Chapter 14: White-Collar Crime

Note: All statutes were retrieved from Florida Statutes Annotated. Only relevant portions thereof were placed in the text. All cases were retrieved from Westlaw. Cases were edited for relevance, clarity and readability. See original cases for complete text. Information in chapter overviews is obtained from the original text by Matthew Lippman.

Chapter Overview:

The term "white collar crime" is used to refer to a category of crime that is carried out by professionals, otherwise known as white collar workers. This category includes certain environmental crimes, violations of standards of occupational health and safety, securities fraud, mail and wire fraud, health care fraud, money laundering, antitrust violations, and public corruption.

The category of environmental crime encompasses a great variety of different criminal acts, such as pollution of the air and water and the illegal dumping of waste materials. Such acts are criminalized due to the danger they pose to people who are exposed to their effects. There have been cases, for example, of individuals who reside in communities where hazardous waste is improperly disposed facing serious complications of health. Threats to health and safety are also of concern for employers, who are legally required to maintain certain standards to protect their employees. For the most part such issues are addressed in civil cases whereby employees seek financial compensation for harms incurred at the workplace.

The heading of white collar crime also covers several types of fraud. Securities fraud involves fraudulent activity with relation to stock and the stock market, such as insider trading and misrepresentation of the value of stock. Mail and wire fraud encompasses a variety of criminal acts itself, specifically those which involve an intent to defraud individuals through the use of communication sent through the mail or various forms of wire. Health care fraud is a crime by which individuals fraudulently obtain an advantage from a health care benefit program. An example of such a crime would be a health care professional filing fraudulent insurance claims to receive payment for services never rendered.

When criminals make monetary gains through illegal acts they often wish to conceal the source of that income to protect themselves from prosecution. The way this is done is through the crime of money laundering. To launder money is to conceal the source of income, such as by creating the appearance of employment by a legitimate business.

Individuals or organizations can also commit crimes by violating antitrust laws, which seek to ensure a fair marketplace. Two elements are required for a conviction of this crime. The first is that two or more parties knowingly formed a contract or conspiracy with each other, and the second is that said contract or conspiracy either caused or had the potential to cause a restraint of interstate trade of a degree deemed unacceptable by the law.

The final white collar crime addressed by this chapter is public corruption, otherwise called crimes of official misconduct. These are crimes by which an individual carries out corrupt behaviors in his or her capacity as a public official. The most common form of public corruption is bribery, by which an official accepts some gain in exchange for an official act or decision. In this chapter of the Florida supplement you will learn what Florida statues specifically address the issues of white collar crime, as well as read Florida case law exhibiting the application of such statutes.

I. White Collar Crime

Section Introduction: In addition to individual statutes regarding various categories of white collar crime, Florida also upholds one statute that deals with white collar crimes in general.

Florida Statutes, sec. 775.0844 - White Collar Crime Victim Protection Act

(1) This section may be cited as the "White Collar Crime Victim Protection Act."

(2) Due to the frequency with which victims, particularly elderly victims, are deceived and cheated by criminals who commit nonviolent frauds and swindles, frequently through the use of the Internet and other electronic technology and frequently causing the loss of substantial amounts of property, it is the intent of the Legislature to enhance the sanctions imposed for nonviolent frauds and swindles, protect the public's property, and assist in prosecuting white collar criminals.

(4) As used in this section, "aggravated white collar crime" means engaging in at least two white collar crimes that have the same or similar intents, results, accomplices, victims, or methods of commission, or that are otherwise interrelated by distinguishing characteristics and are not isolated incidents, provided that at least one of such crimes occurred after the effective date of this act.

(7) In addition to a sentence otherwise authorized by law, a person convicted of an aggravated white collar crime may pay a fine of $500,000 or double the value of the pecuniary gain or loss, whichever is greater.

II. Environmental Crimes

Section Introduction: The seriousness of environmental crimes stems from the fact that they have the potential to put so many people's health and safety in danger. There are a variety of laws that are intended to protect people from such violations. Below are the relevant Florida statutes and an accompanying case law example.

Florida Statutes, section 376.041 - Pollution of waters and lands of the state prohibited

The discharge of pollutants into or upon any coastal waters, estuaries, tidal flats, beaches, and lands adjoining the seacoast of the state in the manner defined by ss. 376.011-376.21 is prohibited.

Florida Statutes, section 376.031 - Definitions; ss. 376.011-376.21
When used in ss. 376.011-376.21, unless the context clearly requires otherwise, the term:

16) "Pollutants" includes oil of any kind and in any form, gasoline, pesticides, ammonia, chlorine, and derivatives thereof, excluding liquefied petroleum gas.

Florida Statutes, section 403.727 - Violations; defenses, penalties, and remedies
(1) It is unlawful for any hazardous waste generator, transporter, or facility owner or operator to:

(a) Fail to comply with the provisions of this act or departmental rules or orders;
(b) Operate without a valid permit;
(c) Fail to comply with a permit;
(d) Cause, authorize, create, suffer, or allow an imminent hazard to occur or continue;
(e) Knowingly make any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to the provisions of this act;
(f) Fail to notify the department pursuant to sec. 403.72(2); or
(g) Refuse lawful inspection.

(3) Violations of the provisions of this act are punishable as follows:

(a) Any person who violates the provisions of this act, the rules or orders of the department, or the conditions of a permit is liable to the state for any damages specified in sec. 403.141 and for a civil penalty of not more than $50,000 for each day of continued violation, except as otherwise provided herein. The department may revoke any permit issued to the violator. In any action by the department against a small hazardous waste generator for the improper disposal of hazardous wastes, a rebuttable presumption of improper disposal shall be created if the generator was notified pursuant to sec. 403.7234; the generator shall then have the burden of proving that the disposal was proper. If the generator was not so notified, the burden of proving improper disposal shall be placed upon the department.
(b) Any person who knowingly or by exhibiting reckless indifference or gross careless disregard for human health:

1. Transports or causes to be transported any hazardous waste, as defined in sec. 403.703, to a facility which does not have a permit when such a permit is required under sec. 403.707 or sec. 403.722;
2. Disposes of, treats, or stores hazardous waste:

a. At any place but a hazardous waste facility which has a current and valid permit pursuant to sec. 403.722;
b. In knowing violation of any material condition or requirement of such permit if such violation has a substantial likelihood of endangering human health, animal

or plant life, or property; or
c. In knowing violation of any material condition or requirement of any applicable rule or standard if such violation has a substantial likelihood of endangering human health, animal or plant life, or property;
3. Makes any false statement or representation or knowingly omits material information in any hazardous waste application, label, manifest, record, report, permit, or other document required by this act;
4. Generates, stores, treats, transports, disposes of, or otherwise handles any hazardous waste and who knowingly destroys, alters, conceals, or fails to file any record, application, manifest, report, or other document required to be maintained or filed for purposes of compliance with this act; or
5. Transports without a manifest, or causes to be transported without a manifest, any hazardous waste required by rules adopted by the department to be accompanied by a manifest is, upon conviction, guilty of a felony of the third degree, punishable for the first such conviction by a fine of not more than $50,000 for each day of violation or imprisonment not to exceed 5 years, or both, and for any subsequent conviction by a fine of not more than $100,000 per day of violation or imprisonment of not more than 10 years, or both.

***St. Regis Paper Co. v. State By and Through Florida Air and Water Pollution Control Commission*, 237 So.2d 797 (1970)**

Procedural History: Suit by Air and Water Pollution Control Commission for civil penalty for violation of Air and Water Pollution Control Act. Motion by the defendant industrial company to dismiss the complaint was denied by the Circuit Court, Duval County, Henry H. Martin, Jr., J., and the industrial company took an interlocutory appeal. The District Court of Appeal, Rawls, J., held that under the Act a requirement that the Commission give notice of violation is a condition precedent to any institution of proceeding by the Commission in a court of competent jurisdiction seeking civil or criminal penalties where a continuing violation is charged predicated upon usual and normal daily operation of the alleged violator's business.

Issue(s): By this interlocutory appeal, St. Regis Paper Company presents the following point, viz.: Does the 1967 Florida Air and Water Pollution Control Act require the Commission established therein to exercise its primary jurisdiction, give notice of an alleged violation or fulfill any administrative duties as a condition precedent to the institution of an action for civil penalties under the provisions of Section 403.161, Florida Statutes, 1967, F.S.A.?

Facts: The undisputed facts for consideration are: The Air and Water Pollution Control Commission, acting on behalf of the State of Florida, pursuant to the authority contained in Chapter 403, Florida Statutes, 1967, F.S.A., filed its complaint in the Circuit Court of Duval County, alleging therein that St. Regis for a period of 47 days had polluted the St. Johns River by discharging oil in its waters in violation of the Commission's Rule, Section 28--5.02(2). The Commission asked for assessment of a civil penalty not exceeding $1,000 per day for violation of F.S. Chapter 403, F.S.A., with the Commission reserving the right to later seek additional civil damages for tracing the source of the pollution and clearing the waters. St. Regis moved to dismiss the foregoing complaint upon the following grounds: 1. Failure to give written notice as required by s 403.121(1). 2. That such failure to give notice cannot be used retroactively. 3. Notice and tender of a hearing are conditions precedent to the existence of a right to institute said action. The trial judge denied defendant's motion to dismiss, hence this appeal.

Holding: Reversed with directions to grant motion to dismiss.

Opinion: RAWLS, Judge.

The Florida Air and Water Pollution Control Act was enacted in 1967, and created a specialized agency to deal with pollution problems. Prior to 1967 the Florida State Board of Health had been charged with the primary responsibility of dealing with pollution problems. Historically, the legislative, executive and judicial branches of the State of Florida have dealt rather gingerly with industries and governmental agencies who have been guilty of defiling our environment. An applicable aphorism, 'Sometimes things have to get worse before they can get better,' is appropos when considering the problems of today's environment. Ecology is the 'IN' subject of today's citizenry, as it well should be. An airplane pilot can readily recognize the tremendous increase of smoke and haze over the cities of Florida, which only a few years ago enjoyed clear and unlimited visibility. A fisherman in the streams of this State has difficulty escaping floating garbage, noxious odors, and beer cans by the gross. Our beaches, especially those situated in an area where a city pumps its sewage into the ocean, are almost uninhabitable. These are conditions that confront us today. Man, of all animals, pollutes his habitat the greatest. What we have defiled over a period of more than 100 years cannot be sanitized in one day, one month, one year, or by one law. Now is not the time to discard concepts of due process, fair play and substitute 'quick justice' in the name of 'kill the pollutants.'

By the enactment of Chapter 403, the legislature provided the lawful tools to be utilized in restoring man's habitat to a healthy environment. The administrative agency created has been charged with the responsibility of searching out and correcting the problems of pollution. It is primarily a regulatory agency, with law enforcement a secondary responsibility. Section 403.061 sets forth 26 separate paragraphs detailing the Commission's powers and duties. Subsection (1) requires the promulgation of current and long-range plans for pollution abatement; (6) grants to the Commission General supervision of the laws, rules and regulations pertaining to air and water pollution; (7), (8) and (9) authorize rule-making power; (10) provides for enforcement of Orders to

effectuate control of air and water pollution; and the remaining 16 subsections primarily deal with the promulgating standards to be utilized for the determination of pollution, the prevention of same, and administrative enforcement. It is apparent in analyzing the powers and duties of the Commission that pollution control has been placed primarily in its hands as an administrative agency.

Having concluded that the Commission is vested with broad powers in dealing with air and water pollution problems, we then must come to grips with the critical question of: How is this power to be exercised? Section 403.121 is captioned 'Enforcement; procedure' and provides in part:

> (1) If the commission has reason to believe a violation of any provision of this act has occurred, it shall cause written notice to be served upon the alleged violator or violators. The Notice shall specify the provision of the law, rule or regulation alleged to be violated, and the facts alleged to constitute a violation thereof, and may include an order that corrective action be taken within a reasonable time. No such order shall become effective except after reasonable notice; except that injunctive relief may be sought as provided under s 403.131.

Subsection (2) of s 403.121 provides for hearing and corrective action if the Commission finds a violation has occurred. The foregoing section details a classic administrative plan for combating pollution. Notice and hearing is provided for the 'run of the mill type' offense with injunctive relief being immediately available through the established judicial arm in critical instances.

The Commission strenuously argues that its grant of powers is derived from Chapter 403 and it further has the inherent powers of both the State Board of Health, under Chapter 381, Florida Statutes, F.S.A. and that of the former Air Pollution Control Commission, under Chapter 403, Florida Statutes, F.S.A. It is well settled that a statutory agency does not possess any inherent powers; such agency is limited to the powers granted, either expressly or by necessary implication, by the statutes creating them. [*Florida Industrial Commission ex rel. Special Disability Fund v. National Trucking Company*, 107 So.2d 397 (Fla.App.1st, 1958)] Comfort is sought by the Commission from the text, *Water Law and Administration, The Florida Experience*, authored by Maloney, Plager and Baldwin, in that the authors concluded that the legislature strengthened the enforcement powers of the State especially in s 403.161. With this observation we agree; however, in analyzing this section we fail to find a specific grant to the Commission to institute an independent judicial action seeking civil and criminal penalties prior to complying with the mandatory requirements of s 403.121.

Reading Chapter 403 in its entirety it is our conclusion that the legislative intent was to establish an administrative agency and empower it with necessary authority to combat the defilement of our air and water primarily through administrative action. An essential mandate to this agency is the seeking out of pollutants and presenting no the violator an opportunity to abate the unlawful practice. The emphasis is upon prevention and abatement; not upon enriching the coffers of the State treasury or its prison population.

The legislative scheme is primarily directed towards re-establishing a livable habitat for man; not the abatement or elimination of the industries and governmental units which are guilty of polluting our environment.

By its complaint, the Commission alleges that it has known appellant has polluted the waters of the St. Johns River from day to day for a period of 43 days prior to filing said complaint. Of equal importance, the Commission failed to allege that it had taken any administrative action towards the prevention or abatement of such conduct. It did not seek injunctive relief as it is permitted to do in certain instances specified by s 403.131, Florida Statutes, F.S.A. Apparently the Commission was content to sit by and observe the defilement of our natural resources for a long period of time and then by construction of its own rules seek civil penalties in a sum that might well abate the industry.

Chapter 403 is construed to require mandatory compliance by the Commission with the provisions of s 403.121 prior to instituting a proceeding in a court of competent jurisdiction seeking civil or criminal penalties where a continuing violation is charged predicated upon the usual and normal daily operation of the alleged violator's business. Our conclusion does not preclude the Commission from instituting a judicial proceeding for civil or criminal penalties for a single violation arising out of unusual or abnormal activities on the part of the alleged violator. Of course, the provision of the Chapter granting to the Commission the right to seek an injunction is available to the Commission for initial relief without regard to s 403.121 in those circumstances coming within the purview of s 403.131. The trial court is directed to grant the instant motion to dismiss.

Critical thinking Question(s): Note that dealing with environmental issues, the forum is usually in a civil court and sanctions are often monetary. Do you believe the State should be more proactive and pursue criminal actions against companies and owners that violate administrative mandates? Why is the ill-conceived action, or omission, by such companies treated differently than individuals that “cause harm”?

III. Occupational Health and Safety

Section Introduction: Occupational health and safety is protected by the Workers’ Compensation Law. Redress for violation of this statute is typically sought in civil court.

Florida Statutes, section 440.015 - Legislative intent
It is the intent of the Legislature that the Workers' Compensation Law be interpreted so as to assure the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the worker's return to gainful reemployment at a reasonable cost to the employer. It is the specific intent of the Legislature that workers' compensation cases shall be decided on their merits. The workers' compensation system in Florida is based on a mutual renunciation of common-law rights and defenses by employers and employees alike. In addition, it is the intent of the Legislature that the facts in a workers' compensation case are not to be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Additionally, the Legislature hereby declares that disputes concerning the facts in workers' compensation cases are not to be

given a broad liberal construction in favor of the employee on the one hand or of the employer on the other hand, and the laws pertaining to workers' compensation are to be construed in accordance with the basic principles of statutory construction and not liberally in favor of either employee or employer. It is the intent of the Legislature to ensure the prompt delivery of benefits to the injured worker. Therefore, an efficient and self-executing system must be created which is not an economic or administrative burden. The department, agency, the Office of Insurance Regulation, the Department of Education, and the Division of Administrative Hearings shall administer the Workers' Compensation Law in a manner which facilitates the self-execution of the system and the process of ensuring a prompt and cost-effective delivery of payments.

IV. Securities Fraud

Section Introduction: There are multiple types of securities fraud recognized under Florida law, reflected in multiple state statutes. Some relevant statutes are listed below, along with a Florida case on securities fraud.

Florida Statutes, section 817.19 - Fraudulent issue of certificate of stock of corporation
Any officer, agent, clerk or servant of a corporation, or any other person, who fraudulently issues or transfers a certificate of stock of a corporation to any person not entitled thereto, or fraudulently signs such certificate, in blank or otherwise, with the intent that it shall be so issued or transferred by himself or herself or any other person, shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Florida Statutes, section 817.34 - False entries and statements by investment companies offering stock or security for sale
Any person who shall knowingly subscribe to or make or cause to be made, any false statements or false entry in any book of any investment company or exhibit any false paper with the intention of deceiving any person authorized to examine into the affairs of any investment company, or shall make, utter or publish any false statement of the financial condition of any investment company, or the stock, bonds or other securities by it offered for sale, shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Florida Statutes, section 817.562 - Fraud involving a security interest
(1) As used in this section, the terms "proceeds," "security agreement," "security interest," and "secured party" shall be given the meanings prescribed for them in chapter 679.

(2) A person is guilty of fraud involving a security interest when, having executed a security agreement creating a security interest in personal property, including accounts receivable, which security interest secures a monetary obligation owed to a secured party, and:

(a) Having under the security agreement both the right of sale or other disposition of the property and the duty to account to the secured party for the proceeds of disposition, he or she sells or otherwise disposes of the property and wrongfully and willfully fails to account to the secured party for the proceeds of disposition; or

(b) Having under the security agreement no right of sale or other disposition of the property, he or she knowingly secretes, withholds, or disposes of such property in violation of the security agreement.

(3) Any person who knowingly violates this section shall be punished as follows:

(a) If the value of the property sold, secreted, withheld, or disposed of or the proceeds from the sale or disposition of the property is $300 or more, such person is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(b) If the value of the property sold, secreted, withheld, or disposed of or the proceeds obtained from the sale or disposition of the property is less than $300, such person is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

State v. Moore, 892 So.2d 1218 (2005)

Procedural History: State charged defendant with fraud involving security interest. The Circuit Court, Duval County, Michael R. Weatherby, J., granted defendant's motion to dismiss information, and State appealed.

Issue(s): The state contends that Moore's conduct constituted fraud as defined by section 817.562(2) because Moore replaced stock certificate # 2030 with stock certificate # 2080 under false pretenses thereby invalidating the instrument that the law firm could use to access the pledged stock.

Facts: Moore owed the law firm of Smith, Hulsey and Busey approximately $250,000 for legal fees and costs arising from the law firm's representation of Moore. As a result, Moore executed a security agreement with the law firm, creating a security interest in Universal Beverages Holdings Corporation stock certificate # 2030. Under the security agreement Moore had no right of sale or other disposition of certificate # 2030. Nonetheless, Moore executed an affidavit certifying that certificate # 2030 had been lost or stolen, and Moore was issued a replacement certificate, certificate # 2080. Thereafter, Moore exchanged certificate # 2080 for three separate stock certificates, and he subsequently sold the underlying stock. The law firm, which continued to be in physical possession of certificate # 2030, had no knowledge of Moore's actions.

Subsequently, the state charged Moore with one count of fraud involving a security interest in violation of section 817.562(2). Moore filed a motion to dismiss the information, contending that the information failed to allege this offense because he could not dispose of certificate # 2030, as it was in the law firm's possession. The trial court granted the motion and this appeal followed.

Holding: The District Court of Appeal, Davis, J., held that evidence did not support charge for fraud involving security interest. Affirmed.

Opinion: DAVIS, J.

The state appeals the trial court's dismissal of a second amended information charging the appellee, Jonathon Oscar Moore, with one count of fraud involving a security interest in violation of section 817.562(2), Florida Statutes (2000). Because Moore's actions do not constitute the charged offense as defined by section 817.562(2), we affirm the trial court's dismissal of the second amended information.On appeal, the state contends that Moore's conduct constituted fraud as defined by section 817.562(2) because Moore replaced stock certificate # 2030 with stock certificate # 2080 under false pretenses thereby invalidating the instrument that the law firm could use to access the pledged stock. We disagree.

Section 817.562, provides in relevant part:

> (2) A person is guilty of fraud involving a security interest when, having executed a security agreement creating a security interest in personal property, including accounts receivable, which security interest secures a monetary obligation owed to a secured party, and:
>
> > (b) Having under the security agreement no right of sale or other disposition of the property, he or she knowingly secretes, withholds, or disposes of such property in violation of the security agreement.

Chapter 817, Florida Statutes, does not define the terms "dispose" or "secrete"; therefore, we employ the plain and ordinary meaning of these terms. [See *State v. Burris,* 875 So.2d 408, 410 (Fla.2004)] The term "dispose" is defined to include the act of transferring an item to the control of another. [Webster's New Collegiate Dictionary 327 (1979)] Likewise, "secrete" is defined as the act of concealing or secretly transferring property, particularly in an attempt to prevent creditors from finding the property. [Black's Law Dictionary 1355 (7th ed.1999)]

In this case, the security agreement created a security interest in stock certificate # 2030. A stock certificate, however, is only tangible evidence of a legal right to stock. [See *Williams Mgmt. Enters., Inc. v. Buonauro,* 489 So.2d 160, 164 n. 3-4 (Fla. 5th DCA 1986)] As such, the security interest was effectively in the intangible property right to stock represented by stock certificate # 2030. Therefore, the dispositive issue is whether Moore disposed of, or otherwise withheld, the law firm's right to the stock represented by certificate # 2030. To resolve this issue we must look to chapter 678, Florida Statutes

(2000), governing certificated securities, to determine whether the facts of this case gave rise to a disposition or transfer of the stock represented by certificate # 2030.

Section 678.4051(1), Florida Statutes (2000), provides that an owner of a certificated security is entitled to a replacement certificate if the original certificate is lost, destroyed, or taken. After the issuance of the new certificate, however, the stock issuer must accept the original certificate, if presented by a "protected purchaser," and then seek recovery from the person that requested the replacement certificate. [*Id.* § 678.4051(2)] A protected purchaser is one who gives value for the security, does not have notice of any adverse claim to the security, and obtains control of the stock certificate. [*Id.* § 678.3031(1)] The law firm is a protected purchaser because the stock certificate served as collateral or security for Moore's monetary obligation to the firm, and the firm remained in actual physical possession of the certificate at all times. [See *First Nat'l Bank of Fla. Keys v. Rosasco*, 622 So.2d 554, 555 (Fla. 3d DCA 1993)] As a protected purchaser, the law firm's right to the stock represented by certificate # 2030 is inalienable. Therefore, although Moore may have defrauded the stock issuer or committed some other criminal act, he did not commit fraud in violation of section 817.562(2) because he could not dispose or otherwise withhold the law firm's right to the stock represented by certificate # 2030.

Accordingly, we affirm the trial court's order dismissing the second amended information.

Dissent: ERVIN, J.

The majority erroneously relies on the provisions of section 678.4051, Florida Statutes (2000), relating to the replacement of lost, destroyed, or wrongfully taken security certificates, to support its affirmance of the order dismissing the information. Section 678.4051 is, however, altogether irrelevant to a determination of whether the owner of a certificated security may be charged with violating the provisions of section 817.562, Florida Statutes (2000), under circumstances where, as here, he is accused of falsely disposing of a stock certificate after previously transferring his interest in same to a protected purchaser of the original certificate. Whether Smith, Hulsey and Busey's right to the issuance of stock, by reason of its possession of the original certificate, may be unaffected by the transfer of the replacement certificate to Moore does not mean that he cannot be prosecuted for illegally disposing of the certificate under the terms of section 817.562.

As is clearly expressed in the first part of section 817.562(2)(b), a person may be prosecuted for fraudulently disposing of a security interest that is the subject of a security agreement if such person has "no right of sale or other disposition of the property." A disposition is defined as, among other things, "a transfer to the care or possession of another." [Merriam Webster's Collegiate Dictionary 335 (10th ed.1998)] Moore obviously had no right to dispose of the certificate, which he had previously placed in possession of Smith, Hulsey and Busey; yet he falsely reported that it was lost or stolen and later exchanged the replacement for separate certificates which he sold. In my

judgment, such acts constitute a disposition that is prohibited by the statute.

In deciding to affirm the lower court's order of dismissal, the majority is essentially construing the terms of section 817.562 *in pari materia* with those of section 678.4051. Such a construction, however, is inapplicable "[u]nless [the] statutes have a common aim or purpose and scope, and relate to the same subject, object, thing or person." [*Dep't of Health & Rehab. Servs. v. McTigue*, 387 So.2d 454, 456 (Fla. 1st DCA 1980)] The two statutes clearly serve different purposes, and the provisions of 817.562 should be enforced solely in accordance with their terms without reference to section 678.4051. The latter statute, placed under part IV of chapter 678 of the Uniform Commercial Code (UCC), relating to the registration of investment securities, was enacted for the purpose of changing the law as it had previously existed, which had rendered ineffective the redemptions of original certificates following the issuance of replacement certificates, except as to the right of a purchaser for value without notice to bring an action for damages. [§ 678.4051, Fla. Stat. Ann., UCC Comment 2 (West 2003)]

By reason of the revision, the corporation is now required to honor both the original and new certificates that are in the possession of protected purchasers unless an overissue results, in which event the purchaser retains only a right to an action for damages. [*Id.*] Although Smith, Hulsey may be a protected purchaser under civil law, this does not exonerate Moore, a person who obviously does not have the status of a protected purchaser, from criminal liability for his act of obtaining a replacement certificate under false pretenses and later profiting therefrom.

Because an order granting a motion to dismiss an information is subject to de novo review, *Bell v. State*, [835 So.2d 392, 394 (Fla. 2d DCA 2003)], we need give no evidentiary deference to any considerations that may have motivated the court's order. In my judgment, the lower court erred as a matter of law in its application of the law to the facts. I would therefore reverse the order of dismissal and remand the case for further proceedings.

Critical Thinking Question(s): In your opinion, did the Court’s Opinion or the Dissent make a more accurate interpretation of the statute and its relevancy to this case? Should someone who willfully violates a provision of the statutes be exonerated from criminal action in such a case? Is the original stock certificate worth anything once the new certificate isissued?

V. Mail and Wire Fraud:

Section Introduction: Mail and wire fraud are encompassed by the Florida statute on communications fraud, listed below with a relevant Florida case to exemplify its application.

Florida Statutes, section 817.034 - Florida Communications Fraud Act

(1) LEGISLATIVE INTENT

(a) The Legislature recognizes that schemes to defraud have proliferated in the United States in recent years and that many operators of schemes to defraud use communications technology to solicit victims and thereby conceal their identities and overcome a victim's normal resistance to sales pressure by delivering a personalized sales message.

(b) It is the intent of the Legislature to prevent the use of communications technology in furtherance of schemes to defraud by consolidating former statutes concerning schemes to defraud and organized fraud to permit prosecution of these crimes utilizing the legal precedent available under federal mail and wire fraud statutes.

(3) DEFINITIONS.--As used in this section, the term:

(a) "Communicate" means to transmit or transfer or to cause another to transmit or transfer signs, signals, writing, images, sounds, data, or intelligences of any nature in whole or in part by mail, or by wire, radio, electromagnetic, photoelectronic, or photooptical system.

(b) "Obtain" means temporarily or permanently to deprive any person of the right to property or a benefit therefrom, or to appropriate the property to one's own use or to the use of any other person not entitled thereto.

(c) "Property" means anything of value, and includes:

1. Real property, including things growing on, affixed to, or found in land;

2. Tangible or intangible personal property, including rights, privileges, interests, and claims; and

3. Services.

(d) "Scheme to defraud" means a systematic, ongoing course of conduct with intent to defraud one or more persons, or with intent to obtain property from one or more persons by false or fraudulent pretenses, representations, or promises or willful misrepresentations of a future act.

(e) "Value" means value determined according to any of the following:

1. a. The market value of the property at the time and place of the offense, or, if such cannot be satisfactorily ascertained, the cost of replacement of the property within a reasonable time after the offense.

b. The value of a written instrument that does not have a readily ascertainable market value, in the case of an instrument such as a check, draft, or promissory note, is the amount due or collectible or is, in the case of any other instrument which creates, releases, discharges, or otherwise affects any valuable legal right, privilege, or obligation, the greatest amount of economic loss that the owner of the instrument might reasonably suffer by virtue of the loss of the instrument.

c. The value of a trade secret that does not have a readily ascertainable market value is any reasonable value representing the damage to the owner, suffered by reason of losing an advantage over those who do not know of or use the trade secret.

2. If the value of property cannot be ascertained, the trier of fact may find the value to be not less than a certain amount; if no such minimum value can be ascertained, the value is an amount less than $300.

3. Amounts of value of separate properties obtained in one scheme to defraud, whether from the same person or from several persons, shall be aggregated in determining the grade of the offense under paragraph (4)(a).

(4) OFFENSES

(a) Any person who engages in a scheme to defraud and obtains property thereby is guilty of organized fraud, punishable as follows:

1. If the amount of property obtained has an aggregate value of $50,000 or more, the violator is guilty of a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

2. If the amount of property obtained has an aggregate value of $20,000 or more, but less than $50,000, the violator is guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

3. If the amount of property obtained has an aggregate value of less than $20,000, the violator is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(b) Any person who engages in a scheme to defraud and, in furtherance of that scheme, communicates with any person with intent to obtain property from that person is guilty, for each such act of communication, of communications fraud, punishable as follows:

1. If the value of property obtained or endeavored to be obtained by the communication is valued at $300 or more, the violator is guilty of a third degree felony, punishable as set forth in s. 775.082, s. 775.083, or s. 775.084.

2. If the value of the property obtained or endeavored to be obtained by the communication is valued at less than $300, the violator is guilty of a misdemeanor of the first degree, punishable as set forth in s. 775.082 or s. 775.083.

(c) Notwithstanding any contrary provisions of law, separate judgments and sentences for organized fraud under paragraph (a) and for each offense of communications fraud under paragraph (b) may be imposed when all such offenses involve the same scheme to defraud.

***Batten* v. *State* 591 So.2d 960 (1991)**

Procedural History: Defendant was convicted for organized fraud, communications fraud, acting as motor vehicle dealer without license and unlawfully representing himself to be attorney in connection with scheme to sell cars and obtain money through conjunction of available methods of communication with false and fraudulent pretenses, or representations after trial in the Circuit Court, Pinellas County, Charles S. Carrere, Acting J. Defendant appealed. The District Court of Appeal, Frank, J., held that: (1) Communications Fraud Act did not violate single subject clause of State Constitution, and (2) defendant's conduct constituted violation of Communications Fraud Act, even though no one appeared to have lost money.

Issue(s): Did the defendant commit fraud when he held himself out as an attorney selling cars for estates even though the “victims” received the autos for which they paid?

Facts: The evidence developed in support of the information's allegations disclosed that James Keyse purchased a 1979 Chrysler from Batten in June, 1988. The car had been located on a vacant lot with a "For Sale" sign. While test driving the automobile, Batten told Keyse that he dealt strictly in estate cars and that he was an attorney. Keyse signed a form giving Batten power of attorney; Batten suggested he could do the title work and save Keyse from having to wait at the title bureau. A document from the Department of Transportation showed that no sales tax was paid on the vehicle. Keyse did not receive his tag and title.

Frank D'Ambrosio testified that in December, 1988, he bought a car from Batten that had been advertised in the newspaper as an estate sale. D'Ambrosio met Batten at a Publix

store to see the car. Batten said he was a lawyer settling an estate and had to get rid of the car. D'Ambrosio bought the automobile for $2,900. Batten told him to tell the motor vehicle personnel that the car cost only $1,200 so they could each save on the tax. Without recounting all of the evidence disclosing Batten's "systematic, ongoing course of conduct" to sell cars and obtain money through the conjunction of available methods of communication with false and fraudulent pretenses, or representations, we find the following summarization of the testimony of several witnesses sufficient to bring Batten's activity within the reach of the Act's proscriptions:

> Clyde C. Mackey bought a Cadillac from appellant on July 14, 1986. The car was advertised in the paper by Batten to settle an estate. Batten told Mackey that he was an attorney specializing in settling estates.
>
> Linda Palmer testified that she was an inside sales division manager at the St. Petersburg Times and the custodian of records for phone installations, rentals, and all other business. She investigated Batten's file and found that during the first three months of 1988, he placed several ads in the paper to sell automobiles, using at least three different names (Robert Smith, Robert Brown, and Robert Jones) and three different telephone numbers. The typical ad placed by Batten said, "Lincoln 1979 Town Car, perfect, low miles, estate, must sell, best offer, 345-9354 any time."
>
> In late 1987 and early 1988, William Critelli worked for the Silver Sands Development Corporation where Batten leased a condominium unit. Critelli testified that Batten requested an extra telephone line. Batten had at least four extra cars that were parked in other people's places with the result that Batten was asked to move the cars. Batten told Critelli the cars were for sale.
>
> James Kebel, a custodian of records for General Telephone Company stated that his investigation showed at least two phone numbers that were call forwarded to the two lines in the leased condominium.
>
> Hugh Forsythe, who worked part-time for Batten between June, 1988 and May, 1989, testified that his job was to drive cars from a body and fender shop to Batten's residence, to parking lots or other persons' homes. During that time, Forsythe picked up, drove, or washed as many as three dozen different cars for Batten.
>
> Larry Krick, a criminal investigator assigned to the special investigations section of Pinellas County Department of Consumer Affairs, testified that he responded to an advertisement in the newspaper on April 27, 1989. Krick called the phone number listed and a man identifying himself as "Lee" answered. Krick arranged to meet Batten in the parking lot of the Grant Plaza K-Mart. Batten informed Krick that the vehicle was an estate car, but that the owner was an elderly gentleman who was still alive. The two men negotiated over the purchase price. Krick signed a power of attorney form, which in normal practice enables the auto dealership to take care of the steps necessary to register the car in the buyer's

> name. Batten had several additional pre-signed, pre-stamped power of attorney forms in his possession. Later, on May 3, 1989, Krick observed the meeting between Dano and Batten. He testified that Batten possessed and offered for sale at least three cars in addition to the one he drove to the meetings. Batten also told Krick that he had "secured these vehicles from attorneys."
>
> John Kilpatrick testified that he is in the towing business and in July or August, 1988, he towed seven of Batten's cars from a vacant lot. Kilpatrick also towed five cars from Batten's condominium parking area. From the end of 1987 until the end of 1989, Kilpatrick said he moved up to twenty vehicles for Batten.
>
> Ralph Miller testified that he had done some title work for Batten. When shown the power of attorney form signed by Keyse, Miller testified that the notary stamp looked like his, but the notary's signature was not his.
>
> Mr. Vicario testified that in March and April of 1988, he rented a room in his house to appellant. During this time, Vicario overheard Batten talking on the phone to people who had responded to the ads for the sale of cars. In most instances, Batten claimed he was an attorney. He told the callers he wanted to "sell the estate, get rid of it, and didn't want to fool with it."

Holding: Affirmed.

Opinion: FRANK, Judge.

Lebert Franklin Batten has appealed from convictions and sentences for organized fraud, communications fraud, acting as a motor vehicle dealer without a license and unlawfully representing himself to be an attorney. Batten has raised and we have considered each of the seven issues in the attack upon his convictions. We affirm.

Our research has revealed only one opinion from a Florida appellate court touching upon the Florida Communications Fraud Act (Act), § 817.034, Fla.Stat. (1989). In *Donovan v. State*, [572 So.2d 522 (Fla. 5th DCA 1990)], Judge Sharp refers to the Act but only to the extent necessary in determining a double jeopardy contention. The resolution of *Donovan* did not require the degree of inquiry into the Act we undertake in this opinion. Thus, we write in an attempt to elucidate the purpose of the Act, and the manner in which it is to operate.

Section 817.034(1)(b), Florida Statutes, describes the legislature's intent in enacting the Act and prescribes a source of authority for its implementation:

> ... to prevent the use of communications technology in furtherance of schemes to defraud by consolidating former statutes concerning schemes to defraud and organized fraud to permit prosecution of these crimes utilizing the legal precedent available under federal mail and wire fraud statutes.

A "scheme to defraud" as that phrase is used in the foregoing section is defined in section 817.034(3)(d) as:

> ... a systematic, ongoing course of conduct with intent to defraud one or more persons, or with intent to obtain property from one or more persons by false or fraudulent pretenses, representations, or promises or willful misrepresentations of a future act.

Our analysis of this matter begins with the information. Count I alleges that Batten "did engage in a systematic, ongoing course of conduct, with intent to defraud one or more persons, or with intent to obtain property from one or more persons, by false or fraudulent pretenses, [or] representations" pursuant to which he "obtained property valued at less than $20,000, contrary to Chapter 817.034(1)(3)." Counts II and III allege that Batten "did engage in a scheme to defraud, and in furtherance of that scheme did communicate with James D. Keyse and Frank D'Ambrosio with intent to obtain property ... [from each of them] in the amount of $300 or more, contrary to Chapter 817.034(4)(b)(1)."

At first blush, one might wonder how Batten's behavior can be condemned as criminal. The purchasers of Batten's cars, Keyse and D'Ambrosio, received the automobiles they had agreed to buy and consensually paid the ultimate amounts of money Batten accepted. He, however, identified the cars as originating in estates, suggesting through that representation that they were not "used cars" in the customary sense, and he complemented the suggestion with reference to himself as the attorney for the vending estate. The test of whether Batten's conduct offended the Act is not, as we show below, dependent upon loss or other detriment, as might be the case in a common law or other statutory fraud setting. [See, e.g., *Bruce v. Stork's Nest, Inc.*, 477 So.2d 51 (Fla. 2d DCA 1985)] The conclusion we have reached in this regard flows from the legislature's grant to the judiciary of the freedom to utilize "legal precedent available under federal mail and wire fraud statutes." [§ 817.034(1)(b). Fla.Stat.]

Before turning to the federal authorities pertinent to this proceeding, it is appropriate to note that the Act appears to have been patterned in substantial part after the federal wire and mail fraud statutes, 18 U.S.C. §§ 1341 and 1343. At the heart of the Act and the two federal statutes is the concept of "a scheme to defraud" with the utilization of communication techniques as the means to accomplish a deceitful objective. Thus, we perceive no distinction having any bearing upon the outcome we reach between the newspaper ads Batten purchased and the use of the mails, as Batten's method of communication would be implicated in an interstate setting violative of 18 U.S.C. § 1341.

Moreover, there is no functional difference between Batten's use of the telephone within Pinellas County to accomplish his illicit purposes and those instances where interstate telephoning subtends a violation of 18 U.S.C. § 1343. Thus, the "means-objective" relationship contemplated by the Act is in parallel with the federal statutes and the manner in which the federal judiciary has enforced those statutes. It is settled beyond cavil that to achieve a conviction under the mail fraud statute, 18 U.S.C. § 1341, the government need only prove a scheme to defraud and the use of the mail system for the purpose of executing the scheme. [*Pereira v. United States*, 347 U.S. 1, 74 S.Ct. 358, 98 L.Ed. 435 (1953)] Specific intent to use the mails in furtherance of the scheme is not an

element of the offense. [*United States v. Young*, 232 U.S. 155, 34 S.Ct. 303, 58 L.Ed. 548 (1914)]

These same principles are applicable to violations occurring under the wire fraud statute. [18 U.S.C. § 1343; *Carpenter v. United States,* 484 U.S. 19, n. 6, 108 S.Ct. 316, n. 6, 98 L.Ed.2d 275 (1987)] To sustain a conviction under either of the federal statutes, [i]t is enough ... that the government charge and the jury find either that the victim was actually deprived of money or property *or* that the defendant intended to defraud the victim of the same. A scheme to defraud, whether successful or not, remains within the purview of section 1341 as long as the jury was required to find an "intent to obtain money or property from the victim of the deceit." [*United States v. Lew*, 875 F.2d 219, 222 (9th Cir.1989). *United States v. Utz,* 886 F.2d 1148, 1151 (9th Cir.1989), *cert. denied,* 497 U.S. 1005, 110 S.Ct. 3242, 111 L.Ed.2d 753 (1990)]

In reliance upon *Utz,* the United States Court of Appeals for the Sixth Circuit observed that "[t]he government need only charge that the defendant intended to defraud the victim of money or property, not that the victim was actually deprived of money or property." [*United States v. Ames Sintering Co.*, 927 F.2d 232, 235 (6th Cir.1990)] In the face of that which we have extracted from the federal precedents, there is no question that the customary element found in the state fraud cases of loss or deprivation of something of value [see, e.g. *Crawford v. State,* 453 So.2d 1139 (Fla. 2d DCA 1984)], is not essential to a conviction based upon a violation of the Act. Indeed, the mail and wire fraud statutes are not confined to common law fraud. [*Durland v. United States,* 161 U.S. 306, 16 S.Ct. 508, 40 L.Ed. 709 (1896); *See United States v. Oren*, 893 F.2d 1057 (9th Cir.1990)] Here, no less than was true in *United States v. Dial,* [757 F.2d 163 (7th Cir.1985)], no one appears to have lost money, but the risk of loss may be deemed sufficient to sustain the convictions for violation of 18 U.S.C. §§ 1341 and 1343. [*Id.* at p. 170]

Although it plays no part in our resolution of this proceeding, the reality is that the Act, not unlike the federal statutes, is instinct with a potential for misapplication. Indeed, "[c]oncern has been expressed with the possible abuse of the mail and wire fraud statutes to punish criminally any departure from the highest ethical standards." [*Dial,* 757 F.2d at 170] Judicial anxiety in the federal setting stems from the broad language of the statutes providing punishment for the "scheme to defraud rather than the completed fraud itself." [*Id.*] The "concern naturally arises that the criminal law will be used to hold businessmen to the maximum, rather than the minimum, standards of ethical behavior." [*Id.*] Be that as it may, we cannot override or ignore the legislature's determination to create the Act and to provide the standard by which it is to be effectuated. Our uneasiness, no different from that expressed by others in this field, is tempered by the good faith and judgment of those charged with the responsibility to carry out Florida's regulation of criminal activities. The judiciary, of course, furnishes the oversight capable of remedying abuse. It cannot be said, however, that the prosecution of Batten was abusive. The record manifests an ongoing "scheme to defraud," composed of acquiring "used cars" and deceptively holding them out as assets of estates. Batten's use of the newspaper ads and telephone provided the means with which he fulfilled the fraudulent objectives.

Finally, the claim is wholly without merit that the federal statutes as construed in *McNally v. United States,* [483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987)], which was thereafter followed in *United States v. Italiano,* [837 F.2d 1480 (11th Cir.1988)], bar Batten's conviction under the Act. The Supreme Court's sole basis for rejecting application of the federal mail fraud statute to McNally's conduct was grounded upon a record disclosing that the citizens of Kentucky were defrauded in a scheme involving the ultimate payment to McNally of money from excess insurance commissions transmitted through the mails. The Sixth Circuit had concluded that the mail fraud statute condemns schemes to defraud citizens of their intangible rights to honest and impartial government. The Supreme Court disagreed and said, "The mail fraud statute clearly protects property rights, but does not refer to the intangible right of the citizenry to good government." [*McNally,* 483 U.S. at 356, 107 S.Ct. at 2879-80] In short, Batten's scheme, unlike those found in *McNally* and *Italiano,* was not in any fashion integrated with a public function conferring an "intangible right" upon the people of Florida.

For the purposes of this chapter [18 USCS §§ 1341, et seq.] the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services. Section 817.034(3)(c)(2) and (3) contain a like reference. Thus, under those aspects of the Act, it is improbable that Batten's argument based upon an "intangible right," even if the phrase had any relevance in this matter, would find support in *McNally.* Affirmed.

Critical Thinking Question(s): Should Batten be held accountable for maintaining a fraudulent scheme or is he just a very good businessman? How does the “puffery” that he uses to sells cars differ from most sales agents? Where is the harm in his actions when the victims actually receive the car they bargain for?

VI. Health Care Fraud

Section Introduction: There are two different types of health care fraud addressed by the statutes below. One is a crime in which an individual defrauds a health care provider to obtain services. The other is a crime by which a health care provider defrauds an insurance provider to obtain compensation for services not actually rendered. Also contained within this section is a Florida case which further examines the application of these laws.

Florida Statutes, section 817.50 - Fraudulently obtaining goods, services, etc., from a health care provider

> (1) Whoever shall, willfully and with intent to defraud, obtain or attempt to obtain goods, products, merchandise, or services from any health care provider in this state, as defined in s. 641.19(14), commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.
>
> (2) If any person gives to any health care provider in this state a false or fictitious name or a false or fictitious address or assigns to any health care provider the

proceeds of any health maintenance contract or insurance contract, then knowing that such contract is no longer in force, is invalid, or is void for any reason, such action shall be prima facie evidence of the intent of such person to defraud the health care provider.

Florida Statutes, sec. 409.920 - Medicaid provider fraud

(2) It is unlawful to:

(a) Knowingly make, cause to be made, or aid and abet in the making of any false statement or false representation of a material fact, by commission or omission, in any claim submitted to the agency or its fiscal agent for payment.

(b) Knowingly make, cause to be made, or aid and abet in the making of a claim for items or services that are not authorized to be reimbursed by the Medicaid program.

(c) Knowingly charge, solicit, accept, or receive anything of value, other than an authorized co-payment from a Medicaid recipient, from any source in addition to the amount legally payable for an item or service provided to a Medicaid recipient under the Medicaid program or knowingly fail to credit the agency or its fiscal agent for any payment received from a third-party source.

(d) Knowingly make or in any way cause to be made any false statement or false representation of a material fact, by commission or omission, in any document containing items of income and expense that is or may be used by the agency to determine a general or specific rate of payment for an item or service provided by a provider.

(e) Knowingly solicit, offer, pay, or receive any remuneration, including any kickback, bribe, or rebate, directly or indirectly, overtly or covertly, in cash or in kind, in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made, in whole or in part, under the Medicaid program, or in return for obtaining, purchasing, leasing, ordering, or arranging for or recommending, obtaining, purchasing, leasing, or ordering any goods, facility, item, or service, for which payment may be made, in whole or in part, under the Medicaid program.

(f) Knowingly submit false or misleading information or statements to the Medicaid program for the purpose of being accepted as a Medicaid provider.

(g) Knowingly use or endeavor to use a Medicaid provider's identification number or a Medicaid recipient's identification number to make, cause to be made, or aid and abet in the making of a claim for items or services that are not authorized to be reimbursed by the Medicaid program.

A person who violates this subsection commits a felony of the third degree, punishable as provided in sec. 775.082, sec. 775.083, or sec. 775.084.

State v. *Wolland*, 902 So.2d 278 (2005)

Procedural History: Defendant was charged with 115 counts of Medicaid fraud/filing false claims, and one count of first degree grand theft. The Circuit Court, Miami-Dade County, Mary Barzee, J., dismissed the Medicaid fraud counts on grounds of federal preemption and the state appealed.

Issue(s): The State appeals the dismissal of 115 counts of making false statements to the Florida Agency for Health Care Administration wherein the trial court concluded that the statute on which these counts are predicated was preempted by federal law.

Facts: The State filed an information charging Shelley Wolland with one hundred and fifteen (115) counts of Medicaid fraud/filing false claims and one count of first degree grand theft. Counts 1 through 115 of the information alleged that on various dates between January 1, 2001 and December 31, 2001, Wolland "did knowingly and unlawfully, make ... a false statement or false representation of material fact ... to the Agency for Health Care Administration ... in violation of s. 409.920(2)(a) Florida Statutes." Count 116 alleged the theft of over one hundred thousand dollars ($100,000) from the Agency for Health Care Administration. Wolland filed a motion to dismiss, arguing that subsection 409.920(2)(a), Florida Statutes (2001) of Florida's Medicaid Provider Fraud Statute was unconstitutional both as applied to her and on its face because it is preempted by federal law. Section 409.920 provides in relevant part:

> (2) It is unlawful to:
>
> > (a) Knowingly make, cause to be made, or aid and abet in the making of any false statement or false representation of a material fact, by commission or omission, in any claim submitted to the agency or its fiscal agent for payment.

The parallel provision of the federal Social Security Act, 42 U.S.C. § 1320a-7b(a) makes it unlawful to:

> (1) knowingly and willfully make[ ] or cause[ ] to be made any false statement or representation of a material fact in any application for any benefit or payment under a Federal health care program ....

Wolland, pointing out that the federal act requires that the act be done "knowingly and willfully" while the Florida act requires only that the act be done "knowingly," maintained that the omission of the "willfully" requirement from the Florida statute rendered conduct that was not criminal under the federal statute unlawful under the Florida Statute. Thus, based on this distinction, she argued that the Florida law should be held unconstitutional. Wolland additionally maintained that because the grand theft charge, count 116, was based on the aggregate of counts 1-115, that count should be dismissed as well.

(1) For the purposes of this section, the term:

> (d) "Knowingly" means that the act was done voluntarily and intentionally and not because of mistake or accident. As used in this section, the term "knowingly" also includes the word "willfully" or "willful" which, as used in this section, means that an act was committed voluntarily and purposely, with the specific intent to do something that the law forbids, and that the act was committed with bad purpose, either to disobey or disregard the law.

Holding: The District Court of Appeal, Wells, J., held that prosecution under state statute for Medicaid fraud/making false claims was not preempted by federal law. Reversed and remanded.

Opinion: WELLS, J.

On the following analysis, we reverse. Shortly after Wolland filed her motion, this Court issued *State v. Harden,* 873 So.2d 352 (Fla. 3d DCA 2004), affirming a trial court's order finding subsection 409.920(2)(e), the anti-kickback provision of Florida's Medicaid provider fraud statute, to be unconstitutional. In *Harden* we decided that subsection 409.920(2)(e) impliedly conflicted with the federal anti-kickback statute, and thus was preempted under the Supremacy Clause. This conclusion rested on two grounds. First, we concluded that as to subsection 409.920(2)(e), federal legislation was in place which protected the particular behavior at issue but because the Florida provision accorded no similar safe harbor, it obstructed the objectives and purposes of the federal act. [*Harden,* 873 So.2d at 355] Second, we concluded that because subsection 409.920(2)(e) criminalized only knowing conduct, whereas the federal act criminalized conduct that was both knowing and willful, enforcement of Florida's law would act as an obstacle to the purposes and goals of the federal act.

The federal anti-kickback statute contains a "knowing and willful" *mens rea* requirement. Under federal law, "in order to establish a 'willful' violation of a statute, 'the Government must prove that the defendant acted with knowledge that his conduct was unlawful.' " [*Bryan v. United States,* 524 U.S. 184, 192, 118 S.Ct. 1939, 141 L.Ed.2d 197 (1998)] In contrast, Florida's anti-kickback statute only requires that the defendant act "knowingly." In turn, "knowingly" is defined as "done by a person who is aware or should be aware of the nature of his or her conduct and that his or her conduct is substantially certain to cause the intended result." [§ 409.920(1)(d), Fla. Stat. (2000)] This Florida definition of "knowingly" would include "mere negligence," thereby criminalizing activity that the federal statute intended to protect. [*Hanlester Network v. Shalala,* 51 F.3d 1390, 1399 n. 16 (9th Cir.1995)("The legislative history demonstrates that Congress, by use of the phrase 'knowingly and willfully' to describe the type of conduct prohibited under the anti-kickback laws, intended to shield from prosecution only those whose conduct 'while improper, was inadvertent.' ")] Again, enforcement of the Florida anti-kickback statute would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. [*Harden,* 873 So.2d at 355]

Applying the analysis outlined in *Harden,* the trial court in this case concluded that the Florida false claims provision, subsection 409.920(2)(a), was preempted by the federal health care false claims provision, 42 U.S.C. § 1320a-7b(a)(1), and that Wolland's motion to dismiss should be granted as to counts 1 through 115. We disagree. Using the same standard employed in *Harden,* we conclude that subsection 409.920(2)(a) does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress as delineated in 42 U.S.C. § 1320a-7b(a)(1), and that Wolland's claim of preemption should have been rejected.

The Supremacy Clause, article VI, clause 2, of the United States Constitution authorizes Congress to preempt state law, either expressly in a federal act or by so completely taking over a field of law as to create an inference of federal exclusivity. [See *Harrell v. Florida Const. Specialists,* 834 So.2d 352, 355 (Fla. 1st DCA 2003)] Federal preemption may also be implied where a conflict exists between a federal and a state law to the extent that it is either physically impossible to comply with the dictates of both sets of laws or where dual compliance is technically possible but state law creates an obstacle to fulfilling federal policy and goals. [*English v. Gen. Elec. Co.,* 496 U.S. 72, 78-79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990) (enumerating the three circumstances in which state law is pre-empted under the Supremacy Clause as (1) where Congress explicitly defines the extent to which its enactments pre-empt state law; (2) where state law regulates conduct in a field that Congress intended the Federal Government to occupy exclusively; and (3) to the extent that state law actually conflicts with federal law); *see also* Hendricks]

Here, as in *Harden,* there is no explicit preemption. There is also no indication that at issue is a field that Congress intended the federal government to occupy exclusively, and, as in *Harden,* physical compliance is not implicated. Thus we, like the *Harden* court, look to whether subsection 409.920(2)(a) stands as an obstacle to the execution and accomplishment of the objectives and goals of Congress to determine whether preemption by implication should be found. For a number of reasons, we find that it does not.

First, we start by presuming against preemption, a presumption particularly strong because federal and state false claims legislation share common goals. [See *Hernandez v. Coopervision, Inc.,* 661 So.2d 33, 34 (Fla. 2d DCA 1995) (confirming that "there is a long-standing presumption against federal preemption of the exercise of the power of the states"); *Forum v. Boca Burger, Inc.,* 788 So.2d 1055, 1061 (Fla. 4th DCA 2001) (recognizing a presumption against preemption); *In re Pharmaceutical Industry Average Wholesale Price Litigation,* 321 F.Supp.2d 187, 198 (D.Mass.2004) (confirming that the presumption against federal preemption of a state statute designed to foster public health has special force when it appears that the two governments are pursuing common purposes; that the "strong medicine" of federal preemption is not to be casually dispensed especially when the federal statute creates a program, such as Medicaid, that utilizes "cooperative federalism"; and that Medicaid is the paradigmatic program of cooperative federalism where the federal and state governments share a common goal)]

Second, although the federal health care false claims provision criminalizes the knowing and willful making of a false claim, this behavior is frequently prosecuted under 18 U.S.C. § 287, the Federal False Claims Act, legislation which, like subsection 409.920(2)(a), contains no express willfulness requirement:

> *Whoever makes* or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, *any claim* upon or against the United States, or any department or agency thereof, *knowing such claim to be false*, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title. [18 U.S.C. § 287]

Prosecution under the Federal False Claims Act has proceeded notwithstanding its lack of an express willfulness requirement because "[i]t is implicit in the filing of a knowingly false claim that the claimant intends to defraud the government, and hence unnecessary to charge willfulness separately." [*United States v. Catton*, 89 F.3d 387, 392 (7th Cir.1996); *United States v. Beasley*, 550 F.2d 261, 273-74 (5th Cir.1977) (observing " '[g]enerally, under our system of criminal law, an individual is only punished when he has the requisite criminal intent accompanying the performance of the act. To have this requisite intent, the individual must be aware that what he is doing is wrong.' Section 287 certainly meets the test even though the word 'willful' does not appear in its text"); *see also United States v. Blecker*, 657 F.2d 629, 634 (4th Cir.1981) (stating that knowledge that a claim is false is sufficient under the False Claims Act, 18 U.S.C. § 287)]

Thus, the fear articulated in *Harden* that the Florida definition of "knowingly" might encompass "mere negligence," thereby criminalizing activity that the federal statute may have intended to protect, is not present when considering section 409.920(2)(a). Simply put, one cannot negligently "[k]nowingly make ... [a] false statement ... in [a] claim submitted to the agency ... for payment." [§ 409.920(2)(a), Fla. Stat. (2001)] Rather, the language of subsection 409.920(2)(a) reflects the same standard which has been held to establish a violation of 42 U.S.C. § 1320a-7b(a)(1).

Initially, we hold that ... "knowledge of falsity" is an element of Medicaid fraud pursuant to 42 U.S.C. § 1320a-7b(a).... [I]n defining the elements of the offense ... the defendant must not only have made false claims, but he must have known at the time he was making such claims that they were, in fact, false. The legislative history, to which we look to discern the *mens rea* for a specific offense ... supports [this] conclusion.... We therefore hold ... to be convicted of medicaid fraud, pursuant to 42 U.S.C. § 1320a-7b(a), a defendant must know that the claims being submitted are in fact false.... [*U.S. v. Laughlin*, 26 F.3d 1523, 1525 (10th Cir.1994); *United States v. Larm*, 824 F.2d 780, 782 (9th Cir.1987)(observing that "to prove Medicaid fraud, the government must show a knowingly false statement of material fact made in an application for benefits from a federally approved state Medicaid plan")]

Subsection 409.920(2)(a) is, therefore, in harmony with the principles applicable to prosecutions under the federal false claims enactments. By its terms, subsection 409.920(2)(a) proscribes presentation of a claim with knowledge that the claim is false

and thereby precludes prosecution for unintended violations. Interpreting "knowingly" as implicitly including willful behavior does no more than give a fair construction to the term as used in subsection 409.920(2)(a). Moreover, in concluding that "knowingly" describes the same behavior as that done "willfully" - as our legislature has since clarified - we do no more than follow a basic precept of both Florida and federal criminal law. As the Florida Supreme Court in *Chicone v. State*, [684 So.2d 736, 743-44 (Fla.1996)], confirmed, we will ordinarily presume, absent an express indication of a contrary intent, that the Legislature intends a statute defining a criminal violation to contain a *mens rea* requirement, even when expressly silent on the subject. "[A]n express provision dispensing with guilty knowledge will always control, of course, since in that instance the Legislature will have made its intent clear," but in the absence of such a provision, a criminal statute will be presumed to include a broad applicable scienter requirement. [*State v. Giorgetti*, 868 So.2d 512, 516 (Fla.2004); *see also Morissette v. United States*, 342 U.S. 246, 250- 252, 72 S.Ct. 240, 96 L.Ed. 288 (1952)("[a]s the states codified the common law of crimes, even if their enactments were silent on the subject [of *mens rea* or intent], their courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation. Courts, with little hesitation or division, found an implication of the requirement as to offenses that *286 were taken over from the common law")]

In sum, considering the objective of Congress to limit and punish health care fraud, and considering the language used in subsection 409.920(2)(a), we conclude that notwithstanding the failure of that subsection to contain the term "willfully," the federal and state enactments regarding false claims are in harmony in purpose and effect, and the charges at issue should not have been dismissed as preempted by federal law. Any statement to the contrary in *Harden*, is not, therefore, determinative and should be limited to that case especially since this court's opinion in *Harden* clearly turned on the absence of safe harbor provisions in Florida's legislation. Wolland's motion to dismiss should, therefore, have been denied and the State's prosecution of the 115 counts for making false statements to the Florida Agency for Health Care Administration should have been allowed to proceed. [See *State v. Williams*, 343 So.2d 35, 37 (Fla.1977)(observing that it is our duty to "sustain legislative enactments when possible"); *North Port Bank v. State Dep't of Revenue*, 313 So.2d 683, 687 (Fla.1975)(same)]

Critical Thinking Question(s): Insurance fraud costs taxpayers an incalculable amount of money annually. Do you think that health care providers should be more heavily sanctioned than private parties that submit false claims? What kind of informal sanctions would you recommend to the health care provider licensing board in addition to any criminal sanctions?

VII. Money Laundering

Section Introduction: Florida law provides a long statute on the crime of money laundering, called the Florida Money Laundering Act. Below are some important parts of this statute and a case that shows how the law is applied in criminal cases.

Florida Statutes, section 896.101 - Florida Money Laundering Act; definitions; penalties; injunctions; seizure warrants; immunity

(3) It is unlawful for a person:

(a) Knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, to conduct or attempt to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity:

1. With the intent to promote the carrying on of specified unlawful activity; or

2. Knowing that the transaction is designed in whole or in part:

a. To conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

b. To avoid a transaction reporting requirement or money transmitters' registration requirement under state law.

(b) To transport or attempt to transport a monetary instrument or funds:

1. With the intent to promote the carrying on of specified unlawful activity; or

2. Knowing that the monetary instrument or funds involved in the transportation represent the proceeds of some form of unlawful activity and knowing that such transportation is designed in whole or in part:

a. To conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

b. To avoid a transaction reporting requirement or money transmitters' registration requirement under state law.

(c) To conduct or attempt to conduct a financial transaction which involves property or proceeds which an investigative or law enforcement officer, or someone acting under such officer's direction, represents as

being derived from, or as being used to conduct or facilitate, specified unlawful activity, when the person's conduct or attempted conduct is undertaken with the intent:

1. To promote the carrying on of specified unlawful activity; or

2. To conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds or property believed to be the proceeds of specified unlawful activity; or

3. To avoid a transaction reporting requirement under state law.

(d) For the purposes of this subsection, "investigative or law enforcement officer" means any officer of the State of Florida or political subdivision thereof, of the United States, or of any other state or political subdivision thereof, who is empowered by law to conduct, on behalf of the government, investigations of, or to make arrests for, offenses enumerated in this subsection or similar federal offenses.

(5) A person who violates this section, if the violation involves:

(a) Financial transactions exceeding $300 but less than $20,000 in any 12-month period, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(b) Financial transactions totaling or exceeding $20,000 but less than $100,000 in any 12-month period, commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(c) Financial transactions totaling or exceeding $100,000 in any 12-month period, commits a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

***Vizcon* v. *State*, 771 So.2d 3 (2000)**

Procedural History: Defendant was convicted in the Circuit Court, Dade County, Martin D. Kahn, J., of 29 counts of money laundering. Defendant appealed. The District Court of Appeal, Schwartz, C.J., held that: (1) money laundering statute did not preclude separate convictions for negotiation of each separate check, and (2) multiple convictions were not barred by double jeopardy on ground that counts of information were identical except for end period of alleged violation.

Issue(s): Does a violation of the money laundering statute involves only a single continuous offense which, notwithstanding the number of acts involved, and thus support only a single conviction and sentence.

Facts: Based on evidence that, between April 18, 1997 and May 28, 1998, she wrote twenty-nine separate checks to cash from an account which contained the proceeds of an extensive insurance fraud, Vizcon was found guilty of twenty-nine separate counts of violating the money laundering statute, section 896.101(2)(a), Florida Statutes (Supp.1996), and was sentenced accordingly. On this appeal, she does not challenge the conclusion that she violated the statute in question. Rather, on two separate grounds, she claims that she could not lawfully have been convicted of more than one offense. We disagree and affirm.

Holding: Affirmed.

Opinion: SCHWARTZ, Chief Judge.

Vizcon's first contention is that a violation of the money laundering statute involves only a single continuous offense which, notwithstanding the number of acts involved, may support only a single conviction and sentence. As a matter of the plain language of the statute, we find to the contrary. As the state points out, the statute proscribes conducting "a financial transaction which in fact involves the proceeds of specified unlawful activity." It is well settled in interpreting both other criminal statutes which involve similar language, *State v. Farnham*, [752 So.2d 12 (Fla. 5th DCA 2000)]; *C.S. v. State*, [638 So.2d 181 (Fla. 3d DCA 1994), review denied, 645 So.2d 451 (Fla.1994)], and even more specifically, the federal money laundering statute, the language of which is tracked by Florida, that the allowable "unit of prosecution" is the particular "financial transaction" involved--in this case, the negotiation of each separate check. [See *United States v. Martin*, 933 F.2d 609, 611 (8th Cir.1991)(affirming conviction on two separate money laundering counts where the counts alleged two transactions on different dates and in different locations involving different amounts of money, and rejecting defendant's apparent argument that "once he had engaged in one act of money laundering, he could continue to engage in subsequent acts of money laundering with impunity"); *United States v. Conley*, 826 F.Supp. 1536 (W.D.Pa.1993); see generally *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932)] The trial court was correct in so ruling below.

Vizcon's second argument presents the much more difficult question of whether, under the highly peculiar circumstances of this case, her multiple convictions and sentences are barred by that aspect of the constitutional rule against double jeopardy which forbids multiple convictions and sentences in the same prosecution for a single offense. [See *Cleveland v. State*, 587 So.2d 1145 (Fla.1991)] The issue arises because, in what is certainly one of the most egregious examples of faulty draftspersonship ever seen, the respective counts of the information did not simply allege that the defendant had negotiated a check on each of the various dates in violation of section 896.101(2)(a). Rather, and inexplicably, the first such count, Count 2, alleged that "[b]eginning on or about April 18, 1997 and continuing through January 30, 1998, ... [she] did knowingly

and unlawfully conduct or attempt to conduct a financial transaction which involved the proceeds of specified unlawful activity...." Each of the succeeding counts was identical except that the end period of the alleged violation coincided with the date of the next check so that Count 10 stated, "[b]eginning on or about April 18, 1997 and continuing through February 18, 1998, ... did knowingly and unlawfully conduct or attempt to conduct a financial transaction which involved the proceeds of specified unlawful activity ... " and the last relevant count, Count 30, stated, "[b]eginning on or about April 18, 1997 and continuing through May 28, 1998, ... did knowingly and unlawfully conduct or attempt to conduct a financial transaction which involved the proceeds of specified unlawful activity...."

The defendant's double jeopardy claim is based on the fact that, as pled, all twenty-eight of the checks dated from January 30, 1998 to May 14, 1998 were included in the allegation of the last such count, so that a separate, successive prosecution on any of those "earlier" counts would have been precluded if Vizcon had first been tried and either acquitted or convicted of Count 30. [See *Bizzell v. State*, 71 So.2d 735 (Fla.1954); *Copsey v. State*, 67 Md.App. 223, 507 A.2d 186 (1986); *State v. Brownrigg*, 87 Me. 500, 33 A. 11 (1895); *Collins v. State*, 489 So.2d 188, 189 (Fla. 5th DCA 1986) (Cowart, J., dissenting)] All these statements are accurate, in fact undisputed, and the defendant's contention based upon them is facially appealing. Ultimately, however, it cannot be accepted.

This is, at bottom, because the issue before us does not concern the double jeopardy preclusion of successive prosecutions, as to which the contents of the respective charging documents are determinative, but whether the defendant has been unconstitutionally punished in the same prosecution more than once for only one criminal act. On this point, the question is only whether that is true as a matter of objective fact. [See *State v. Carpenter*, 417 So.2d 986 (Fla.1982); *Young v. United States*, 745 A.2d 943 (D.C.2000)] Here, because, however clumsy the accusatory pleading, the record is clear that the defendant committed twenty nine punishable offenses and that she was tried and found guilty by the jury for each of those violations, the defendant's argument on this issue must fail.

Closely on point is *Nicholson v. State*, 757 So.2d 1227 (Fla. 4th DCA 2000), in which the court, dealing with a case in which separate counts were not only overlapping as here, but actually identical, held as follows:

> On evidence that appellant threw a brick through the window of the patio door at the rear of a dwelling, then ran to the front of the dwelling where he threw a brick through a front window, thereby putting the dwelling's occupant in fright, the jury found appellant guilty of two identically worded counts of throwing a deadly missile into a dwelling and one count of aggravated assault on its occupant. [*Nicholson*, 757 So.2d at 1228]

Appellant ... contends that because Counts I and II were identically worded, his conviction on both violates his protection against double jeopardy and, thus, constitutes

fundamental error, citing in support of this argument *Miles v. State*, [418 So.2d 1070 (Fla. 5th DCA 1982)]. In that case the defendant was convicted on two identically worded counts. On appeal, the court vacated one of the counts on double jeopardy principles because neither the charging document nor the state's bill of particulars distinguished between the facts of the two offenses, nor did the evidence adduced at trial. In *Collins v. State*, [489 So.2d 188 (Fla. 5th DCA 1986]), involving convictions on each of two identically worded counts of an information, the court upheld both convictions against a claim of double jeopardy violation, distinguishing Miles on the grounds that in Collins the evidence clearly differentiated between the two counts. Here, as discussed above, the evidence at trial clearly distinguished between the two separate offenses, and on the basis of that proof we conclude, as did the Collins court, that double jeopardy considerations are not implicated.

We believe, because the issue was not raised below until after the trial and verdict, that this statement applies to the present case as well. Although the defendant points out that the multiplicity issue was argued before sentencing, and that a true double jeopardy claim is not subject to waiver in any event, see *Novaton v. State*, [634 So.2d 607 (Fla.1994); *Novaton*, 610 So.2d at 728 n. 3], our analysis has, we hope, demonstrated that, properly viewed, the case does not actually present a valid double jeopardy claim, but rather, at most, one of a defective information. That issue is subject to waiver by the failure to assert it in a timely attack on the information itself. [Fla.R.Crim.P. 3.190; *Nicholson*, 757 So.2d 1227; *Collins*, 489 So.2d at 188; *Hernandez v. State*, 749 So.2d 1284 (Fla. 3d DCA 2000)]

We agree. In the end, faulty pleading irrelevant to the assertion of any of the defendant's substantial interests should not result in even a partial forfeiture of the state's right to the full enforcement of its laws. Affirmed.

Critical Thinking Question(s): When convicted of money laundering, the State often assesses the entire proceeds of the business as subject to the “ongoing scheme.” Does that mean that everyone associated with such a business is somehow culpable? What would prevent someone such as the defendant from blaming some other agent in the business that actually files the transactions?

VIII. Antitrust Violations

Section Introduction: Antitrust violations endanger the freedom and fairness of an open market. For this reason, state and federal statutes have been put in place to protect the fair market by preventing certain kinds of business practices. Below is a Florida statute prohibited such unlawful acts within the state.

Florida Statutes, section 501.204 - Unlawful acts and practices

> (1) Unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

(2) It is the intent of the Legislature that, in construing subsection (1), due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to s. 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. s. 45(a)(1) as of July 1, 2001.

IX. Public Corruption

Section Introduction: Public corruption is a danger at all levels of government. For this reason, there are laws governing the conduct of public officials at both the state and federal level. In this section you will find the relevant Florida statute prohibiting official misconduct, as well as a case on the crime below.

Florida Statutes, section 838.022 - Official misconduct

(1) It is unlawful for a public servant, with corrupt intent to obtain a benefit for any person or to cause harm to another, to:

(a) Falsify, or cause another person to falsify, any official record or official document;

(b) Conceal, cover up, destroy, mutilate, or alter any official record or official document or cause another person to perform such an act; or

(c) Obstruct, delay, or prevent the communication of information relating to the commission of a felony that directly involves or affects the public agency or public entity served by the public servant.

(2) For the purposes of this section:

(a) The term "public servant" does not include a candidate who does not otherwise qualify as a public servant.

(b) An official record or official document includes only public records.

(3) Any person who violates this section commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

State v. *Castillo*, 877 So.2d 690 (2004)

Procedural History: Defendant, a police officer, was convicted in the Circuit Court, Miami Dade County, Scott J. Silverman, J., of unlawful compensation and official misconduct. Defendant appealed. The District Court of Appeal, 835 So.2d 306, Ramirez, J., reversed in part, affirmed in part, and remanded.

Issue(s): Whether the State may prove a violation through circumstantial evidence and whether the corruption statute requires proof of an agreement

Facts: We present the facts in the light most favorable to the jury verdict. At about 4 a.m. on March 9, 2000, nineteen-year-old A.S., who had been drinking heavily, was traveling at about 55 m.p.h. in a 40 m.p.h. speed zone when a police cruiser drove up behind her with its overhead lights on. The respondent, Miami-Dade County Police Officer Fernando Castillo, on duty and in uniform, was driving. A.S. pulled over near a Burger King restaurant. Using the patrol car's loudspeaker, Officer Castillo ordered her out of her vehicle. A.S. feared she would be arrested because she was both drunk and speeding. As she walked toward the officer, she stumbled. Castillo remarked that "[t]he party must have been good." After rummaging through her wallet, Castillo told A.S. to follow him into the empty Burger King parking lot. She complied. They both exited their cars and talked for awhile.

Castillo was very friendly, smiling and touching A.S.'s shoulder as he stood close to her. Castillo noticed alcohol on her breath. At one point, Castillo asked her, "Do you want to follow me?" She said, "what?" and he replied, "You are going to follow me." Afraid not to obey, she complied. Castillo led her to a nearby deserted warehouse area. Again they exited their cars. He leaned her back on the hood of her car, pulled her pants and panties down, and mumbled "something like 'let me get that thing on.' " Commenting that she had the body of a stripper, he had vaginal intercourse with her. Because she was scared, A.S. did not look or say or do anything, and when he finished, she felt wetness on her lower stomach. As they dressed, Castillo smiled and told her that she was lucky he did not give her a ticket. He gave her his beeper number and they each drove away.

Castillo did not report his over-forty-minute encounter with A.S. Instead, he reported that during that time he was engaged in various other patrol duties. Castillo was charged with, and a jury found him guilty of, unlawful compensation and official misconduct. [See § 838.016(1), Fla. Stat. (1999); § 839.25, Fla. Stat. (1999)] The trial court denied Castillo's motion for judgment of acquittal. On appeal, the Third District Court of Appeal reversed the conviction of unlawful compensation. The district court focused on A.S.'s trial testimony that before she followed Castillo to the warehouse he never specifically stated that he would arrest her if she did not have sex with him. [835 So.2d at 309] The court concluded that because of "the absence of any spoken understanding," the State failed to establish an agreement to these terms. [See *id.*] The court thus required direct evidence of a specific agreement to prove unlawful compensation.

Holding: Quashed and remanded.

Opinion: CANTERO, J.

In this case, we interpret Florida's unlawful compensation statute, which prohibits public officials from seeking or accepting unauthorized benefits in return for performance or nonperformance of official duties. [See § 838.016(1), Fla. Stat. (1999)] In this case, a police officer was convicted of soliciting sex in return for not issuing a traffic citation. We must decide whether the State may prove a violation through circumstantial evidence

and whether the statute requires proof of an agreement. In the decision on review, the court held that the State must present direct evidence of an agreement. [See *Castillo v. State,* 835 So.2d 306, 309 (Fla. 3d DCA 2002)] That holding expressly and directly conflicts with *State v. Gerren,* [604 So.2d 515, 520-21 (Fla. 4th DCA 1992)]. We have jurisdiction. [See art. V, § 3(b)(3), Fla. Const.] We hold that circumstantial evidence is sufficient to prove the offense, and that proof of a specific agreement is not required. We therefore quash *Castillo.*

The unlawful compensation statute provides in pertinent part as follows:

> (1) It is unlawful for any person corruptly to give, offer, or promise to any public servant, or, if a public servant, corruptly to request, solicit, accept, or agree to accept, any pecuniary or other benefit not authorized by law, for the past, present, or future performance, nonperformance, or violation of any act or omission which the person believes to have been, or the public servant represents as having been, either within the official discretion of the public servant, in violation of a public duty, or in performance of a public duty. [§ 838.016(1), Fla. Stat. (1999)]

Section 838.014, Florida Statutes (1999), defines the terms "benefit" and "corruptly":

> (1) "Benefit" means gain or advantage, or anything regarded by the person to be benefited as a gain or advantage, including the doing of an act beneficial to any person in whose welfare he or she is interested.
>
> (6) "Corruptly" means done with a wrongful intent and for the purpose of obtaining or compensating or receiving compensation for any benefit resulting from some act or omission of a public servant which is inconsistent with the proper performance of his or her public duties.

We must decide two related issues concerning the statute: (A) whether a violation may be proved through circumstantial evidence; and (B) whether the State must prove a specific agreement. The district court in this case reversed Castillo's conviction because the State failed to establish a "spoken understanding" that if A.S. submitted to sexual intercourse with Castillo, he would not issue her a citation. [835 So.2d at 309] Thus, the court required direct evidence of an agreement between the public official and the person unlawfully compensating him. In *Gerren,* on the other hand, the court specifically held that "[w]hile the state must show a quid pro quo, it should be permitted to establish this element indirectly, through the use of circumstantial evidence." [604 So.2d at 520- 21] We agree with *Gerren* insofar as it holds that a violation of the statute may be proven through circumstantial evidence.

The statute itself is silent on the type of proof required. It certainly does not require either a "spoken understanding" or any other direct evidence of a violation. In the absence of explicit statutory direction, it has long been established that circumstantial evidence is competent to establish the elements of a crime, including intent. [See *Moorman v. State,* 157 Fla. 267, 25 So.2d 563, 564 (1946) ("It is too well settled to

require citation of authorities that any material fact may be proved by circumstantial evidence, as well as by direct evidence."); *see also State v. Waters,* 436 So.2d 66, 71 (Fla.1983) ("The element of intent, being a state of mind, often can only be proved by circumstantial evidence."), *cited in Gerren,* 604 So.2d at 520] Moreover, Florida courts have regularly reviewed bribery and unlawful compensation cases for the legal sufficiency of the circumstantial evidence to support the charges, without requiring direct evidence. [See, e.g., *Merckle v. State,* 512 So.2d 948, 949 (Fla. 2d DCA 1987) (rejecting the contention that circumstantial evidence was legally insufficient and not inconsistent with reasonable hypothesis of innocence, and affirming convictions for bribery, receiving unlawful compensation, and extortion by a state officer), *approved,* 529 So.2d 269, 272 n. 3 (Fla.1988); *Garrett v. State,* 508 So.2d 427 (Fla. 2d DCA 1987) (finding the circumstantial evidence legally insufficient to support a conviction for receiving unlawful compensation); *Bias v. State,* 118 So.2d 63 (Fla. 2d DCA 1960) (affirming an unlawful compensation conviction where the officer "fined" a car's occupants $75 for various offenses, took the $25 proffered, and released the occupants, telling them he expected the rest to be paid later)]

In *Gerren,* the Fourth District Court of Appeal warned that if an express agreement were required to prove a violation of the statute, a public servant "could receive funds or other benefits from interested persons" and avoid prosecution "so long as he never explicitly promises to perform his public duties improperly." [604 So.2d at 520] The court concluded that requiring proof of a violation through circumstantial evidence did not violate procedural safeguards. As the court noted, " '[t]he element of intent, being a state of mind, often can only be proved by circumstantial evidence,' " and when guilt is proven by circumstantial evidence, the state is required to present evidence inconsistent with the defendant's theory of defense. [*Id.* at 520 (quoting *State v. Waters,* 436 So.2d 66 (Fla.1983)); *see State v. Law,* 559 So.2d 187 (Fla.1989)]

Therefore, we hold that circumstantial evidence can establish a violation of the unlawful compensation statute. The district court's requirement of a "spoken understanding" imposes too high a burden on the State and would prohibit prosecution of all but the most blatant violations. Public corruption has become sophisticated enough at least to expect that public officials soliciting or accepting unlawful compensation ordinarily will not be so audacious as to explicitly verbalize their intent.

The second, related issue we must consider is whether the unlawful compensation statute requires evidence of an agreement or meeting of the minds. The district court held it did. [*Castillo,* 835 So.2d at 309] It concluded that without direct evidence that Officer Castillo actually stated that he would arrest A.S. if she did not have sex with him, there was only evidence that A.S. believed this to be true. [*Id.*] The Fourth District in *Gerren* also required proof of a "meeting of the minds." Although the Fourth District did not require that an agreement be explicit, it did require proof at least of an "implicit agreement." [See 604 So.2d at 517, 520-21] We respectfully disagree.

On its face, the statute does not require an agreement. In fact, it criminalizes the mere solicitation of a "benefit not authorized by law," regardless of whether the solicited party accepts the offer. The statute expressly makes it unlawful for a public servant corruptly

to request, solicit, or accept any pecuniary or other benefit not authorized by law. Such language implies that, although evidence of an agreement is sufficient to prove a violation--the statute also prohibits agreeing to accept a benefit--it is not required. Section 838.016(1) further requires that the public servant must request, solicit, accept, or agree to accept the unlawful benefit "corruptly," which means "with a wrongful intent and for the purpose of obtaining or compensating or receiving compensation for any benefit resulting from some act or omission of a public servant which is inconsistent with the proper performance of his or her public duties." [§ 838.014(6), Fla. Stat.] The statute thus focuses on the official's intent, not on an agreement. The statute does not require that the person from whom the public official requests or accepts a benefit agree to - or even understand - the exchange.

Other states with similarly phrased bribery statutes have concluded that proof of an agreement is not required to establish violation of the statute. In *Commonwealth v. Schauffler*, [397 Pa.Super. 310, 580 A.2d 314 (1990)], for example, the statute in question provided that "a person is guilty of bribery, a felony of the third degree, if he offers, confers or agrees to confer upon another, or solicits, accepts or agrees to accept from another ... any benefit as consideration for a violation of a known legal duty as public servant or party official." [18 Pa. Cons.Stat. Ann. § 4701(a)(3) (West 1983)] The statute resembles Florida's because it, too, focuses on the wrongdoer's intent. The Pennsylvania court relied on the commentary to section 240.1 of the Model Penal Code, from which its statute was derived, and cited the commentary as follows:

> [I]t is sufficient if the actor believes that he has agreed to confer or agreed to accept a benefit for the proscribed purpose, regardless of whether the other party actually accepts the bargain in any contract sense. ... The evils of bribery are fully manifested by the actor who believes that he is conferring a benefit in exchange for official action, no matter how the recipient views the transaction.... Each defendant should be judged by what he thought he was doing and what he meant to do, not by how his actions were received by the other party. [580 A.2d at 317-18 (quoting Model Penal Code § 240.1 cmt. 4.(b)- (c) (1980)]

[See also *State v. Martin*, 95 Or.App. 170, 769 P.2d 203, 205 n. 1 (1989) (citing the state's criminal code commentary on its bribe-giving statute, which explained that the mens rea requirement of "with the intent" was meant "to avoid the necessity of proving a 'meeting of the minds' " because "subjective wrongful intent of the bribe offeror is the gravamen of bribe giving").

We agree with this reasoning and hold that section 838.016(1) does not require a specific agreement. Only corrupt intent must be shown. In requiring a meeting of the minds, the district court relied on our decision in *State ex rel. Grady v. Coleman*, [133 Fla. 400, 183 So. 25 (1938)]. In *Grady*, this Court discussed the legal sufficiency of an information to charge a crime under a predecessor unlawful compensation statute. The Court described the violation of the statute as follows:

> It shall be unlawful for any officer, State, county or municipal, or any public appointee, or any deputy of any such officer or appointee, to exact or accept any reward, compensation, or other remuneration other than those provided by law, from any person whatsoever for the performance, non-performance or violation of any law, rule or regulation that may be incumbent upon the said officer or appointee to administer, respect, perform, execute or to have executed....

The statute was later codified at section 838.06, Florida Statutes, which was repealed and readopted as section 838.016, Florida Statutes, effective in 1975. Over the years the language has undergone various changes. The most important evolution for our purposes is the change in verbs over the years from "exact or accept" in 1927 to the current "request, solicit, accept, or agree to accept."

The gravamen of the action as stated [by] Mr. Justice Ellis in *Callaway v. State,* [112 Fla. 599, 152 So. 429 (1938)], is the exacting by the officer of compensation or extortion practiced by demanding the sum required? If the money is demanded and there is a meeting of the minds on the part of the officer who is to be compensated or rewarded by his exaction or acceptance of the reward other than that allowed by law, and the party from whom it is exacted or accepted, then the statutes, supra [§§ 7486-7487, Comp. Gen. Laws (1927)], have been violated. We do not read *Grady* as holding that proof of a meeting of the minds is required; only that it suffices. The Court in *Grady* stated only that if a mutuality of understanding is present along with other facts, the statute is violated. Moreover, *Grady* analyzed an earlier version of the statute, which prohibited only exacting or accepting remuneration. The current statute, section 838.016(1), prohibits requesting, soliciting, accepting, or agreeing to accept a benefit. Even assuming the statute at issue in *Grady* prohibited only a specific agreement, the prohibition has since been broadened. Thus, the statute only requires the State to prove the corrupt intent of the actor, which in this case is the police officer. We disapprove both *Castillo* and *Gerren* to the extent they require proof of a meeting of the minds to prove a violation of the statute.

Applying our holdings that neither direct evidence nor evidence of a specific agreement is required to establish a violation of the statute, we conclude that competent, substantial evidence supports Castillo's conviction in this case. The evidence shows that Castillo, a uniformed officer in a marked patrol car, stopped A.S. while she was exceeding the speed limit. He recognized her intoxicated state when he remarked, after she stumbled, that "[t]he party must have been good." He required A.S. to follow him to the nearby deserted restaurant parking lot where he was "very friendly" while they spoke. He smelled alcohol on her breath. He then required A.S. to follow him again, this time to a deserted warehouse area where he initiated and had intercourse with her. Afterwards, he told her she was lucky he did not ticket her, and he permitted her to leave. Castillo not only did not report his contact with A.S., but he misrepresented his activities during this almost hour-long period as official duties. Thus, the evidence of the officer's words and actions demonstrated his understanding that A.S. was violating the law when he stopped

her, and his releasing A.S. without legal consequence after having sex with her demonstrates his corrupt intent in soliciting an unlawful quid pro quo.

The district court's conclusion that if Castillo thought that A.S. followed him to the warehouse voluntarily, then Castillo did not violate the statute, is groundless for two reasons. First, the evidence, taken in the light most favorable to the jury verdict, was that he required her to follow him. Second, as we explained above, the other participant's state of mind is irrelevant; it is the public servant's state of mind that matters. Although an agreement may be sufficient to prove a violation, it is not necessary. Accordingly, whether Castillo thought or believed A.S.'s actions were voluntary or whether her actions were in fact voluntary is irrelevant. Castillo demonstrated the causal relationship of his actions when he told A.S., after having intercourse with her, that she was lucky he did not give her a ticket. Thus, the competent, substantial evidence in this case demonstrates that Castillo acted with corrupt intent in accepting an unauthorized benefit – sex - in exchange for his exercising his discretion not to issue a traffic citation. For the reasons stated, we quash the decision below and remand for proceedings consistent with this opinion.

Critical Thinking Question(s):

- Should the offense require a specific agreement or meeting of the minds? If so, should it have to be verbalized in plain words rather than implied as in the case above?
- What is it about the officer that made his actions different from some regular guy meeting a girl cruising?
- What are the additional circumstances that make this officer culpable?