U.S. 1132 (1995).

⁴⁴ *Avatar, supra*, at p. 203 (citation omitted), discussing *B.H., supra*.

⁴⁵ *Kalway v. State*, 708 So.2d 267, 269 (Fla.1998).

⁴⁶ *Avatar, supra*, at p. 204.

⁴⁷ *Id.*

Overbreadth

Avoiding overbreadth problems: Legislators must narrowly craft legislation and advance an important governmental interest to restrict speech and conduct afforded protection under the Florida and federal constitutions. Legislators may want to have staff research case law for guidance. Overbroad legislation may also violate due process if it can be construed to apply to entirely innocent activities and create prohibitions that are irrational. Including a scienter or mens rea requirement may make a criminal provision less susceptible to an overbreadth challenge.

Discussion: “[B]oth the First Amendment to the United States Constitution and Article 1, Section 4, of the Florida Constitution protect the rights of individuals to express themselves in many ways.”⁴⁸ For example, “[t]here are few categories of speech that are not protected by the First Amendment.”⁴⁹ Exceptions include “true threats, fighting words, incitements to imminent lawless action, and classes of lewd and obscene speech.”⁵⁰ “A statute is deemed to be overbroad if it seeks to control or prevent activities properly subject to regulation by means which sweep too broadly into an area of constitutionally protected freedom. Any restrictions on first amendment rights must be supported by a compelling governmental interest, and must be narrowly drawn to insure that there is no more infringement than is necessary.”⁵¹

Overbroad statutes may also violate due process. The Fourteenth Amendment of the United States Constitution and Article I, section 9 of the Florida Constitution “protect individuals from arbitrary and unreasonable governmental interference with a person’s right to life, liberty, and property.”⁵² Due process requires that a penal statute’s “purpose be for the general welfare” and “the means selected” must “have a reasonable and substantial relationship to the object sought to be attained” and “not be unreasonable, arbitrary, or capricious.”⁵³ Due process is violated when a penal statute is “susceptible of application to entirely innocent activities” and creates “prohibitions that lack any rational basis.”⁵⁴

Overbreadth: A statute that punished publications tending to expose persons to hatred, contempt, or ridicule was unconstitutionally overbroad because it “profoundly” impacted clearly protected speech, e.g., it “could be construed to proscribe parodies, anonymous political cartoons, or anonymous ‘letters to the editor’ of a local newspaper that ridicule or expose to contempt individuals who are not public figures, but are nevertheless ‘in the news.’”⁵⁵ A statute that punished the unauthorized wearing of a military uniform, imitation uniform, or any part thereof, violated due process because the statute could apply to innocent conduct (“a child wearing his parent’s Army boots or a person wearing an imitation uniform for Halloween”) and contained “no requirement that the action be taken with the intent to deceive a reasonable person or in an effort to impersonate a member of the military.”⁵⁶

No overbreadth: A statute that punished computer solicitation of a minor for illegal sexual activity did not chill protected communications. “Consenting adults are free to engage in sexually oriented communication without violating the statute, and not all sexually oriented communications seduce or lure[.]”⁵⁷ Due process was not violated by a statute punishing possession of a controlled substance within 1000 feet of a church because the statute only impinged on the act of selling drugs and had the legitimate goal of deterring drug activity where the public congregates.⁵⁸

⁴⁸ *J.L.S. v. State*, 947 So.2d 641, 644 (Fla. 3d DCA 2007) (citation omitted), review denied, 958 So.2d 919 (Fla.2007).

⁴⁹ *Brayshaw v. City of Tallahassee*, --- F.Supp.2d ----, 2010 WL 1740832 (N.D.Fla 2010), at p. 7.

⁵⁰ *Id.*

⁵¹ *J.L.S.*, *supra*, at p. 644 (citations omitted).

⁵² *State v. Robinson*, 873 So.2d 1205, 1212 (Fla.2004) (citations omitted).

⁵³ *State v. Saiez*, 489 So.2d 1125, 1128 (Fla.1986) (citations omitted).

⁵⁴ *Robinson v. State*, 393 So.2d 1076, 1077 (Fla.1980).

⁵⁵ *State v. Shank*, 795 So.2d 1067, 1070 (Fla. 4th DCA 2001).

⁵⁶ *State v. Montas*, 993 So.2d 1127, 1131-32 (Fla. 5th DCA 2007).

⁵⁷ *Cashatt*, *supra*, at p. 436.

⁵⁸ *Hobby v. State*, 761 So.2d 1234 (Fla. 2d DCA 2000), review denied, 779 So.2d 271 (Fla.2000), certiorari denied, 532 U.S. 985 (2001).

Vagueness

Avoiding vagueness problems: Due process requires that statutory language be sufficiently definite to apprise a person of what conduct the Legislature intends to make criminal. Legislators do not have to define every word but a word that has a meaning different than its common usage probably should be defined. Including a scienter or mens rea requirement may make a criminal provision less susceptible to a vagueness challenge. Laws which are susceptible to differing constructions are construed in favor of the accused.

Discussion: “The requirements of due process of Article I, Section 9, Florida Constitution, and the Fifth and Fourteenth Amendments to the Constitution of the United States are not fulfilled unless the Legislature, in the promulgation of a penal statute, uses language sufficiently definite to apprise those to whom it applies what conduct on their part is prohibited. It is constitutionally impermissible for the Legislature to use such vague and broad language that a person of common intelligence must speculate about its meaning and be subjected to arrest and punishment if the guess is wrong.”⁵⁹ A vague statute, “because of its imprecision, may also invite arbitrary and discriminatory enforcement.”⁶⁰

The fact that the Legislature may not have defined words or chosen the clearest or most precise language in a statute does not necessarily render a statute unconstitutionally vague.⁶¹ “In the absence of a statutory definition, resort may be had to case law or related statutory provisions which define the term, and where a statute does not specifically define words of common usage, such words are construed in their plain and ordinary sense.”⁶²

“Significantly, in evaluating criminal or quasi-criminal enactments against a challenge for vagueness, the [United States] Supreme Court has long recognized that a mens rea or scienter requirement to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid.”⁶³

Vagueness: A statute that punished negligently depriving a child of necessary food, clothing, shelter or medical treatment was unconstitutionally vague, indefinite, and overbroad. “Without some statutory standards or guidelines,” the Legislature “effectively set a net large enough to catch all possible offenders” and “left to the courts the power to say who should be detained and who should be set at large.”⁶⁴

No vagueness: A statute which punished depriving a child of necessary food, clothing, shelter or medical treatment, willfully or by culpable negligence, was not unconstitutionally vague. The net was closed because the statute did not proscribe negligent treatment.⁶⁵

⁵⁹ *State v. Wershow*, 343 So.2d 605, 608 (Fla.1977). If a law is “indefinite and susceptible of differing constructions, the rule of lenity applies; the statute must be construed in the manner most favorable to the accused.” *State v. Del Castillo*, 890 So.2d 376, 398 (Fla. 3d DCA 2004). See s. 775.021(1), F.S. (codifying the rule of lenity). The rule “simultaneously saves a statute from being struck down as void for vagueness or overbreadth and ensures that people who rely upon a reasonable interpretation of statutory language are not punished as criminals.” *Cuellar v. State*, 70 S.W.3d 815, 825 (Tex.Crim.App. 2002).

⁶⁰ *Southeastern Fisheries Ass’n, Inc. v. Department of Natural Resources*, 453 So.2d 1351, 1353 (Fla.1984).

⁶¹ *State v. Barnes*, 686 So.2d 633, 637 (Fla. 2d DCA 1996), review denied, 695 So.2d 698 (Fla.1997), certiorari denied, 522 U.S. 903 (1997). “[A] defendant who establishes only that the statute is vague in the sense that it requires a person to conform his or her conduct to an imprecise but comprehensible standard cannot prevail on a vagueness challenge.” *Id.*

⁶² *State v. Hagan*, 387 So.2d 943, 945 (Fla.1980) (citations omitted). In *Barnes, supra*, the court determined that the undefined terms “high speed vehicle pursuit” and “high speed,” which appeared in a statute punishing unlawful flight from a law enforcement officer, were not impermissibly vague in all of their applications. The meaning of the term “high” could be ascertained from a dictionary definition and the meaning of the term “high speed pursuit” could be ascertained from a plain reading.

⁶³ *M.C. v. State*, 695 So.2d 477, 482-83 (Fla. 3d DCA 1997) (citations omitted), review denied, 700 So.2d 686 (Fla.1997).

⁶⁴ *State v. Winters*, 346 So.2d 991, 993 (Fla.1977).

⁶⁵ *State v. Joyce*, 361 So.2d 406, 407 (Fla.1978).

Federal and State Preemption

Avoiding preemption problems: Federal law may preempt state criminal laws, so legislators may want to ask staff to research preemption questions, which typically arise when a federal agency regulates in a field in which a state also seeks to regulate or there is significant federal law enforcement involvement in a field. If it is clear that Congress expressly preempted states from adopting criminal laws in a particular field, passage of such laws can be avoided. However, preemption may also occur if federal law is so pervasive in a field that it effectively leaves no room for the states to operate or state criminal law is in irreconcilable conflict with federal law. Where there is no express preemption, legislators must use their best judgment, informed by a review of the federal law and available state and federal case law, to determine whether or not adoption of a state criminal law in a field is preempted. For example, many state legislatures are currently making best-judgment assessments whether federal law preempts legislation in their states that is similar to Arizona's recent immigration-related law.⁶⁶

Although local governments have broad authority to enact ordinances, the Legislature may preempt ordinances inconsistent with state criminal law. If legislators intend to preempt local governments from criminalizing or providing particular penalties for conduct, making that intent clear in the law may avoid preemption challenges.

Discussion: Under the Supremacy Clause, Article VI, clause 2 of the United States Constitution, federal law may preempt state criminal laws. There are three types of federal preemption: express; field; and conflict. An express preemption occurs when a “federal statute explicitly demonstrates Congress’ intent to preempt state law.”⁶⁷ Field preemption occurs “when federal regulation in a field is so pervasive . . . that Congress left no room for the states to supplement it.”⁶⁸ Conflict preemption “occurs when it is impossible to comply with both federal and state law, or when state law stands as an obstacle to the objectives of federal law.”⁶⁹

The Legislature may preempt a county or municipal ordinance. “[C]ounties in Florida are given broad authority to enact ordinances” under Article VIII, section 1(f) of the Florida Constitution,⁷⁰ and municipalities are given similar broad authority under Article VII, section 2(b) of the Florida Constitution.⁷¹ However, both of these constitutional provisions preclude ordinances inconsistent with state law.

“Florida law recognizes two types of preemption: express and implied. Express preemption requires a specific legislative statement; it cannot be implied or inferred. Express preemption of a field by the Legislature must be accomplished by clear language stating that intent. In cases where the Legislature expressly or specifically preempts an area, there is no problem with ascertaining what the Legislature intended.”⁷² “Preemption is implied when the legislative scheme is so pervasive as to evidence an intent to preempt the particular area, and where strong public policy reasons exist for finding such an area to be preempted by the Legislature. Implied preemption is found where the state legislative scheme of regulation is pervasive and the local legislation would present the danger of conflict with that pervasive regulatory scheme.”⁷³

Local governments and the Legislature may legislate concurrently in areas unless there is an express state preemption, but an ordinance “must not conflict with any controlling provision of a statute.”⁷⁴ For example, local

⁶⁶ SB 1070, as amended by HB 2162, Forty-ninth Legislature, Second Regular Session (2010), State of Arizona.

⁶⁷ *Cloyd v. State*, 943 So.2d 149, 159 (Fla. 3d DCA 2006), review denied, 959 So.2d 716 (Fla.2007).

⁶⁸ *Id.* “[F]ield preemption should not be inferred simply because [an] agency’s regulations are comprehensive.” *Id.*, at p. 160 (internal quotation and citation omitted).

⁶⁹ *Id.*, at p. 159. “The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there is between them.” *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-67 (1989) (internal quotation and citation omitted).

⁷⁰ *Phantom of Clearwater, Inc.*, *supra*, at p. 1018.

⁷¹ *City of Hollywood v. Mulligan*, 934 So.2d 1238, 1243 (Fla.2006).

⁷² *Sarasota Alliance For Fair Elections, Inc. v. Browning*, 28 So.3d 880, 886 (Fla.2010) (citations omitted).

⁷³ *Id.* (internal quotations and citations omitted). “There is conflict between a local ordinance and a state statute when the local ordinance cannot coexist with the state statute.” *Phantom of Brevard, Inc. v. Brevard County*, 3 So.3d 309, 314 (Fla.2008).

⁷⁴ *Thomas v. State*, 614 So.2d 468, 470 (Fla.1993).

governments cannot prohibit an act the Legislature has authorized or authorize an act the Legislature has prohibited.⁷⁵ “Local governments can sometimes create local ordinances which criminalize conduct not governed by state statute[.]”⁷⁶ and, absent express state preemption or conflict with state law, can also create an offense which punishes the same act that is punished by state law.⁷⁷ However, local governments cannot adopt a penalty for an ordinance violation that is “more severe than a state criminal statute regulating the same conduct.”⁷⁸

Federal or state preemption: Federal wiretap law preempted a state law authorizing a wiretap to provide evidence of prostitution. Congress preempted the field of wiretapping but states were authorized by federal law to adopt more (not less) restrictive wiretap legislation.⁷⁹ In the federal law, prostitution was not an enumerated offense for which a wiretap was authorized, nor was it an offense that fell within the general category of “any ‘other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year.’”⁸⁰

An ordinance which prohibited the possession of cannabis and cocaine was not preempted by state law.⁸¹ However, the penalty for violation of this ordinance was invalidated because the ordinance set a greater penalty for the prohibited conduct than provided by state law. The ordinance penalty precluded sentencing options authorized by state law (judicial discretion to withhold adjudication and order probation and to require a violator to participate in a drug rehabilitation program). Similarly, an open container ordinance was preempted by state law because a violation of this ordinance, which was punishable as a misdemeanor, conflicted with state law, which made an open container violation a noncriminal moving traffic violation.⁸²

No federal or state preemption: Federal law did not preempt state law authorizing a wiretap for alleged violations of Florida’s racketeering law (RICO Act) in which the predicate RICO acts were related to prostitution. The Legislature based its need for the RICO Act on “findings of the various economic and other harms visited by organized crime.”⁸³ “These findings of the inherent dangers of organized crime squarely place[d] RICO violations within the federal wiretap law’s category of ‘crime dangerous to life, limb, or property.’”⁸⁴ Further, the federal wiretapping statute authorized wiretaps to investigate alleged federal RICO law violations.

An ordinance prohibiting convicted sexual offenders from residing within 2500 feet of a school was not preempted by state law because the local regulation of the field of sexual predators was not clearly preempted and the 2500 foot buffer zone was not “in cognizable ‘conflict’” with a state law creating a “less restrictive 1000 foot buffer zone[.]”⁸⁵ Similarly, an ordinance which authorized the seizure and impoundment of a motor vehicle whenever a police officer had probable cause to believe the vehicle was used in the commission of certain misdemeanor offenses was not preempted by the Florida Contraband Forfeiture Act (FCFA).⁸⁶ There was no express preemption of the field of forfeiture and the ordinance and the FCFA did not “conflict because they authorize[d] different remedies for different criminal conduct.”⁸⁷ The FCFA allowed for forfeiture of vehicles used in the commission of felonies, but the ordinance allowed for impoundment of vehicles used in the commission of misdemeanors. Impoundment (temporary taking of tangible personal property) is not the same as forfeiture (permanent taking of tangible or intangible real or personal property).

⁷⁵ *Id.*

⁷⁶ *State v. Smith*, 584 So.2d 145, 147 (Fla. 2d DCA 1991), citing s. 125.69, F.S., which authorizes prosecution of county ordinance violations in the same manner as misdemeanor prosecutions.

⁷⁷ *Jaramillo v. City of Homestead*, 322 So.2d 496, 498 (Fla.1975) (approving a municipal ordinance that adopted by general reference all state criminal misdemeanor laws).

⁷⁸ *Smith, supra*, at pp. 146-47.

⁷⁹ *State v. Rivers*, 660 So.2d 1360 (Fla.1995).

⁸⁰ *Id.* at 1362 (citation omitted).

⁸¹ *Edwards v. State*, 422 So.2d 84 (Fla. 2d DCA 1982).

⁸² *Smith, supra*.

⁸³ *State v. Otte*, 887 So.2d 1186, 1190 (Fla.2004).

⁸⁴ *Id.*

⁸⁵ *Exile v. Miami-Dade County*, 35 So.3d 118, 119 (Fla. 3d DCA 2010).

⁸⁶ *City of Hollywood, supra*.

⁸⁷ *Id.*, at p. 1247.