Chapter 5: *Mens Rea*, Concurrence, and Causation

Chapter Overview:

In conjunction with *actus reus*, a crime requires a criminal intent, or *mens rea*. This stems from the belief that a person should only be criminally punished for a crime if they can be held morally blameworthy for the act. If someone commits an act accidentally, without intent, it is believed that they are not morally blameworthy and so should not be criminally accountable. This is intended to uphold the concepts of individual responsibility, deterrence, and a punishment fitting of the crime. This element is essential to a crime and so prosecutors are required to prove *mens rea* beyond a reasonable doubt.

Intent is divided into four categories, which reflect their varying degrees of severity. The most serious form of intent is purposeful intent, which means that the individual acted deliberately for the purpose of committing the crime. The next level of intent requires that an individual act knowingly. This means the perpetrator is aware of the fact that an act is criminal but commits it anyway. The third level is reckless intent, by which an individual is aware of the risky and dangerous nature of their behavior and continues to act knowing that there is a high probability of harm. The lowest level of intent is negligence. Negligence involves participation in risky and dangerous behavior similar to that of recklessness, but in this case the perpetrator is unaware of the great potential for harm and so is considered less blameworthy.

Some criminal acts do not require *mens rea*. These are called strict liability offenses, and they only require that a criminal act be committed. An example of this would be statutory rape laws, by which an individual can be held accountable for sexual misconduct with a minor even if they were not aware of the age of the victim, or believed the age to be different than it was. One may also be punished for mistaking the age of a minor in the case of the sale of alcohol or tobacco.

When *mens rea* is required, as in the great majority of crimes, it is also necessary to show a concurrent between the criminal intent and the criminal act. This means that the intent must exist at the same time as the act. For example, if someone intends to commit murder, and even may attempt to commit murder, but later finds out that the individual they have tried to kill was already dead, he or she cannot be convicted of murder because the intent did not occur concurrent to the murder of the victim. Finally, criminal law also requires that causation be proved beyond a reasonable doubt. It must be shown that the acts committed by the perpetrator were the factual or proximate cause of the harm to the victim. If there are other factors outside the control of the perpetrator that may have contributed to the resulting harm, it must be determined if it was those other factors or the action of the perpetrator which was the factual or legal cause of harm. In this chapter of the supplement you will read Florida cases which exemplify the various levels of criminal intent, as well as the necessity for concurrence and causality.

I. *Mens rea*:

Section Introduction: *Mens rea* is the necessary element of intent in the commission of a crime. There are four different levels of *mens rea*, which imply different degrees of criminal culpability. These are known as purposely, knowingly, recklessly, and negligently, and they will each be addressed separately.

> Purposely: This is the most serious form of criminal intent. It implies that a defendant acted with the express purpose of the commission of a crime. The following case examines the question of what is required for a perpetrator to act purposely.

***Crittendon* v. *State*, 338 So.2d 1088 (1976)**

Procedural History: Defendant was convicted before the Circuit Court, Duval County, R. Hudson Olliff, J., of murder in second degree, and he appealed. The District Court of Appeal, Smith, J., held that venue was properly laid in county where acts of defendants reached far enough toward accomplishment of desired result to amount to commencement of consummation of murder, notwithstanding fact that victim was fatally shot in adjoining county; and that defendant was properly charged and convicted as principal in first degree and properly charged and tried in county where much of his aid was given.

Issue(s): Did the appellant commits acts with the purpose of facilitating a murder while in Duval County where he was charged and tried?

Facts: On June 16, 1974, Crittendon and three confederates, all black males, armed themselves and set out in an automobile to 'catch a white devil and kill him.' In Duval County one of the group wrote a note, declaring vengeance on society by 'the Black Revolutionary Army,' which they agreed would be secured to the victim's body by the stab of a knife. After a predatory search in Duval County they picked up the hitchhiking victim at Jacksonville Beach in Duval County. They then drove just over the boundary of St. Johns County and, in a deserted area, shot Orlando dead with a pistol. They left the note as planned and returned to Duval County, where they threatened whites in the community in tape-recorded messages. The Duval County grand jury indicted Crittendon and the others for murder in the first degree, committed by killing the victim from a premeditated design to effect his death 'in the County of Duval and the County of St. Johns, State of Florida.' The indictment was not attacked for any asserted irregularity in its allegation of venue. There was no motion for change of venue.

Holding: Affirmed.

Opinion: SMITH, Judge.

The Duval County circuit court convicted Crittendon of murder in the second degree and sentenced him to 199 years imprisonment for his part in the brutal murder of Stephen

Anthony Orlando. The only substantial point raised on Crittendon's appeal is that venue was improperly laid in Duval County.

Crittendon's argument that venue could properly be laid only in the county where the victim was shot and where he died is not compromised by his failure before trial to attack the indictment as containing venue allegations insufficient as a matter of law. He was not obliged to anticipate proof that Orlando was shot and killed in the same place, St. Johns County. Consistent with Crittendon's position, the indictment might properly have been regarded as intending to invoke s 910.09, F.S.1975:

> 'If the cause of death is inflicted in one county and death occurs in another county, the offender may be tried in either county.'

The Constitution of the society which Crittendon so grievously insulted assures the accused in a criminal case 'a speedy and public trial by impartial jury in the county where the crime was committed.' [Art. I, s 16, Florida Constitution] Except in circumstances not here pertinent, the Duval County grand jury had power to indict only for an offense 'triable within the county.' [Secs. 905.16, .21, F.S.197] The grand jury charged unambiguously that Crittendon's offense was committed in the counties of Duval and St. Johns, and did not invoke its power to indict for a murder committed in a county unknown, but either in Duval or St. Johns:

> 'If the county (where the crime was committed) is not known, the indictment or information may charge venue in two or more counties conjunctively and proof that the crime was committed in that area shall be sufficient; but before pleading the accused may elect in which of those counties he will be tried.' [Art. I, s 16, Fla.Const.; s 910.03, F.S.1975]

The State, pointing to evidence that the murder party assembled, prepared themselves and picked up their victim in Duval County, claims the benefit of s 910.05, F.S.1975, which provides:

> 'If the acts constituting one offense are committed in two or more counties, the offender may be tried in any county in which any of the acts occurred.'

Were any of the 'acts constituting' this murder committed in Duval County? The meaning of s 910.05's critical phrase is illumined by its provisions before 1970, when legislation changed only its 'style of expression.' We are entitled to the benefit of that illumination in interpreting the present law. [*State ex rel. Szabo Food Services, Inc. v. Dickinson*, 286 So.2d 529, 531 (Fla.1974); *Tampa & J. Ry. Co. v. Catts*, 79 Fla. 235, 243, 85 So. 364, 366 (1920). Section 910.05, F.S.1969, provided:

> 'Where several acts are requisite to the commission of an offense, the trial may be in any county in which any of such acts occurs.'

The legislature regarded 'acts constituting' an offense as substantially equivalent to 'acts . . . requisite to the commission of an offense'; so, therefore, do we.

There are no Florida decisions answering the central question in this case. In considering judicial interpretations of similar venue statutes in other states, we must distinguish those of California and other states where statutes permit prosecution anywhere 'the acts or effects thereof constituting or requisite to the consummation of the offense occur . . ..' [E.g., *People v. Powell*, 67 Cal.2d 32, 59 Cal.Rptr. 817, 835, 429 P.2d 137, 155 (1967); *State v. Parker*, 235 Or. 366, 384 P.2d 986 (1963); *People v. Tullo*, 41 A.D.2d 957, 343 N.Y.S.2d 984 (1973), aff'd 34 N.Y.2d 712, 356 N.Y.S.2d 861, 313 N.E.2d 340 (1974); *People v. Thorn*, 21 Misc.Rep. 130, 47 N.Y.S. 46 (Gen.Sess. N.Y.Co. 1897); Annot., 30 A.L.R.2d 1265, 1285 (1953)]

The Kansas Supreme Court, in *State v. Pyle*, [216 Kan. 423, 434--35, 532 P.2d 1309, 1318 (1975)], regarded a Kansas statute like Florida's pre-1970 s 910.05 as sufficiently 'similar' to California's to be given identical effect. We disagree. In *Pyle*, the Court stated:

> (I)f Goldie was removed from her home (in Kiowa County) and killed in another county, the removal was an act 'requisite' to the commission of the murder; venue would still be proper in Kiowa county.' [*Pyle*, 216 Kan. at 435, 532 P.2d at 1318]

This decision is perhaps explicable by the fact that the victim's body was never found and the place of her death and of the force causing it could not be proved. Many acts of preparation may be requisite to 'consummation' of a particular homicide, but preparation is not one of the elemental acts 'constituting' or 'requisite to the commission' of premeditated first degree murder.

Venue statutes are typically construed coextensively with the law of criminal attempts: if the criminal object was so far effectuated by acts in the county of the forum that a prosecution for the attempted offense could there be laid, had the offense failed of completion, the same acts may be regarded as among those 'constituting' or 'requisite to the commission' of the offense culminated in another county. Thus, the Ohio Court of Appeals held in *State v. Domer*, [1 Ohio App.2d 155, 159 - 60, 204 N.E.2d 69, 74 (1965)]:

The act performed purposely to kill another must (in order to fix venue where the antecedent act occurred) proceed to a point beyond mere preparation where it can be said that the act committed tends directly toward accomplishing such specific criminal purpose. There must be the performance of an act in furtherance of or carrying out at least, in part, one of the necessary physical elements by which the murder is to be accomplished and of such a character that unless interrupted by an unknown intermediate and independent force, the crime will be consummated.

To determine proper venue in *Domer*, the Ohio court invoked the rule of a New York decision acquitting of attempted robbery defendants who 'were driving around, looking

for the payroll employee . . ., intending to rob him.' [1 Ohio App.2d at 160, 204 N.E.2d at 74] The Ohio court held, concerning a venue statute similar to Florida's s 910.09, F.S.1975 (supra, n. 1):

> Driving around, intending to kill a passenger in the automobile driven by the defendant, looking for a place to commit the act or going to a predetermined place to commit the proposed unlawful act, at most, is preparation which could not be punished in the trial of one charged with murder in the first degree committed after arrival at the place ultimately or previously determined. [1 Ohio App.2d at 160, 204 N.E.2d at 74]

The Arizona Court of Appeals, in *State v. Cox*, [25 Ariz.App. 328, 543 P.2d 449 (1976)], construed an Arizona venue statute which, like s 910.05, F.S.1969, permitted prosecution wherever any act 'requisite to the commission of an offense' was committed. That court refused to adopt the relaxed venue criterion prevailing in California, doubting that it would 'pass constitutional muster' in Arizona; and held, consistently with Arizona law of criminal attempts, that there must have been an act in the county of the forum from which 'the situation becomes unequivocal and it appears the design will be carried into effect if not interrupted . . ..' [Cox, 543 P.2d at 453] By that standard the court held that venue could not be laid for attempted murder in Pima county, where '(n)o act which composed the corpus delicti of the crime occurred':

> It was not until the money was paid (to an ostensible hired killer) in Pinal County that the situation became unequivocal and it appeared that the design would be carried into effect if not interrupted. [543 P.2d at 453]

In the peculiar circumstances of this case, the acts committed by Crittendon and his cohorts in Duval County would have been sufficient to constitute an attempt to murder Stephen Anthony Orlando had Orlando been prescient enough to step out of the car before it entered St. Johns County en route to the place of execution. In Duval County the four assassins gathered, conceived their plan, put on appropriate clothing, obtained weapons, prepared the death note, selected the victim, took him into the car and drove the car purposefully toward its destination. The murder strategy was fully, elaborately and, the jury could have found, irrevocably set in motion. Momentum, absent in *Domer*, was here enforced by the combination of four separate wills.

'A conspirator who has committed himself to support his associates may be less likely to violate this commitment than he would be to revise a purely private decision. Moreover, the encouragement and moral support of the group strengthens the perseverance of each member.' [Developments in The Law - Criminal Conspiracy, 72 Harv.L.Rev. 920, 924 (1959)] As the car approached the county line, Crittendon and the others were attempting to commit murder. The time of preparation had passed and the acts of the four had 'reach(ed) far enough towards the accomplishment of the desired result to amount to the commencement of the consummation.' [*Groneau v. State*, 201 So.2d 599, 603 (Fla.App.4th, 1967), aff'd 207 So.2d 452 (Fla.1967); 1 Wharton's Criminal Law and Procedure s 74 (Anderson ed. 1957); Annot., 54 A.L.R.3d 612 (1973)] For those reasons,

Crittendon's offense was committed, as the indictment charged, in both Duval and St. Johns. Venue was properly laid in Duval. Sec. 910.05, F.S.1975.

There is another reason why Crittendon was properly charged and tried in Duval County. Crittendon's conviction does not rest on proof that he himself shot the fatal bullet into Orlando's head. Crittendon was an aider of the other three, including the one who fired the shot. As an aider Crittendon was properly charged and convicted as a principal in the first degree, s 777.011, F.S.1975, and he was properly charged and tried in Duval County, where much of his aid was given. Sec. 910.04, F.S.1975: If a person in one county aids, abets, or procures the commission of an offense in another county, he may be tried in either county.

Critical Thinking Question(s): While the venue issue is interesting, the more enlightening matter is the discussion on the suspects' *mens rea*. Define "purpose" as related in your text and common usage. How does it differ from knowingly?

Knowingly: A defendant reaches this level of criminal intent if they act with the knowledge that their behavior constitutes a crime. The following case examines whether a particular defendant met this requirement of the crime for which he was charged.

***Mogavero* v. *State*, 744 So.2d 1048 (1999)**

Procedural History: Defendant was convicted in the Circuit Court, Indian River and Martin Counties, C. Pfeiffer Trowbridge, J., of acting as mortgage broker without license and collection of advance fee by loan broker, and in separate case his probation was revoked. Defendant appealed. In consolidated appeals, the District Court of Appeal, Gross, J., held: (1) circuit court's instruction on meaning of term "knowingly," as used in statute prohibiting acting as mortgage broker without license, improperly enlarged the scope of the crime beyond the language of the statute, and (2) two convictions for collection of advance fee by loan broker were sufficient to support a revocation of probation.

Issue(s): Did Mogavero have the requisite knowledge (knowing) element of brokering without a license to sustain a conviction?

Facts: Joseph G. Mogavero, Jr. appeals his conviction of two counts of acting as a mortgage broker without a license and two counts of collection of an advance fee by a loan broker. See §§ 494.0018, 494.0025(3), 687.141(1), Fla. Stat. (1997). In a separate case, Mogavero appeals the revocation of his probation. The trial court was required to charge the jury on the elements of the crime of acting as a mortgage broker without a license. Reading sections 494.0018(1) and 494.0025(3) together, the crime charged was "knowingly" acting as a mortgage broker in Florida without a current, active license issued by the Department of Banking and Finance. One acts "knowingly" as a mortgage

broker if he is aware that his conduct is of that nature. [See *O'Neill v. State*, 684 So.2d 720, 722 n. 5 (Fla.1996)]

In its charge defining the crime, the trial court included the following language:

> [K]nowledge may be either actual or constructive, actual knowledge is knowledge known by a person. A person has constructive knowledge of fact if by the exercise of reasonable care he could have known of a fact.

Holding: Affirmed in part, reversed in part, and remanded.

Opinion: GROSS, J.

We reverse the convictions under Chapter 494, because the trial court's instruction on the elements of the crime improperly expanded it beyond its statutory definition. We affirm the two convictions under section 687.141(1) and the revocation of probation.
This instruction improperly enlarged the scope of the crime beyond the language of the statute. Penal statutes are to be strictly construed in a manner most favorable to the accused. [See *Weber v. City of Fort Lauderdale*, 675 So.2d 696, 698 (Fla. 4th DCA 1996); § 775.021(1), Fla. Stat. (1997)] When the legislature defines a crime in specific terms, courts are without authority to define it differently. [See *State v. Jackson*, 526 So.2d 58, 59 (Fla.1988)] The language in a statute should be given its plain and obvious meaning. [See *C.S. v. S.H.*, 671 So.2d 260, 268 (Fla. 4th DCA 1996)] "Knowingly" means to act "[w]ith knowledge." [BLACK'S LAW DICTIONARY 872 (6th ed.1990)] The ordinary meaning of the term "knowledge" is "being aware of something," [WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 665 (1988)], or "awareness, as of a fact or circumstance," [[THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 793 (1967)].

The use of the term "knowingly" in section 494.0018(1) requires that a defendant have actual knowledge or awareness that he is acting as a mortgage broker without a license. The court's instruction on "constructive knowledge" went beyond this definition to allow a conviction on less than actual knowledge, when, by the exercise of reasonable care, the defendant could have known that he was acting as a mortgage broker. A trial court "should not give instructions which are confusing, contradictory, or misleading." [*Butler v. State*, 493 So.2d 451, 452 (Fla.1986); see *Gerds v. State*, 64 So.2d 915, 916 (Fla.1953)] As we wrote in *Gross v. Lyons*, [721 So.2d 304, 306 (Fla. 4th DCA 1998), review granted, 732 So.2d 326 (Fla. May 4, 1999)]:

> Reversible error occurs when an instruction is not only an erroneous or incomplete statement of the law, but is also confusing or misleading.... The test is not whether a particular jury was actually misled, but "instead the inquiry is whether the jury might reasonably have been misled."

[See *Goldschmidt v. Holman*, 571 So.2d 422, 425 (Fla.1990)] Although a civil case, Gross is pertinent because the principles that underlie the giving of jury instructions are

the same in civil and criminal cases. [*Lewis v. State*, 693 So.2d 1055, 1059 (Fla. 4th DCA 1997) (Farmer, J., dissenting), review denied, 700 So.2d 686 (Fla. Sept.30, 1997)]

When a court erroneously charges a jury on the elements of a crime, the harmless error doctrine should be invoked with great caution. In *Gerds*, the supreme court explained the constitutional significance of a correct charge to the jury on the elements of a crime:

> It is an inherent and indispensable requisite of a fair and impartial trial under the protective powers of our Federal and State Constitutions as contained in the due process of law clauses that a defendant be accorded the right to have a Court correctly and intelligently instruct the jury on the essential and material elements of the crime charged and required to be proven by competent evidence. Such protection afforded an accused cannot be treated with impunity under the guise of 'harmless error'. [64 So.2d at 916]

One of Mogavero's defenses at trial was that he did not knowingly act as a mortgage broker without a license. As his attorney argued in closing:

> Mr. Mogavero took a fee, but it wasn't to provide the services of a loan broker, it was to prepare a package, it was to provide an introduction, that's in his contract, you can see that, it's in it. He didn't knowingly act as a mortgage broker, that means he did not knowingly violate a statute.

Although there was substantial evidence that Mogavero knowingly violated the statute, the jury in this case might reasonably have been misled to convict him based on the less stringent state of mind standard contained in the jury instructions. For these reasons, we reverse the two convictions for acting as a mortgage broker without a license.

Mogavero next argues that certain of the prosecutor's comments during closing argument were error. At trial there was no objection to any of the alleged errors made by the prosecutor during closing argument. Because none of the prosecutor's statements amounted to fundamental error, any error in the closing argument was not preserved for review. [See *DeFreitas v. State*, 701 So.2d 593, 602 (Fla. 4th DCA 1997) (Gunther, J., concurring)] However, in the event of retrial, we note that the prosecutor's argument concerning the defendant's reasons for consulting with attorney David Corden were improper.

We find no error in the giving of the instruction on principals, in light of the defendant's use of a corporation he controlled to handle funds received from the victims. [See *Lewis*, 693 So.2d at 1057] We also find no error in the trial court's determination that there had been no discovery violation. [See *Lopez v. Singletary*, 634 So.2d 1054, 1058 (Fla.1993); *Stark v. Regency Highland Condominium Ass'n*, 418 So.2d 1058 (Fla. 4th DCA 1982)] On the appeal from the revocation of probation, we affirm. The two convictions under section 687.141(1) were sufficient to support a revocation of probation.

Critical Thinking Question(s): Why did the Court say that while the defendant, in all probability, acted knowingly, yet still reversed the decision of the lower court? Distinguish the *mens rea* of knowing from that of purposely. What is the fine line between the two levels of intent?

Recklessly: To commit a crime with reckless intent, a defendant must have engaged in risky behavior while being aware of the dangerous nature of the act. Read the following Florida case keeping in mind the question of what constitutes reckless intent.

Pitts v. _State_, 473 So.2d 1370 (1985)

Procedural History: After jury found defendant, a deputy sheriff, guilty of vehicular homicide, the Circuit Court, Alachua County, R.A. Green, J., entered order withholding adjudication of guilt and placing defendant on probation, and defendant appealed. The District Court of Appeal, Pearson, Tillman, (Ret.) Associate Judge, held that: (1) evidence on defendant's lack of care was for jury; (2) trial court properly rejected requested instruction on careless driving; (3) trial court did not abuse its discretion in allowing expert witness as rebuttal witness; and (4) admission of provision of sheriff's department manual that officer who made decision to proceed under "code one," an emergency code, with blue lights and siren on, should advise sheriff's department communications of his decision was prejudicial error.

Issue(s): Did the appellant show the lack of care necessary to establish the charge of vehicular homicide? Was the evidence introduced and challenged harmful error?

Facts: On August 18, 1983, the appellant was a deputy sheriff with the Alachua County Sheriff's Office. Just before 1:00 a.m., Pitts received a request for a "backup" from a lone officer on the scene of a possible burglary in progress. Pitts advised communications at the Sheriff's Office that he was responding to the call but failed to inform communications that he was running "code one", an emergency code, with blue lights and siren on. The officer requesting backup later testified that such a situation is viewed as potentially lethal for an officer on the scene. Pitts testified that he was concerned for the security of the lone deputy.

While responding code one, Pitts came upon a vehicle moving in the same direction as his patrol car; the vehicle yielded to let the deputy pass. Occupants of that car testified that the Pitts' vehicle was traveling at approximately 50 miles per hour. As Pitts approached the vicinity of the crime, he turned off his siren because he had been taught in the police academy to respond silently when approaching an area of a burglary in progress.

While proceeding in a westerly direction with blue lights flashing and siren off, Pitts came upon a second westbound vehicle moving at approximately 40 to 50 miles per hour. Pitts testified that he attempted to get the car to yield by alternately flashing his bright

and dim lights and blowing his horn. Pitts testified that when the vehicle did not yield, he checked to make sure the oncoming lane was clear and pulled around to pass. Occupants of that vehicle apparently continued to occupy the westbound lane without yielding. As Pitts pulled to a position ahead of the vehicle he was passing, decedent's oncoming car rounded the curve ahead. Trooper Daniel Campbell, an accident reconstructionist presented by the State, testified that, although the driver of the vehicle being passed by Pitts was in a position to see decedent's oncoming vehicle before Pitts did, Pitts reacted and applied his brakes before the driver of the vehicle being passed reacted. Pitts unsuccessfully tried to avoid the collision by driving into the guardrail. As a result of the collision the driver of the oncoming vehicle was killed.

The highway curved just beyond the point of collision. Trooper Campbell indicated that, for a driver approaching the curve from Pitts' direction, the road ahead has the appearance of being straight because of two roads coming together at a 35-degree angle. There is evidence that Pitts attempted the pass maneuver in a no-passing zone with a speed limit of 50 miles per hour and that the patrol car had poor acceleration. State and defense expert witnesses dispute the rate of speed at which Pitts was traveling. The State estimates the prebraking speed for Pitts to be approximately 75 to 80 miles per hour, while the defense calculates that speed at 58.5 miles per hour. Pitts testified that he was traveling between 55 to 60 miles per hour. The State disputed Pitts' testimony that he was never able to get far enough in front of the westbound vehicle to complete the pass.

Holding: Reversed and remanded.

Opinion: PEARSON, TILLMAN (Ret.), Associate Judge.

The appellant, Carl Michael Pitts, was found guilty, by a jury, of vehicular homicide as proscribed by Section 782.071, Florida Statutes (1981): " 'Vehicular homicide' is the killing of a human being by the operation of a motor vehicle by another in a reckless manner likely to cause the death of, or great bodily harm to, another...." This court is asked to review the trial judge's order withholding adjudication of guilt and placing the defendant on probation. We reverse and remand for a new trial, finding that prejudicial error appears in the introduction of evidence.

Appellant's first point claims error upon the denial of the motion for judgment of acquittal made at the close of the State's case and renewed at the close of all the evidence. The dividing line between the lack of care required for proof of vehicular homicide by reckless operation of a motor vehicle in a manner likely to cause death or great bodily harm and careless driving, a noncriminal traffic offense, is obviously hard to draw. In this case, we hold that the assessment of the defendant's actions was properly left to the jury. [See *Tillman v. State*, 353 So.2d 948 (Fla. 1st DCA 1978); *Lynch v. State*, 293 So.2d 44 (Fla.1974); *Amato v. State*, 296 So.2d 609 (Fla. 3d DCA 1974)] In this connection, we are not unmindful of the rule that a police officer should take such steps as may be necessary to apprehend an offender but, in doing so, should not exceed proper and rational bounds or act in a negligent, careless, or wanton manner. [*City of Miami v. Horne*, 198 So.2d 10 (Fla.1967)]

The second point urges error upon the denial of an instruction on careless driving. The theory of defense presented was that Pitts may have been negligent or even careless but that this conduct did not meet the standard of recklessness required for conviction of vehicular homicide. The rejected jury instruction asked the court to instruct the jury on the law concerning careless driving and its relationship to reckless driving. Pitts argues that refusal to give the requested instruction is reversible error because the jury was not apprised of any legal basis upon which it could consider his theory of defense. [*Bryant v. State*, 412 So.2d 347 (Fla.1982); *Motley v. State*, 155 Fla. 545, 20 So.2d 798 (1945)] As noted above, careless driving is not a lesser-included offense of vehicular homicide. The instructions given fully covered the issue of reckless driving. The giving of the requested instruction would not have served to clarify the issue and may have been confusing to the jury. We cannot agree with appellant that the instruction was necessary for the presentation of his theory of the case. No error has been shown on the instruction. [*Cruz v. State*, 310 So.2d 360 (Fla. 3d DCA 1975); *Wells v. State*, 270 So.2d 399 (Fla. 3d DCA 1972)]

It is argued in the third point that the court erred in allowing an expert witness as a rebuttal witness. Whether the testimony of a particular witness is cumulative or proper, rebuttal is an area where the trial court must have broad discretion, and, in the absence of clear and harmful error, the ruling will be affirmed. [See *Britton v. State*, 414 So.2d 638 (Fla. 5th DCA 1982)] No abuse of discretion appears on the record.

The fourth point concerns the admission over objection of evidence, which we hold to have been prejudicial error. The State called as a witness a captain with the Alachua County Sheriff's Office and, through his testimony, secured introduction into evidence of excerpts from a departmental manual of the Alachua County Sheriff's Office. The objectionable section of the manual, which was read into evidence, provided that an officer who made a decision to proceed under "code one" should advise communications of his decision. It will be recalled that Deputy Pitts only informed communications that he was responding to the emergency call.

The State Attorney, again over objection, cross-examined Pitts as to whether he was in violation of the departmental manual. The State then argued, in closing argument, that the deputy's violation of the office manual was evidence to be considered in determining whether or not Pitts had acted recklessly. The court instructed the jury as follows:

> The failure of the deputy sheriff to follow the rules set out in the rules manual of the Sheriff's Office is not proof of recklessness in and of itself, however, if you find the defendant failed to follow the rules of the department and that this failure caused or contributed to the cause of the death of the deceased ... you may consider this circumstance together with the other circumstances in the evidence considering whether the vehicle of the defendant was operated in a reckless manner.

In other words, the violation of communications procedure became a feature of the case as opposed to the actual operation of the motor vehicle on the night in question. No evidence was presented as to who promulgated the manual or for what purpose it was promulgated except the following excerpt from the preface:

> The contents are designed to assist in functions of the office and to assist in standardizing policies and procedures. This manual is for internal use only, and does not enlarge an officer's civil or criminal liability in any way.

The policy that a deputy should report to communications that the deputy is proceeding in "code one" seems to be designed to keep the communicator informed of the location of all deputies. It may also be helpful to communications in coordinating the dispatch of backup personnel. No evidence was presented on these points. The jury was left to guess as to the relationship of the violation to the culpability of the defendant. The State suggests that, if the deputy was so forgetful of the proper procedure, he might also be reckless. We fail to see the probative value of the manual, both because it introduced a false standard in the measure of reckless driving and because the force and effect of the manual was not shown.

There are civil negligence cases which permit the introduction of policy manuals as evidence of customary care. The rule regarding the admissibility of evidence of custom in civil cases to prove negligence is not applicable in a criminal case. In a civil case, there is often no statute regulating the specific kind of conduct that is before the court. In that case, the jury needs some standard by which to judge the alleged negligence. Evidence of ordinary practice or general custom is then introduced as a standard by which the conduct under scrutiny can be compared. In a criminal case, there is no such need. The question is whether the defendant has violated a statute. As a citizen, Pitts was entitled to be judged by the state statute, not a standard promulgated by some unknown person in the Sheriff's Office. If Pitts operated his motor vehicle in violation of a manual rule but not in a reckless manner, he could not be convicted of vehicular homicide.

In *City of St. Petersburg v. Reed*, [330 So.2d 256 (Fla. 2d DCA 1976)], the court had before it a case where the civil liability of a city for the alleged assault and battery of a citizen by a police officer was being tested. The court held [330 So.2d at 258]:

> We agree with the Fourth District that in this suit for assault and battery, statewide standards for the use of deadly force must be controlling. Accordingly, introduction into evidence of the safety order was error.

In the Fourth District case referred to, *Chastain v. Civil Service Board of Orlando*, [327 So.2d 230 (Fla. 4th DCA 1976)], the court, in an appeal involving the dismissal of a police officer, held that a police department regulation could be considered but pointed out [327 So.2d at 232]:

> We therefore hold that a police department may lawfully impose upon its police officers a regulation concerning the use of deadly force which is more stringent than the law imposes upon police officers for criminal and civil liability, and while such regulation would not affect the standard by which the officer's criminal or civil liability is measured, the violation of such regulation would properly subject the offending member to appropriate disciplinary action within the department.

Accordingly, the judgment is reversed. The defendant may be retried if the State Attorney finds the admissible evidence sufficient. Reversed and remanded.

Critical Thinking Question(s): How do you think a jury will decide on this case without the evidence that was found to be in error? Should the officer be treated more leniently than a civilian that does the same thing because he was acting in his official capacity? What if that civiclian was rushing his pregnant wife to the hospital?

> Negligently: If a defendant commits a criminal act while engaged in risky behavior, the dangerous nature of which the defendant was unaware at the time of the act, then they have negligently committed the crime. The following case examines the requirements for and consequences of negligent intent.

State v. Smith, 638 So.2d 509 (1994)

Procedural History: Defendant was charged with driving with suspended license causing death or injury. The Circuit Court, Pasco County, Stanley R. Mills, J., dismissed, and state appealed. The District Court of Appeal, 624 So.2d 355, affirmed, and state appealed. The Supreme Court, Overton, J., held that statute making it a felony to drive with suspended license causing death or serious injury did not unconstitutionally criminalize simple negligence.

Issue(s): Can simple negligence be used to enhance a criminal act from a misdemeanor to a felony?

Facts: In this case, the appellee, Robert N. Smith, was charged with driving with a suspended license causing death or injury under section 322.34(3), which provides:

> Any person whose driver's license has been canceled, suspended, or revoked pursuant to s. 316.655, s. 322.26(8), s. 322.27(2), or s. 322.28(2) or (5) and who operates a motor vehicle while his driver's license is canceled, suspended, or revoked and who by careless or negligent operation thereof causes the death of or serious bodily injury to another human being, is guilty of a felony of the third degree, punishable as provided in s. 775.082 or s. 775.083.

Smith was also charged with DUI manslaughter under section 782.07, Florida Statutes (1991). That charge is not at issue in this appeal. Smith moved to dismiss the charge on

the basis that section 322.34(3) unconstitutionally criminalizes mere negligence. The trial court granted the motion to dismiss and the State appealed.

On appeal, the Second District Court of Appeal affirmed. The district court noted that driving with a suspended or revoked license is normally a misdemeanor. Under the statute at issue, however, the district court determined that simple negligence is used to enhance the crime of driving with a suspended or revoked license to a felony. In reviewing whether the statute was constitutional, the district court first determined that simple negligence, standing by itself, cannot constitute a criminal act. The district court then looked to the question of whether the non-criminal act of simple negligence could be combined with the criminal act of driving with a canceled, suspended, or revoked license to create a new and distinct criminal offense. Finding no causal connection between the criminal and non-criminal acts, the district court held that simple negligence could not be used to enhance a criminal act from a misdemeanor to a felony.

Holding: Reversed and remanded.

Opinion: OVERTON, Justice.

We have on appeal *State v. Smith*, [624 So.2d 355 (Fla.2d DCA 1993)], in which the district court declared section 322.34(3), Florida Statutes (1991), to be unconstitutional because it found that an act of simple negligence in operating a motor vehicle could not be combined with the crime of driving a motor vehicle under a canceled, suspended, or revoked license to create a new criminal offense. We have jurisdiction. [Art. V, § 3(b)(1), Fla.Const.] For the reasons expressed, we find the statute to be constitutional and reverse the decision of the district court.

As the district court correctly noted, on several occasions this Court has found statutes criminalizing simple negligence to be unconstitutional. [See, e.g., *State v. Hamilton*, 388 So.2d 561 (Fla.1980); *State v. Winters*, 346 So.2d 991 (Fla.1977)] This does not mean, however, that simple negligence can never be used to enhance the penalty for a willful criminal act. For example, under section 316.193, Florida Statutes (1993), the act of driving under the influence (DUI), when combined with an act of simple negligence, is elevated to the crime of DUI manslaughter. [See *Magaw v. State*, 537 So.2d 564 (Fla.1989)] The district court distinguished the DUI manslaughter statute by stating that driving under the influence is, in and of itself, a reckless act, whereas driving with a suspended, canceled, or revoked drivers license is not. We disagree.

Only when a driver's license has been suspended, canceled, or revoked due to some wrongdoing on the part of the driver can a person be charged under section 322.34(3). For instance, only persons who have had their driver's licenses suspended, canceled, or revoked pursuant to sections 316.655 (suspension due to conviction of traffic offenses), 322.26(8) (suspension by a court due to conviction of serious traffic offense), 322.27(2) (suspension by the Department of Highway Safety and Motor Vehicles due to conviction of serious traffic offense), 322.28(2) (suspension for driving under the influence), or 322.28(5) (suspension due to conviction of manslaughter or vehicular homicide), are

subject to prosecution under the statute at issue. Consequently, when a person is charged under the statute, a determination already has been made that the person is no longer fit to be driving on Florida's highways. As such, knowingly driving with a suspended, canceled, or revoked driver's license, as defined under the statute at issue, is indeed a willful act in clear violation of the law.

We also disagree with the district court's conclusion that the statute is unconstitutional because "[n]o causal connection exists between driving with a cancelled, suspended or revoked license and an accident involving death or serious injury." [624 So.2d at 358] As we stated in Magaw:

> [Under the DUI manslaughter statute,] the state is not required to prove that the operator's drinking caused the accident. The statute requires only that the operation of the vehicle ... caused the accident. Therefore, any deviation or lack of care on the part of a driver under the influence to which the ... accident can be attributed will suffice. [537 So.2d at 567]

Under either the DUI manslaughter statute or the statute at issue, it is not the simple negligence of the driver that is the criminal conduct being punished; it is the willful act of choosing to drive a vehicle under the influence or to drive a vehicle with a suspended, canceled, or revoked license that is the criminal conduct being punished. In both instances, the legislature has simply made a policy decision that anyone who engages in the prohibited criminal conduct and who, while engaging in that prohibited criminal conduct, negligently injures another, is guilty of a more severe crime than if the prohibited conduct had not resulted in injury to another.

Similarly, one who negligently kills another while engaged in the commission of certain enumerated felonies is guilty of felony murder. [See § 782.04(1)(a)(2), Fla.Stat. (1993)] Although the homicide may have been unintentionally committed through negligence, it is the willful act of committing the underlying felony that criminalizes the simple negligence supporting the conviction for felony murder. Consistent with that rationale, we hold that section 322.34(3) does not unconstitutionally criminalize simple negligence. Accordingly, we find section 322.34(3), Florida Statutes (1991), to be constitutional, reverse the decision of the district court, and remand this cause for further proceedings.

Concur: KOGAN, Justice, concurring in result only.

Criminalizing a negligent act poses serious questions of constitutional law and public policy that deserve very careful consideration. The United States Supreme Court has detailed many of these questions in *Morissette v. United States*, [342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1951)], where Mr. Justice Jackson outlined the history of American criminal law's development from its English antecedents. As *Morissette* notes, there has been a slow drift away from the early English requirement that every crime must arise from a "vicious will" or else there is no crime at all. [*Morissette v. United States*, 342 U.S. 246, 251, 72 S.Ct. 240, 244, 96 L.Ed. 288 (1951) (quoting 4 Blackstone's Commentaries 21)]

Today, some crimes can exist in the complete absence of even the slightest degree of intent, the most notable for present purposes being certain traffic regulations. These types of "strict liability" or "reduced intent" crimes generally are thought to be on their firmest footing when they involve relatively minor penalties and regulate those aspects of modern life arising from technological advances unknown to the common law. The question that generally is still unsettled in the law today is how far a legislative body can go in dispensing with scienter or diminishing it below what the common law required. "Scienter," of course, refers to the intent element of a crime. The common law generally required at least reckless disregard for others, while certain common law crimes required the higher level of "general" or "specific" intent.

This drift toward reduced scienter has met with criticism, some of it justified. The Pennsylvania Superior Court, for example, extended *Morissette* [FN4] to strike down a statute creating a maximum sentence of five years if a driver (a) violated a traffic regulation, and thereby (b) caused the death of another person. The Pennsylvania defendant had been tried under the statute for a form of "homicide" because he made an improper turn in his car and accidentally struck a motorcyclist he did not see, resulting in the motorcyclist's death. [*Commonwealth v. Heck*, 341 Pa.Super. 183, 491 A.2d 212 (1985), affirmed, 517 Pa. 192, 535 A.2d 575 (1987)] This statute obviously is both analogous to and less severe than the one at hand, so it deserves some scrutiny.

The majority above stresses that driving with a revoked license is itself a violation of the law. While this is true, it does not eliminate the real problem here, just as it did not in the Pennsylvania case quoted above. The act of driving with a revoked licensed, like the act of committing a traffic violation in Pennsylvania, is far and away a minor matter compared to homicide. (By contrast, DUI is itself a serious matter because of the serious risk it poses to the others.) Both here and in the Pennsylvania case, the statute does much more than just criminalize a traffic violation; it creates a form of homicide with an "intent" element apparently consisting of simple negligence. The majority argues that the penalty for this new crime is simply a matter of "policy," and that the underlying offense remains the traffic violation. That approach reads the severe penalty here as though it had no constitutional dimension at all and ignores the disproportionate penalties at stake.

In examining public policy and constitutional issues, the Pennsylvania Superior Court noted that the foundations of American criminal law rest on the belief that it is the criminal act combined with the culpable mind that deserves to be labeled as "infamous." [See id. 491 A.2d at 220] Or as Oliver Wendell Holmes, Jr., once remarked, "even a dog distinguishes between being stumbled over and being kicked." [O.W. Holmes, Jr., The Common Law 3 (1881)] Severely criminalizing an unintentional act is contrary to the genius of Anglo-American law, which attaches the greater blameworthiness to the crime that rests on guilty intent, not mere carelessness. Criminal statutes that reduce or eliminate traditional scienter therefore should receive greater scrutiny, though they certainly should not be stricken for want of scienter alone.

In this vein, the Pennsylvania Superior Court concluded that a "reduced intent" crime can violate due process in light of the following factors: (a) it imposes a penalty that is not light, but severe; (b) the conviction "gravely besmirches" the reputation of the offender; (c) the crime is one falling within the parameters of the traditional hierarchy of common law felonies, which is to say, those crimes regarded as "infamous." [*Heck*, 491 A.2d at 222] The Pennsylvania court therefore concluded that the particular vehicular homicide statute at issue in *Heck* ran afoul of the distinction because it (a) imposed a maximum five-year penalty, which is "severe,"; (b) gravely besmirched the character of the offender because he faced lengthy imprisonment; and (c) was a modified version of the common law crime of manslaughter, an "infamous" offense. [See id.]

Clearly, all the same criteria exist in the instant case. For present purposes, the only relevant distinction between *Heck* and the case at hand is that the penalty is more severe here. Otherwise, both the Pennsylvania and Florida statutes create a type of vehicular homicide predicated solely on a negligent act associated with a violation of traffic regulations.

I think it also important to consider how cases of this type may implicate precedent dealing with impermissible burden-shifting. The United States Supreme Court repeatedly has noted that a state may not create a presumption that an element of the crime exists as a matter of law and fact. In *Sandstrom v. Montana*, [442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)], for example, the Court confronted the case of a person accused of "deliberate homicide." Although the statute obviously included a scienter element ("deliberateness"), the jury nonetheless was instructed that "the law presumes that a person intends the ordinary consequences of his voluntary acts." [Id. at 513, 99 S.Ct. at 2453] The *Sandstrom* Court made the following observations in finding the instruction and hence the conviction unconstitutional:

> The instruction announced to David Sandstrom's jury may well have [invaded the fact finding function]. Upon finding proof of one element of the crime (causing death), and of facts insufficient to establish the [intent element], Sandstrom's jurors could reasonably have concluded that they were directed to find against defendant on the element of intent. [Id. at 523, 99 S.Ct. at 2459]

Accord *Francis v. Franklin*, [471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985)].

It is true that *Sandstrom* is distinguishable from what we are facing today. The *Sandstrom* Court confronted a State scheme that was self-contradictory, effectively resulting in a complete lack of a scienter requirement in the jury's eyes though the statute purported to require an intent element. Here we are dealing with a statute that does not create an illusory intent element, but creates one that apparently has been reduced to the level of simple negligence. Nevertheless, the federal burden-shifting cases to my mind pose a distinct problem when the state tries to create "reduced intent" statutes. These federal cases reasonably can be read as saying that the state may not reduce the intent element below a minimum level for certain serious offenses. After all, the difference

between creating an illusory intent element and forthrightly abandoning it altogether is really only semantic.

Moreover, I think this Court also must keep in mind that, by affirming a statute criminalizing and severely punishing negligence, we open the door for more such statutes in the future notwithstanding the traditions of American law embodied in the concept of due process. [Art. I, § 9, Fla.Const.] Any person or group that may be vulnerable to a charge of negligence or malpractice has something to fear from such a holding. It means that even simple acts of negligence could be converted into serious crimes.

The Heck case illustrates the problem. There, a driver improperly made a turn, struck a motorcyclist he did not see, and then was prosecuted for a homicide with up to five years imprisonment. To my mind, this constitutes a draconian result that is cruel or unusual and a violation of due process within the meaning of the Florida Constitution. [Id.] I would not equate the actual offense in *Heck* with the one here, but the statutes viewed by themselves are little different from each other.

Nevertheless, the problems I have outlined easily and constitutionally can be avoided by the adoption of a simple narrowing construction. [See *State v. Stalder,* 630 So.2d 1072 (Fla.1994)] Because the present crime imposes an infamous penalty, I would find that it cannot constitutionally be applied in the absence of at least criminal or "culpable" negligence, as opposed to simple negligence. Accord *State v. Ritchie,* [590 So.2d 1139 (La.1991)]. This means the negligence must be gross and flagrant in character, evincing a reckless disregard of human life or the safety of others. [*Preston v. State,* 56 So.2d 543 (Fla.1952)] I believe this is necessary to make the statute conform to the requirements of Article I, section 9 of the Florida Constitution.

Turning to the facts at hand, I think it obvious beyond any doubt that the conduct of Smith met the standards for criminal negligence in connection with driving with a revoked license. Specifically, he was legally intoxicated, as shown by his contemporaneous conviction for DUI manslaughter. Choosing to drive while legally drunk is itself an act of reckless disregard of the life or safety of others. Coupled with the fact of the revoked license, this recklessness showed that Smith committed a criminal act that falls within the statute even after it is narrowly construed. Accordingly, I concur with the result reached here.

Critical Thinking Question(s): Do you agree with the primary opinion or the concurring opinion? Should the basis for the license revocation be considered when enhancing the charge and penalty? In the instant case, the defendant was also DUI, but what if his license revocation was simply due to a technical error? What if the driver does not know that his license is revoked?

II. Strict Liability

Section Introduction: Some crimes do not require that the element of *mens rea* be satisfied for prosecution. These are known as strict liability crimes and a defendant can

be held criminally accountable for commission of such acts regardless of a lack of criminal intent. The following statute and Florida case exemplify one such strict liability offense.

Florida Statute, section 794.021 - Ignorance or belief as to victim's age no defense

> When, in this chapter, the criminality of conduct depends upon the victim's being below a certain specified age, ignorance of the age is no defense. Neither shall misrepresentation of age by such person nor a bona fide belief that such person is over the specified age be a defense.

***Hodge v. State*, 866 So.2d 1270 (2004)**

Procedural Hisotry: Defendant was convicted in the Circuit Court, Seventeenth Judicial Circuit, Broward County, Ilona M. Holmes, J., of sexual activity by a person 24 or older with a person 16 or 17 years of age. Defendant appealed.

Issue(s): Is proof of the removal of the disabilities of nonage of a minor victim an affirmative defense or is it the State's burden to prove otherwise?

Facts: James Hodge appeals his conviction for sexual activity by a person twenty-four or older with a person sixteen or seventeen years of age. We affirm and write to address two issues.
Hodge contends that the trial court improperly denied his motion for judgment of acquittal, arguing that the State failed to prove that the seventeen-year-old victim had not had the disabilities of nonage removed. Appellant was found to have violated section 794.05, Florida Statutes (2000), which provides in pertinent part:

> (1) A person 24 years of age or older who engages in sexual activity with a person 16 or 17 years of age commits a felony of the second degree....
>
> (2) The provisions of this section do not apply to a person 16 or 17 years of age who has had the disabilities of nonage removed under chapter 743.

Hodge unsuccessfully argued to the trial judge that subsection (2) above is an element of the offense to be proven by the State beyond a reasonable doubt. In denying his motion for judgment of acquittal, the court ruled that the disabilities of nonage exception was an affirmative defense.

Holding: Affirmed. The District Court of Appeal, Oftedal, Richard L., Associate Judge, held that: (1) removal of the disabilities of nonage from victim was an affirmative defense, and (2) crime was a strict liability crime.

Opinion: OFTEDAL, RICHARD L., Associate Judge.

Determining whether the disabilities of nonage exception is an element of the crime to be negated by the State or is in the nature of a defense, requiring the defendant to come forward with evidence, is an issue of law subject to de novo review. [See *McCann v. Walker*, 852 So.2d 366, 368 (Fla. 5th DCA 2003)(questions of law are reviewed de novo)] Because the subsection in question is an exception to the crime, [*Campbell v. State*, 771 So.2d 1205, 1206 (Fla. 2d DCA 2000), review denied, 786 So.2d 578 (Fla.2001)], we must look to its placement in the wording of the statute.

If the exception appears in the enacting clause, the burden lies with the State to prove that the defendant is not within the exception; but, if the exception is contained in a subsequent clause or statute, that is a matter of defense requiring the defendant to put forth some evidence in support thereof. Only then does the burden shift to the State, requiring it to disprove the defense beyond a reasonable doubt. [See *State v. Thompson*, 390 So.2d 715, 716 (Fla.1980); *Stevens v. State*, 680 So.2d 569, 570 (Fla. 1st DCA 1996)(holding that an exception to the theft statute was a defense to the crime as it was not set forth in the enacting clause, but in a subsequent subsection of the statute), aff'd, 694 So.2d 731 (Fla.1997)]

Here, the exception is not in the enacting clause but is contained in a subsequent subsection of the statute. Nowhere else in the statute is there any suggestion that the removal of the disabilities of nonage exception was intended to be an element of the crime. It was, therefore, a defense. Since Hodge presented no evidence that the minor victim had the disabilities of nonage removed at the time of the offense, he was not entitled to a judgment of acquittal.

Hodge also alleges error in the trial judge's refusal to submit to the jury proposed instructions that would have required the State to prove that he knew the victim was underage and that he acted with criminal intent. Whether or not the statute defines a strict liability crime is a question of legislative intent. [See *Chicone v. State*, 684 So.2d 736, 741 (Fla.1996)(reiterating that "since the legislature is vested with the authority to define the elements of a crime, determining whether scienter is an essential element of a statutory crime is a question of legislative intent")] 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. [Id.; see also *Giorgetti v. State*, 821 So.2d 417, 420-21 (Fla. 4th DCA 2002), review granted, 837 So.2d 412 (Fla.2003)]

Turning to the statute in question, the legislature left no doubt as to its intention that this offense be treated as a strict liability crime for which the State was not required to prove criminal scienter on the part of Hodge. Section 794.021, Florida Statutes (2000), unequivocally provides that ignorance or mistake of the victim's age is not a defense to the crime for which Hodge was charged:

> When, in this chapter, the criminality of conduct depends upon the victim's being below a certain specified age, ignorance of the age is no defense. Neither shall misrepresentation of age by such person nor a bona fide belief that such person is over the specified age be a defense.

Our holding that section 794.05 is a strict liability crime is supported by earlier caselaw finding that crimes against underage persons fall " 'within the category of crimes in which, on grounds of public policy, certain acts are made punishable without proof that the defendant understands the facts that give character to his act ... and proof of an intent is not indispensable to conviction.' " [*State v. Sorakrai*, 543 So.2d 294, 295 (Fla. 2d DCA 1989) (quoting *Simmons v. State*, 151 Fla. 778, 10 So.2d 436, 438 (1942), and stating that ignorance or mistake as to age is no defense to a defendant charged with committing a lewd and lascivious act upon a child under the age of sixteen years); see also *Grady v. State*, 701 So.2d 1181 (Fla. 5th DCA 1997) (defendant's knowledge that the person he procured for prostitution was under eighteen is irrelevant); *Hicks v. State*, 561 So.2d 1284 (Fla. 2d DCA 1990) (defendant's ignorance of victim's age not a defense for defendant charged with use of a child in a sexual performance)]

Accordingly, because we find that the charged offense is a strict liability offense in which the State has an interest in protecting underage persons from being sexually battered or exploited, Hodge could not defend on his lack of criminal intent or mistake of age. The trial judge correctly denied Hodge's request to instruct the jury to the contrary.

Critical Thinking Question(s): Strict liability offenses have long been a concern of the law because they require no *mens rea* as to certain elements; however, they usually just result in fines. Why does the law treat statutory rape differently than other forms of rape? What if the accused was shown proof of the person's age, but it turned out to be false identification?

III. Concurrence:

Section Introduction: In order for a defendant to be convicted of a crime for which *actus reus* and *mens rea* are both required, it must be proven that the *actus reus* and *mens rea* occurred at the same time. Read the following Florida case keeping in mind the issue of concurrence.

State v. Brady, 745 So.2d 954 (1999)

Procedural History: Defendant was convicted in the Circuit Court, Orange County, Theotis Bronson, J., of two counts of attempted second-degree murder. He appealed. The District Court of Appeal, Fifth District, 700 So.2d 471, affirmed one conviction, reduced one conviction to aggravated battery, and certified question. The Supreme Court held that evidence supported both convictions of attempted murder without resort to doctrine of transferred intent.

Issue(s): Does the concept of transferred intent apply to attempted second degree murder where the defendant intended to kill one victim and, in the process, injured an innocent bystander?

Holding: Decision quashed in part; certified question not answered.

Opinion: PER CURIAM.

We have for review the decision in *Brady v. State*, [700 So.2d 471 (Fla. 5th DCA 1997)], based on a certified question of great public importance:

> CAN A DEFENDANT BE CONVICTED OF ATTEMPTED MURDER OF BOTH THE INTENDED VICTIM AND AN INNOCENT BYSTANDER WHEN THE DEFENDANT HAD NO INTENT TO MURDER THE LATTER, BUT THE LATTER IS INJURED DURING THE ATTEMPT ON THE INTENDED VICTIM?

We have jurisdiction pursuant to article V, section 3(b)(4) of the Florida Constitution. For the reasons that follow we decline to answer the certified question, and we quash, in part, the decision of the Fifth District Court of Appeal.

Facts: Petitioner, Bill Brady, was charged with two counts of attempted first-degree murder and convicted of two counts of attempted second-degree murder. The evidence at trial reflected that Brady fired a single shot at Ricky Mack ("Mack"), intending to murder Mack. The bullet missed Mack, but hit an unintended victim, Toya Harrell ("Harrell"), injuring her in the hand. The incident in question occurred on New Year's Eve while Brady, Mack, and Harrell were in a nightclub. The opinion below did not relay the following facts. Rather, these facts are taken directly from the record in this case. According to Mack's testimony at trial, Mack approached Brady inside the club to ask him about a prior incident. After tapping Brady on the shoulder, Mack asked him why he had shot at Mack several days earlier. Brady responded, "Yeah n, what about it?" and then pulled out his gun and shot at Mack. The bullet missed Mack but hit Harrell in the hand. The jury convicted Brady of attempted second-degree murder of both Mack and Harrell.

On appeal, the Fifth District upheld Brady's conviction of attempted second-degree murder of Mack. However, the court reduced Brady's conviction of attempted second-degree murder of Harrell to aggravated battery because it held that transferred intent could not be used to convict Brady of attempted murder of Harrell where there was no evidence of intent to kill her. [*Brady*, 700 So.2d at 473]. The court held that transferred intent could be used to transfer Brady's general intent to shoot Mack "to satisfy the 'intentionally causing bodily harm' requirement of aggravated battery as against Harrell." [Id.] As for the attempted murder conviction, however, the court below relied on *People v. Chinchilla*, [52 Cal.App.4th 683, 60 Cal.Rptr.2d 761 (1997)], in noting that had the issue been whether the "defendant attempted to murder multiple victims, then such intent is not subject to transfer but rather such intent should be independently evaluated as to each victim." [*Brady*, 700 So.2d at 473] As one commentator notes:

> If, without justification, excuse or mitigation, D with intent to kill A fires a shot which misses A but unexpectedly inflicts a non-fatal injury upon B, D is guilty of

> an attempt to commit murder, but the attempt was to murder A whom D was trying to kill and not B who was hit quite accidentally. And so far as the criminal law is concerned there is no transfer of this intent from one to the other so as to make D guilty of an attempt to murder B. Hence an indictment or information charging an attempt to murder B, or (under statute) an assault with intent to murder B, will not support a conviction if the evidence shows that the injury to B was accidental and the only intent was to murder A. [Rollin M. Perkins & Ronald N. Boyce, Criminal Law 925 (3d ed.1982)]

[See also Lt.-Col. LeEllen Coacher & Capt. Libby Gallo, Criminal Liability: Transferred and Concurrent Intent, 44 A.F. L.Rev. 227 (1998)]

A number of jurisdictions have rejected the doctrine of transferred intent in relation to the crime of attempted murder of the unintended victim. [See, e.g., *Jones v. State*, 159 Ark. 215, 251 S.W. 690 (1923); *People v. Chinchilla*, 52 Cal.App.4th 683, 60 Cal.Rptr.2d 761, 765 (1997); *People v. Calderon*, 232 Cal.App.3d 930, 283 Cal.Rptr. 833 (1991); *State v. Hinton*, 227 Conn. 301, 630 A.2d 593, 602 (1993); *Ford v. State*, 330 Md. 682, 625 A.2d 984 (1993); *State v. Williamson*, 203 Mo. 591, 102 S.W. 519 (1907); *State v. Mulhall*, 199 Mo. 202, 97 S.W. 583 (1906); *People v. Fernandez*, 88 N.Y.2d 777, 650 N.Y.S.2d 625, 673 N.E.2d 910, 914 (1996); *State v. Shanley*, 20 S.D. 18, 104 N.W. 522 (1905)] As several of these cases reason, transferred intent is inapplicable where no death results and the defendant is charged with attempted murder of the intended victim, because the defendant committed a completed crime at the time he shot at the intended victim regardless of whether any injury resulted to the unintended victim. [See *Chinchilla*, 60 Cal.Rptr.2d at 764-65; *Calderon*, 283 Cal.Rptr. at 836-37; *Fernandez*, 650 N.Y.S.2d 625, 673 N.E.2d at 914]

The state cites to *State v. Wilson*, [[313 Md. 600, 546 A.2d 1041 (1988)] and *State v. Gillette*, [102 N.M. 695, 699 P.2d 626 (1985)], in support of its argument that transferred intent applies to attempted murder of the unintended victim. Although relied upon by the state in this case, we note that the holding in *Wilson* was disapproved in a later decision by the Maryland Court of Appeals in *Ford*. [See also *Poe v. State*, 341 Md. 523, 671 A.2d 501 (1996) (holding that transferred intent does not apply to attempted murder)] In so holding, the court disapproved its earlier opinion in *Wilson* to the extent it held otherwise but, nevertheless, approved the result in *Wilson* because the evidence was sufficient to uphold the convictions for attempted murder as to each victim. [See *Ford*, 625 A.2d at 999-1000] The court noted that because Wilson shot into an area where a number of persons were standing, it could be shown that he possessed the requisite intent for each individual victim, and therefore there was no need to resort to the doctrine of transferred intent. [[Id. at 1000] The Court of Special Appeals in Maryland, in *Harvey v. State*, [111 Md.App. 401, 681 A.2d 628 (1996)], followed the reasoning in *Ford* in holding that transferred intent applies only where the defendant intends to kill one person and mistakenly kills an unintended victim. In other words, the court held that transferred intent does not apply to inchoate crimes where the defendant either misses or merely injures the unintended victim. [Id. at 639-44]

We must look to the law of attempted second-degree murder to determine whether the two convictions here may stand. Although Florida recognizes the doctrine of transferred intent, the issue of whether the doctrine applies to the crime of attempted second-degree murder appears to be one of first impression. The district court did not specifically discuss the issue, and the parties have cited no cases on the issue. Rather, it appears that the district court treated the case as if it involved convictions of attempted first-degree murder, a crime that requires proof of specific intent to kill.

In the instant case, had Harrell been killed rather than injured and the jury found an intent to kill Mack, under Florida law the doctrine of transferred intent clearly would apply to hold Brady responsible for his true culpability - murder. In that situation, transferred intent would connect the *mens rea* (intent to kill Mack) with the *actus reus* (physical act of killing Harrell) to form a completed crime. Here, however, Harrell was injured but not killed and, rather than find Brady guilty of attempted first-degree murder as charged, the jury found Brady guilty of attempted second-degree murder.

The offense of attempted second-degree murder does not require proof of the specific intent to commit the underlying act (i.e., murder). [See *Gentry v. State*, 437 So.2d 1097 (Fla.1983)] In *Gentry*, we held that the crime of attempted second-degree murder does not require proof of the specific intent to kill. Although the crime of attempt generally requires proof of a specific intent to commit the crime plus an overt act in furtherance of that intent, we reasoned:

> If the state is not required to show specific intent to successfully prosecute the completed crime, it will not be required to show specific intent to successfully prosecute an attempt to commit that crime." [Id. at 1099]

To establish attempted second-degree murder of Harrell, the state had to show (1) that Brady intentionally committed an act which would have resulted in the death of Harrell except that someone prevented him from killing Harrell or he failed to do so, and (2) that the act was imminently dangerous to another and demonstrated a depraved mind without regard for human life. [See Standard Jury Instructions in Criminal Cases, 697 So.2d 84, 90 (Fla.1997)]
Based on *Gentry* and the evidence presented at trial as outlined above, it would appear that a jury could reasonably conclude that Brady intentionally committed an act imminently dangerous to others, including Mack and Harrell, without regard for human life which would have resulted in death had the bullet fatally struck either Mack or Harrell. That is, by intentionally firing a deadly weapon in close proximity to both Mack and Harrell, the defendant intentionally committed an act that, had death resulted, would have constituted second-degree murder as to either Mack or Harrell. The attempt as to Mack appears clearer under evidence indicating that Mack was the intended target. However, because Harrell was in close proximity we also believe a jury could reasonably conclude, under the evidence, that the "act imminently dangerous to others" requirement of the second-degree murder statute would also be met by the proof submitted. Hence, there is no need to resort to the doctrine of transferred intent to the extent the facts in this case support a conviction of attempted second-degree murder of Mack and Harrell.

Our conclusion is strengthened by the jury instructions given by the trial judge in this cause. As part of the instruction on attempted first-degree murder, the court instructed the jury:

> If the person aims or shoots a firearm at another person but instead misses and hits a different person, the law transfers the intent to shoot from the person who was aimed at to the person who was actually hit.

However, no instruction on transferred intent was given as to the lesser included offenses, including the lesser offense of attempted second-degree murder. Of course, as we have noted above, we have not required specific intent to be proven for attempted second-degree murder. [See *Gentry*, 437 So.2d at 1097] Thus, it appears that the jury convicted Brady on two counts of attempted second-degree murder without resort to the doctrine of transferred intent. Under our analysis and holding in *Gentry* that would be lawful. Accordingly, we decline to answer the certified question, quash the district court's decision and remand for further proceedings consistent herewith.

Critical Thinking Questions: For an attempt, it would make sense to require a specific intent rather than a general intent. In your own words, how does the Court explain the concurrence element of the defendant's *mens rea* and *actus reus* as it pertains to the unintended victim? Why did the Court refuse to answer the certified question?

IV. Causality:

Section Introduction: Conviction for certain types of criminal behavior also requires that the criminal act be either the factual or proximate cause of some harm. In these cases a defendant may draw his or her guilt into question based upon the idea that their actions did not properly cause the harm that followed. Read the following Florida statute with regard to the issue of causality and keep these ideas in mind while you examine the two cases that follow.

Florida Statute, section 782.035 - Abrogation of common-law rule of evidence known as "year-and-a-day rule"

> The common-law rule of evidence applicable to homicide prosecutions known as the "year-and-a-day rule," which provides a conclusive presumption that an injury is not the cause of death or that whether it is the cause cannot be discerned if the interval between the infliction of the injury and the victim's death exceeds a year and a day, is hereby abrogated and does not apply in this state.

***Gian-Cursio/Epstein v. State*, 180 So.2d 396 (1965)**

Procedural History: Physicians were convicted in the Criminal Court of Record of Dade County, Jack A. Falk, J., of manslaughter through culpable negligence, and they

appealed. The District Court of Appeal, Carroll, J., held that evidence that chiropractic physicians were aware of patient's tuberculosis, that they treated patient without drugs and by a vegetarian diet interspersed with fasting periods, together with testimony that treatment given patient was not approved medical treatment for one with active tuberculosis, was sufficient to sustain physicians' convictions for manslaugther.

Issue(s): Was there sufficient evidence to show that the defendant's actions caused the death of the patitent?

Facts: The record discloses that one Roger Mozian died of pulmonary tuberculosis in May of 1963. His disease had been diagnosed in 1951 by Dr. Matis, a New York medical doctor in whose charge he remained for some ten years, during which his tuberculosis continued dormant or arrested. An X-ray examination of Mozian by Dr. Matis in January of 1962 showed his disease had become active. Dr. Matis recommended hospitalization and drug treatment, which Mozian refused. Mozian went under the care of Dr. Gian-Cursio a licensed chiropractic physician in the State of New York, who practiced Natural Hygiene. Dr. Gian-Cursio was advised that Mozian was suffering from tuberculosis. His treatment of the patient was without drugs and by a vegetarian diet, interspersed with fasting periods. Evidence was in conflict as to length of fasting. There was testimony that on occasion the facting continued 14 days. Dr. Epstein was a licensed chiropractic physician of Florida. Acting with Dr. Gian-Cursio and under his direction, Dr. Epstein operated a home or establishment for patients in Dade County, Florida. Beginning in the winter of 1962, on the advice of Dr. Gian-Cursio, Mozian went there and was treated by the appellant doctors, in the manner stated above.

Eventually, in May of 1963 he was hospitalized, where through other doctors he was given drugs and other approved treatment for the disease but within a matter of days he died, on May 16, 1963. There was testimony that the treatment given Mozian was not approved medical treatment for one with active tuberculosis, and that had he been treated by approved medical methods and given available drugs his disease could have been arrested or controlled.

Holding: Affirmed.

Opinion: CARROLL, Judge.

The appellants, who are chiropractic physicians, were informed against in Dade County, charged with manslaughter by having caused the death of one Roger Mozian through culpable negligence. The defendants were tried together and convicted. Dr. Gian-Cursio was sentenced to confinement for a period of five years, and sentence was suspended as to Dr. Epstein. Motions for new trial filed by defendants were denied, and they appealed. The two appeals were consolidated for presentation in this court.

§ 782.07, Fla.State., F.S.A., provides as follows: 'The killing of a human being by the act, procurement or culpable negligence of anothere, in cases where such killing shall not be jusifiable or excusable homicide nor murder, according to the provisions of this chapter,

shall be deemed manslaughter, and shall be punished by imprisonment in the state prison not exceeding twenty years, or imprisonment in the county jail not exceeding one year, or by fine not exceeding five thousand dollars.'

Appellants contend that evidence was insufficient to support the verdicts and judgments of conviction. In addition, appellant Gian-Cursio, in a second point in his brief, claims errors at trial which he lists as allowing introduction of certain inadmissible evidence and improper impeachment of a witness, and prejudicial remarks by the prosecutor in argument. We have examined the voluminous record of the proceedings on the trial, and on consideration thereof and of the briefs and arguments we conclude that the contentions of the appellants are without merit. In our view the evidence adequately supports the verdicts and judgments against the appellants, and we find no reversible error in the rulings or action of the trial court as referred to in the second point in the brief of appellant Gian-Cursio.

From the evidence the jury could, and no doubt did conclude that the treatment afforded by the appellants advanced rather than retarded the patient's tuberculosis infection and caused his death, and that their method of treatment of this tuberculosis patient amounted to culpable negligence as it has been defined in the decisions of the Supreme Court of this State. In *State v. Heines*, [144 Fla. 272, 197 So. 787, 788], the Florida Supreme Court reversed an order quashing a manslaughter information which charged a chiropractic physician with causing the death of a patient who suffered from diabetes, by culpable negligence through treatment which included taking him off insulin.

After citing and discussing the earlier Florida decision in *Hampton v. State*, [50 Fla. 55, 39 So. 421], and the cases of *State v. Lester*, [127 Minn. 282, 149 N.W. 297, L.R.A.1915D, 201], and *State v. Karsunky*, [197 Wash. 87, 84 P.2d 390], the Florida Supreme Court said:

> We need add little more to what has been written in the three cases cited to show how one who is proven to have offended as detailed in the information has violated the law against manslaughter. If a person undertakes to cure those who search for health and who are, because of their plight, more or less susceptible of following the advice of any one who claims the knowledge and means to heal, he cannot escape the consequence of his gross ignorance of accepted and established remedies and methods for the treatment of diseases from which he knows his patients suffer and if his wrongful acts, positive or negative, reach the degree of grossness he will be answerable to the State.

In the earlier case of *Hampton v. State*, [supra], the Florida Court went into the matter at greater length, and what they held there is applicable to the situation presented by this record. In that case the Court said [39 So. at 424]:

> We do not agree with this contention of the able counsel for the defendant. The law seems to be fairly well settled, both in England and America, that where the death of a person results from the criminal negligence of the medical practitioner in the treatment of the case the latter is guilty of manslaughter, and that this

> criminal liability is not dependent on whether or not the party undertaking the treatment of the case is a duly licensed practitioner, or merely assumes to act as such, acted with good intent in administering the treatment, and did so with the expectation that the result would prove beneficial, and that the real question upon which the criminal liability depends in such cases in whether there was criminal negligence; that criminal negligence is largely a matter of degree, incapable of precise definition, and whether or not it exists to such a degree as to involve criminal liability is to be determined by the jury; that criminal negligence exists where the physician or surgeon, or person assuming to act as such, exhibits gross lack of competency, or gross inattention, or criminal indifference to the patient's safety, and that this may arise from his gross ignorance of the science of medicine or surgery and of the effect of the remedies employed, through his gross negligence in the application and selection of remedies and his lack of proper skill in the use of instruments, or through his failure to give proper instructions to the patient as to the use of the medicines; that where the person treating the case does nothing that a skillful person might not do, and death results merely from an error of judgment on his part, or an inadvertent mistake, he is not criminally liable. [22 Am. & Eng. Ency. Law (2d Ed .) pp. 810, 811, and authorities there cited.]

We reject as unsound the arguments of appellants that because their treatment conformed to generally accepted practice of drugless healers and was rendered in good faith in an effort to heal Mozian, it was proper and could not be found to constitute criminal negligence. That, and appellant's further argument that their treatment of Mozian could not have been stated through testimony of medical doctors, is answered adversely to appellant by *Hampton v. State*, [supra]. In *Hampton* it was held to be immaterial 'whether or not the party undertaking the treatment of the case is a duly licensed practitioner, or merely assumes to act as such, acted with good intent in administering the treatment, and did so with the expectation that the results would prove beneficial.'

Additionally, appellants argue that proximate cause was not established. The issue of proximate cause was one for the jury, and the record furnished substantial evidence upon which that issue was submitted for jury determination. Under the applicable law as enunciated in the cited Florida cases, the trial court was eminently correct in denying defendants' motions for directed verdict and in submitting the issue of their alleged culpable negligence to the jury. No reversible error having been made to appear, the judgments in appeals numbered 64-514 and 64-561 should be and hereby the affirmed.

Critical Thinking Question(s): Should medical practitioners be held culpable if they follow standard medical practices in their field and the patient consents? How did the State prove that the defendant’s actions were the proximate cause of the patient’s death? Doe sit matter that he would have died sooner or later any way?

***Martin* v. *State*, 377 So.2d 706 (1979)**

Procedural History: Defendant was convicted in the Circuit Court, Volusia County, Uriel Blount, Jr., J., of first-degree murder by distribution of heroin proximately causing the

death of another, and he appealed. The Supreme Court, 360 So.2d 396, reversed and remanded for a new trial. Upon a subsequent plea of nolo contendere, the Circuit Court found defendant guilty of second-degree murder, and he appealed. The Supreme Court, Boyd, J., held, inter alia, that: (1) as regards death resulting from the criminal act of distributing heroin, the standard for causal relation embodied in the first-degree felony-murder statute is constitutional; (2) rule of Adams and Dixon, that a participant in the underlying felony who is not present when the killing occurs is liable for second-degree but not first-degree felony-murder, applies to all of the enumerated felonies in subsection (1)(a) of the statute except distribution of heroin; and (3) felony-murder liability for distribution of heroin causing death is not inapplicable simply because the victim obtained, possessed and used the heroin voluntarily.

Issue(s): Is the defendant legally culpable for causing the death of a consenting drug user merely by supplying drugs even though he was not present at the time of death?

Facts: The victim of the killing in this case gave money to a heroin user, who took the money, purchased heroin from the appellant with it, brought the heroin back and delivered it to the victim. The victim died from injection of the heroin. The appellant was not present at the time of the delivery of the heroin to the victim, nor at the time of the injection of the heroin or the death of the victim. The appellant never had any contact with the victim.

Before the trial that resulted in the judgment from which appellant's earlier appeal was brought, he moved to dismiss the indictment on constitutional grounds. In that proceeding he also raised issues as to the applicability to him of the first-degree felony murder statute. On remand after appeal to this Court, these contentions were renewed by motion to dismiss. After the denial of his new motion to dismiss, the appellant pursuant to agreement with the state pled nolo contendere to a charge of murder in the second degree, reserving the right to appeal the court's rulings.

Holding: Judgment affirmed.

Opinion: BOYD, Justice.

This cause is before the Court on appeal from a judgment of the Circuit Court of the Seventh Judicial Circuit, in and for Volusia County. The trial court passed upon the constitutionality of a state law, thus vesting in this Court jurisdiction of the appeal. [Art. V, s 3(b)(1), Fla.Const.] Previous to the proceedings culminating in the judgment from which this appeal is brought, the appellant was convicted of murder in the first degree by distribution of heroin proximately causing the death of another in violation of section 782.04(1)(a), Florida Statutes (1973). On appeal, this Court reversed and remanded for a new trial. [*Martin v. State*, 360 So.2d 396 (Fla.1978)]

The appellant presents three issues. The appellant contends that the first-degree felony murder statute violates due process in that it permits conviction upon a showing of proximate causation of the death by the criminal act of distributing heroin. This standard

of causation, appellant contends, is impermissible in a criminal prosecution. He argues that due process requires a more direct causal connection between the culpable conduct and the criminal result.

The appellant contends further that even if such an indirect causation standard is permissible, it is unclear whether the legislature intended such a standard. He says that because the statute is not clear as to whether, in the case of such an indirect causal connection, liability under felony murder is intended, the statute is unconstitutionally vague for failure to advise of what conduct will be considered a violation.

The appellant's arguments are without merit. We hold that the standard for causal relation embodied in the statute is constitutional. We also hold that the legislature has clearly expressed its intent that section 782.04(1)(a) be applicable to a distributor of heroin who has no direct contact with the ultimate user who is killed. The law comports with due process.

The appellant contends that because of the distinction between first-degree felony murder and second-degree felony murder, as intended by the legislature and elucidated by case law, section 782.04(1)(a) is not applicable to one who distributes heroin but has no direct contact with the victim. *Adams v. State*, [341 So.2d 765 (Fla.1976)] and *State v. Dixon*, [283 So.2d 1 (Fla.1973)], say that the difference in language between the felony murder provisions of subsections (1)(a) and (2) demonstrates a legislative intent to resurrect the distinction between principals of the first and second degree on the one hand, and accessories before the fact on the other. A participant in the underlying felony who is not personally present at the time of the killing is liable for second-degree felony murder while a participant who is present is liable for first-degree felony murder. Since the appellant was not present when the victim received the heroin or when he died, he argues that first-degree felony murder is inapplicable.

The appellant further contends that although the *Adams* and *Dixon* cases say that his conduct constitutes second-degree rather than first-degree felony murder, second-degree felony murder is inapplicable also, since section 782.04(2) does not include distribution of heroin among its enumerated underlying felonies. He argues, therefore, that his conviction for second-degree murder cannot stand because second-degree felony murder by distribution of heroin is a nonexistent offense.

The appellant's arguments are without merit. We hold that the rule of *Adams* and *Dixon* that a participant in the underlying felony who is not present when the killing occurs is liable for second-degree but not first-degree felony murder, applies to all of the enumerated felonies in subsection (1)(a) except distribution of heroin. In the case of a felony murder prosecution based on the underlying felony of heroin distribution, different considerations apply. The heroin distributor, even where the heroin passes through the hands of another before it reaches the victim and kills, and even where the perpetrator is not present when the death occurs, is the principal in the crime. He is the perpetrator of the underlying felony and is liable for first-degree murder.

The appellant pled nolo contendere to the second-degree murder charge and thus admitted the facts necessary to sustain it. We hold that since the facts would have supported a conviction of first-degree murder, the appellant's plea of nolo contendere to second-degree precludes any consideration of the sufficiency of the charge of second-degree murder.

The appellant contends that felony murder liability is not applicable to the facts of this case since the person killed was a voluntary participant in the distribution of heroin. He cites cases holding that the death of a co-felon cannot be the basis for a charge of felony murder. In *State v. Williams*, [254 So.2d 548, 550 (Fla.2d DCA 1971)], it was said that "the obvious ultimate purpose of the felony-murder statute . . . is, we think, to prevent the death of innocent persons likely to occur during the commission of certain inherently dangerous and particularly grievous felonies." Whatever force this rationale may have in dealing with other factual situations that may arise under the statute, we hold that it is inapplicable here. To hold otherwise would undercut the operation of the statute and thwart the obvious legislative purpose. Felony murder liability for distribution of heroin causing death is not inapplicable simply because the victim obtained, possessed and used the heroin voluntarily.

Each of the appellant's contentions is without merit. The judgment of the circuit court is affirmed.

Critical Thinking Question(s): This case is really about causality as the appellant does not seem to understand that it was the fact that he facilitated the death by supplying the drugs.

- Do you believe the defendant should receive leniency due to the fact that the victim in the case was not only a willing participant, but actually sought out the drugs that killed her?
- How far back in the supply train can the State go to hold someone culpable for causing the death of a user that overdoses?