IN THE SUPREME COURT OF FLORIDA

CASE NO. SC21-1204

KEVIN F. TOMLINSON,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ANSWER BRIEF ON THE MERITS

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE THIRD DISTRICT COURT OF APPEAL
LOWER TRIBUNAL NO. 3D18-1982

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STATEMENT OF THE CASE AND FACTS

The State charged Petitioner with two counts of extortion. Following a jury trial, he was convicted on both counts. The trial court sentenced Petitioner to two years of house arrest with electronic monitoring, followed by fifteen years of probation. (R. 271-76). The events precipitating the charges are described below.

Facts of the Case

In April of 2015, Petitioner filed a complaint with the Miami Association of Realtors ("MAR") against two fellow real estate brokers, Jill Hertzberg and Jill Eber ("the Jills"). (T. 228-29, 432). The complaint alleged that the Jills were altering data in a shared listing service ("MLS") operated by MAR.[1] (T. 230-32, 521, 538).

In June of 2015, the Jills filed a written response to Petitioner's complaint. (T. 237; 438). Although the Jills denied having an

[1] MAR is not associated with the state licensing authorities. (T. 539). It is an organization that provides "products and services" to realtors and has a grievance committee that accepts complaints "[i]f somebody has a problem with one of the realtors in the organization." (T. 520, 530). In 2015, sanctions that could have been imposed by the grievance committee included a warning, a reprimand, a mandatory educational class, a fine, and a temporary suspension. (T. 531- 32).

unethical intent, they took full responsibility for the alleged actions. (T. 236, 438-39, 484).

On July 14, 2015, Petitioner called Jill Hertzberg. (T. 238-39). The Jills knew him as a fellow realtor. (T. 227). Petitioner stated:

> I just want to tell you something. I am not a monster. I feel bad about what I said. I got carried away. I figured out what you did wrong, that you were taking the [expired listings] off the hot sheet,[2] and I had spoken to people in my office about it, everyone is excited, we are going to get the Jills. And you know, I just feel differently, and I am sorry, I would like to come over and speak to you.

(T. 239).

Ms. Hertzberg decided to meet with Petitioner. (T. 239-40). She expected Petitioner to visit her that same day, however, he could not make it. (T. 243; R. 50). Ms. Hertzberg asked Petitioner to reach out the next day and meet before she left for vacation. (T. 243-45).

Around midnight on July 14, 2015, Ms. Hertzberg received an email from Petitioner. (T. 244-48; R. 59). He wrote that the issue would not be "cleared up" before Ms. Hertzberg's upcoming trip and disclosed that "there [were] some realities that need[ed] to be dealt with before [they] [could] come to an agreement – or decide [they]

[2] "Hot sheet" is a term used to describe a daily report generated by the MLS that reflects recent listing events. (T. 231).

[could not] come to an agreement." (R. 59). Petitioner further wrote: "I hope you'll take my word that I would not want to ruin your career or vacation." (R. 59-60).

Ms. Hertzberg responded that she was "probably not going to be able to speak" to Petitioner. (T. 246). She did not know what "matter" needed to be "closed" since the MAR complaint had been already filed. (T. 246-47).

The next day, Ms. Hertzberg agreed to meet with Petitioner. (T. 251). He arrived at her residence and "was friendly at the beginning." (T. 254). Petitioner stated that he had spoken to a person who was in charge of the complaint process at MAR and some other realtors. (T. 254-55). Petitioner insisted that he could "make [the MAR issue] go away." (T. 255).

Ms. Hertzberg knew that the grievance was out of Petitioner's hands. (T. 255). However, she thought Petitioner meant he could convince the grievance committee to make the outcome "not so terrible." (T. 255). Petitioner clarified that Ms. Hertzberg had to pay him. (T. 257).

When Ms. Hertzberg refused to pay Petitioner, he started making threats, such as: "[L]isten, sister, you are going to pay me

money, because if you don't, I am going to ruin your career, that's the end of the Jills." (T. 257). He stated that he would do everything to "ruin" the Jills. (T. 257). When Ms. Hertzberg inquired about money, Petitioner explained: "You are going to pay me $250,000 and Jill Eber is going to pay me $250,000." (T. 257-58). Petitioner further stated:

> [Y]ou better listen, and you better listen very well, because I am going to go and ruin your whole reputation. I am going to call the Wall Street Journal. I am going to go to the Department of Business and Professional Regulation, and they are going to take away your license. And if you don't have a license, you are not going to make a living. There [is] no livelihood, there is nothing.

(T. 258).

Ms. Hertzberg called Ms. Eber in Petitioner's presence. (T. 258-59). Petitioner repeated his demand for money and reiterated the threats. (T. 259-61, 443-45). Ms. Eber explained that Petitioner could not ruin their lives because the dispute was confined to MAR. (T. 260, 446). Petitioner again asked for half a million dollars and continued threatening the Jills. (T. 260, 444). He neither mentioned a lawsuit nor did he explain the basis of the amount of money he demanded. (T. 261, 413-14, 492-93).

After the call had ended, on the way out of Ms. Hertzberg's house, Petitioner stated: "I will accept $200,000 from you and $200,000 from Jill and that's it." (T. 262). Ms. Hertzberg promised to call him the next day. (T. 262-63). When Petitioner left, she called the police. (T. 263-64).

After the meeting, Petitioner called his friend, Monica Harvey. (T. 497-98). He admitted that "he had just left Jill Hertzberg's house, and that he had asked her for money." (T. 499-500). Petitioner felt he could resolve the MAR issue and was confident that the Jills would pay him the amount demanded. (T. 500, 504).

The next day, Ms. Hertzberg left on her trip as planned. (T. 264). She then received an email from Petitioner: "[O]ut of my respect for my [sic] friendship, I met you [yesterday]…[a]ll the good feelings and good intentions I left with must have been a scam." (T. 264-65; R. 62). Petitioner continued: "Jill, you might as well give your attorney's [sic] the go on skewering me. Can't wait to see how the Grievance Committee views this." (R. 62). Ms. Hertzberg wrote back that she planned to discuss the matter further with Ms. Eber. (T. 268-69; R. 64).

Upon returning from her trip, on July 28th, Ms. Hertzberg and her attorney met with the police. (T. 271-73). At law enforcement's request, she arranged calls with Petitioner that were recorded. (T. 273-75).

During the August 2, 2015 call, Petitioner warned the Jills that if their negotiation became public, he was "going to deny it." (R. 69). Although there was no lawsuit, he advised Ms. Hertzberg to call his attorney and settle with him. (T. 288, R. 71). He wanted her to "start a dialog with [his] attorney" because he was "not jealous of [Ms. Hertzberg]" and did not "want somebody's beautiful career to be marred." (R. 72). Petitioner stated he had spoken to his attorney and "they were going to do something" to Ms. Hertzberg. (R. 72). Petitioner gave her his attorney's name. Ms. Hertzberg told him that she would have her attorney call Petitioner's lawyer. (R. 87).

During the August 3, 2015 call, Petitioner stated he did not want Ms. Hertzberg to go "before the board." (R. 112). He encouraged her to contact his attorney because they were "maybe possibly looking to settle." (R. 1123). Petitioner asked that they pay him by the end of the week. (T. 297; R. 116). He stated that MAR wants "this

to go away," and Ms. Hertzberg should not worry about him using a "nuclear option." (T. 300; R. 131).

On August 5, 2015, Ms. Hertzberg informed Petitioner that the Jills would pay him $400,000 in total. (T. 301-02). Petitioner was to receive payment the next day. (R. 53-54).

On the evening of August 6, 2015, Petitioner arrived at the meeting with the Jills with an empty briefcase. (T. 304-06, 309). All conversations between them were recorded. (T. 305-06). Petitioner stated that he wanted to give the Jills every opportunity he could and then mentioned that his attorney suggested a "class action suit against Coldwell Banker," the company with which the Jills were affiliated. (R. 147-48). Petitioner warned the Jills that "you only need four people" for a class action, and that he had found other realtors to join it. (R. 149).

Petitioner claimed he could "quell the class action." (R. 152). When asked if he could "make this go away," Petitioner stated that they were "in a different story now." (R. 151). Petitioner then doubled his demand, stating that his price was $800,000. (T. 308, 564, 616-17; R. 166-67).

Ms. Helzberg informed Petitioner that the Jills were ready to pay $400,000. (R. 167). As instructed by the police, Ms. Hertzberg tendered him a check for that amount. (T. 320-21, 614-16). Petitioner did not accept it. (T. 321, 616, 645-46). Petitioner claimed that they needed to sign "release agreements." (T. 647; R. 167-69). Petitioner promised he could persuade other members of the alleged class action not to go forward with it. (R. 171). He insisted that once the MAR grievance committee learned that Petitioner and the Jills had reached an agreement, "everything [would] get[ ] canceled." (R. 169).

After the meeting, Ms. Hertzberg received an email from Petitioner. (T. 309). It had multiple recipients, including attorneys and members of the MAR. (T. 311; R. 182). Petitioner wrote that he believed he had reached "a tentative settlement" with the Jills. (R.179). He inquired: "What would the board require to close this case?" (R. 179). Petitioner requested that such a process occur "expeditiously." (R.179). That night, Petitioner also sent Ms. Hertzberg a text message stating he was working on getting release agreements. (T. 311; R. 55).

The next day, Petitioner sent another text message to Ms. Hertzberg, stating that he had "found a class action attorney." (T.

312; R. 56). He inquired whether the settlement was going forward. (T. 313; R. 57). Ms. Hertzberg replied to Petitioner's message a few hours later. (T. 313; R. 57). Petitioner informed her that it was "too late." (R. 57). Later that night, Ms. Hertzberg received an email from Petitioner advising the recipients of the earlier email that they were unable to reach an agreement and asked to "proceed with the grievance." (T. 314; R. 181).

On August 7, 2015, the police arrested Petitioner. (T. 567). Following the arrest, Appellant was charged by the State with two counts of extortion. (R. 19-25).

Jury Instructions

At trial, the court denied Petitioner's request to instruct the jury that actual malice[3] was an essential element of extortion. Instead, the judge instructed the jury on legal malice[4] and provided the jurors with the following written instruction:

[3] Actual malice means ill will, hatred, spite, and evil intent. Fla. Std. Jury Instr. (Crim.) 8.23.

[4] Legal malice refers to an act taken intentionally and without any lawful justification. Id.

8.23 EXTORTION
§836.05, Fla. Stat.

To prove the crime of Extortion charged in count three, the State must prove the following four elements beyond a reasonable doubt:

1. KEVIN TOMLINSON made a verbal communication to JILL HERTZBERG.

2. In that communication, KEVIN TOMLINSON threatened to

a. accuse another person of any [crime] [offense].

b. injure another person.

c. injure the property or reputation of another person.

d. expose another person to disgrace.

3. KEVIN TOMLINSON's threat was made maliciously.

4. KEVIN TOMLINSON's threat was made with the intent to extort money or any pecuniary advantage whatsoever from JILL HERTZBERG.

"Maliciously" means intentionally and without any lawful justification.

(R. 254).

The jury received the same instruction as to count four – Extortion of Jill Eber. (R. 255). Following deliberations, the jury found Petitioner guilty on both counts of extortion. (R. 263).

Appeal to the Third District Court of Appeal

Petitioner appealed his judgment and sentence to the Third District Court of Appeal ("Third District"). Tomlinson v. State, 322 So. 3d 212, 214 (Fla. 3d DCA 2021). He argued, inter alia, that the trial court committed fundamental error by denying his request to instruct the jury on actual malice as an essential element of Extortion. Adopting the Fourth District's reasoning in Alonso v. State, 447 So. 2d 1029 (Fla. 4th DCA 1984), and the Second District's reasoning in Dudley v. State, 634 So. 2d 1093 (Fla. 2d DCA 1994), the Third District held that legal malice, not actual malice, is an essential element of extortion. It held:

> [We] find that legal malice is the more appropriate standard to be applied in extortion cases...The conduct that the statute criminalizes is a malicious threat with the intent "to extort money or any pecuniary advantage" or to compel the person to do an act against his or her will. § 836.05, Fla. Stat. "[T]he extortionist need not hate his victim. That kind of malice is not contemplated by the crime of extortion." Alonso [v. State], 447 So. 2d [1029,] 1030 [(Fla. 4th DCA 1984)]. In an extortion case, the defendant is driven by greed, not hatred. "Taking the text of [section 836.05] as a whole, and considering its context and the discernable purposes of the legislature," we conclude that the statutory term "maliciously" means legal malice. Seese [v. State], 955 So. 2d [1145, 1149 (Fla. 4th DCA 2007)].

Tomlinson, 322 So. 3d at 215.

Further, the Third District rejected the Fifth District's holding in Calamia v. State, 125 So. 3d 1007, 1011 (Fla. 5th DCA 2013), in which the court concluded that actual malice is an essential element of extortion. In so finding, the Fifth District wrote:

> Although we think the Fourth District's analysis in Alonso is correct and legal malice is the more appropriate definition, we are compelled to follow the supreme court's directive in Carricarte [v. State, 384 So. 2d 1261 (Fla. 1980)]. Therefore we hold actual malice is the correct standard for extortion and certify conflict with Alonso and Dudley.

Calamia, 125 So. 3d at 1010.

Petitioner disagreed with the Third District's reading of the statute. On September 20, 2021, he filed the Amended Jurisdictional Brief arguing that the Third District's decision approving instructing the jury on the legal malice rather than actual malice standard was in direct conflict with the decision of the Fifth District in Calamia v. State, 125 So. 3d 1007 (5th DCA 2013). This Court accepted jurisdiction on February 7, 2022.

SUMMARY OF ARGUMENT

The Third District correctly determined that legal malice, not actual malice, is a required element of extortion. Taking the text of section 836.05, Florida Statute, as a whole, and considering its context and the discernible purposes of the legislature, warrant a conclusion that the plain meaning of the statutory term "maliciously" is legal malice: i.e. "wrongfully, intentionally, without legal justification."

Further, the first sense of "malice" listed in Black's Law Dictionary and the common law definition of extortion support Respondent's position that section 836.05 requires only legal malice. Defining malice as actual malice is most typical in nonlegal contexts. And at common law, a conviction for extortion never required the conduct to be motivated by "ill will" or "evil intent."

Most importantly, nearly every district court to have considered the question agrees that legal malice, not actual malice, applies to extortion cases. The purpose of the extortion statute is to prevent one person from unjustly enriching himself by threatening another's person, property, or reputation. The extortionist need not hate his victim. Legal malice is the essential element of extortion.

ARGUMENT

THE THIRD DISTRICT CORRECTLY DETERMINED THAT LEGAL MALICE IS THE PROPER STANDARD FOR EXTORTION. THIS COURT SHOULD DISAPPROVE THE FIFTH DISTRICT'S DECISION IN CALAMIA V. STATE THAT REACHED THE OPPOSITE CONCLUSION AND APPROVE THE THIRD DISTRICT'S DECISION BELOW.

Standard Of Review

"The elements of a criminal offense are a matter of statutory interpretation. " D.J. v. State, 67 So. 3d 1029, 1032 (Fla. 2011). Therefore, the conflict issue is addressed under the de novo standard of review. Id.; see also McCloud v. State, 260 So. 3d 911, 914 (Fla. 2018) ("This Court undertakes de novo review for questions of statutory interpretation").

Merits

Petitioner contends the trial court committed fundamental error by denying his request to instruct the jury that actual malice was an element of extortion under section 836.05, Florida Statutes. The State does not agree. Legal malice, not actual malice, is a required element of extortion. As such, this Court should approve the Third District's decision below reaching the same conclusion and

disapprove the Fifth District's decision in Calamia v. State, 125 So. 3d 1007 (Fla. 5th DCA 2013).

Principles of Statutory Interpretation

"The starting point for any statutory construction issue is the language of the statute itself - and a determination of whether that language plainly and unambiguously answers the question presented." State v. Peraza, 259 So. 3d 728, 730 (Fla. 2018). "[W]hen the language of a statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." Id. (original alteration) (internal quotations omitted).

When the text of a statute is truly ambiguous and capable of different meanings, this Court will apply established principles of statutory construction to resolve the ambiguity, Anderson v. State, 87 So. 3d 774, 777 (Fla. 2012); see also Wheaton v. Wheaton, 261 So. 3d 1236, 1242 (Fla. 2019). The "elementary principle of statutory construction [is] that significance and effect must be given to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage." Larimore

v. State, 2 So. 3d 101, 106 (Fla. 2008), as revised on denial of reh'g (Jan. 29, 2009).

The "statute is to be read as a consistent whole, and a court should accord meaning and harmony to all of its parts, with effect given to every clause and related provision." Anderson, 87 So. 3d at 777. This Court "adhere[s] to the 'supremacy-of-text principle': 'The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.'" Advisory Opinion to Governor re Implementation of Amendment 4, The Voting Restoration Amendment, 288 So. 3d 1070, 1071 (Fla. 2020) (quoting Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 56 (2012)).

The Third District Correctly Construed "Maliciously" as Requiring Legal Malice

Petitioner was convicted for extortion pursuant to section 836.05, Florida Statutes (2015). Section 836.05, provides:

> Whoever, either verbally or by a written or printed communication, … maliciously threatens an injury to the person, property or reputation of another, or maliciously threatens to expose another to disgrace, or to expose any secret affecting another … with intent thereby to extort money or any pecuniary advantage whatsoever . . . shall be guilty of a felony of the second degree …

§ 836.05, Fla. Stat. (2015).

The statute does not define the term "maliciously." In law, however, the term malice and its adverbial form maliciously have two meanings: "legal malice" (also known as "malice in law"), and "actual malice" (also known as "malice in fact"). Reed v. State, 837 So. 2d 366, 368 (Fla. 2002). Legal malice means "wrongfully, intentionally, without legal justification or excuse," while actual malice means "ill will, hatred, spite, an evil intent." Id.

Here, although the statute does not explicitly refer to legal malice, reading the text of section 836.05 as a "consistent whole" supports a conclusion that the statutory term "maliciously" means legal malice. The statute does not state that the criminal conduct need be motivated by ill will, hatred, spite or an evil intent, i.e., actual malice. Instead, it requires that the offense have been committed "with intent to extort money or any pecuniary advantage." § 836.05, Fla. Stat. (2015). The mens rea provision clarifies that the malice required for the crime is the intent to obtain money via threat without a lawful justification—in other words, legal malice.

Further, consideration of the statutory language along with the discernible purposes of the legislature reinforces Respondent's

position that legal malice, not actual malice, is a required element of extortion. The purpose of the extortion statute is to prevent one person from unjustly enriching himself by threatening another's person, property, or reputation. As this Court previously opined, the State has an "interest . . . in shielding its citizens from these types of strong-arm tactics," Carricarte v. State, 384 So. 2d 1261 (Fla. 1980), and it hardly matters whether those tactics are motivated by personal animosity or simple greed. In other words, whether the perpetrator extorts a rival businessperson whom he dislikes or a family member whom he purports to love, the injury—and thus the crime—is committed.

Further, "[i]n ascertaining the plain meaning of statutory language, consulting dictionary definitions is appropriate." State v. Weeks, 202 So. 3d 1, 7 (Fla. 2016). Where, as here, the Legislature leaves a term undefined, Florida courts frequently use legal definitions found in Black's Law Dictionary. Id; Valdes v. State, 3 So. 3d 1067, 1076 (Fla. 2009). Thus, courts have looked to Black's for definitions of "malicious" or "maliciously." See, e.g., Daker v. Bryson, 841 F. App'x 115, 121 (11th Cir. 2020) (relying on the Black's Law Dictionary when defining "malicious" as "[w]ithout just cause or

excuse."); Alonso v. State, 447 So. 2d 1029, 1030 (Fla. 4th DCA 1984) (using Black's to define "malice").

The first sense of "malice" listed in Black's Law Dictionary supports a conclusion that section 836.05 requires only legal malice. Black's Law Dictionary defines "malice" as "[t]he intent, without justification or excuse, to commit a wrongful act." Malice, Black's Law Dictionary (11th ed. 2019). Additionally, Black's defines "malicious" as "[w]ithout just cause or excuse." Malicious, Black's Law Dictionary (11th ed. 2019). And although Black's also recognizes that "malice" can mean "[i]ll will; wickedness of heart," the dictionary stresses such a definition is "most typical in **nonlegal** contexts." Id. Malice, Black's Law Dictionary (11th ed. 2019) (emphasis added); see Michigan v. Harris, 845 N.W.2d 477, 478 (Mich. 2014)(quoting Black's three definitions of extortion and then stating "only those threats made with the intent to commit a wrongful act without justification or excuse, or made in reckless disregard of the law or of a person's legal rights, rise to the level necessary to support extortion conviction.").

Florida Courts' Interpretation of the Term "Maliciously"

Florida courts have long adopted the legal malice definition in extortion cases, reasoning:

> [Actual] malice is not contemplated by the crime of extortion. The basic statutory ingredients are a threat made maliciously with the intent to require another to perform an act against his will. The malice requirement is satisfied if the threat is made "willfully and purposely to the prejudice and injury of another, ..."

Alonso, 447 So. 2d at 1030 (citing Black's Law Dictionary, 4th Ed.); see also Dudley v. State, 634 So. 2d 1093, 1094 (Fla. 2d DCA 1994).

Nearly every district court to have considered the issue agrees "the extortionist need not hate his victim" and "[n]either the actual intent to do harm nor the ability to carry out the threat is essential to prove that extortion occurred." Alonso, 447 So. 2d at 1030; Dudley, 634 So. 2d at 1094; Duan v. State, 970 So. 2d 903 (Fla. 1st DCA 2007); Tomlinson, 322 So. 3d at 214. "That kind of malice is not contemplated by the crime of extortion." Id.

In fact, even the Fifth District in Calamia acknowledged that "legal malice is the more appropriate definition…" 125 So. 3d at 1010. It only departed from the other districts' reasoning because, as discussed in detail below, it erroneously believed it was following binding precedent. Id.

Indeed, the Third District properly joined the majority of the Florida district courts:

> [We] find that legal malice is the more appropriate standard to be applied in extortion cases...The conduct that the statute criminalizes is a malicious threat with the intent "to extort money or any pecuniary advantage" or to compel the person to do an act against his or her will. § 836.05, Fla. Stat. "[T]he extortionist need not hate his victim. That kind of malice is not contemplated by the crime of extortion." Alonso [v. State], 447 So. 2d [1029,] 1030 [(Fla. 4th DCA 1984)]. In an extortion case, the defendant is driven by greed, not hatred. "Taking the text of [section 836.05] as a whole, and considering its context and the discernable purposes of the legislature," we conclude that the statutory term "maliciously" means legal malice. Seese [v. State], 955 So. 2d [1145, 1149 (Fla. 4th DCA 2007)].

Tomlinson, 322 So. 3d at 214.

Moreover, numerous Florida statutes containing the term "maliciously" have been interpreted to require legal malice. For instance, the aggravated stalking statute, section 784.048(7), Florida Statutes, provides:

> A person who, after having been sentenced for a violation of s. 794.011, s. 800.04, or s. 847.0135(5) and prohibited from contacting the victim of the offense under s. 921.244, willfully, **maliciously**, and repeatedly follows, harasses, or cyberstalks the victim commits the offense of aggravated stalking, a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

§ 784.048(7), Fla. Stat. (2021) (emphasis added). This Court expressly recognized the applicability of the legal malice standard to aggravated stalking crimes and amended the standard jury

instruction by defining the term "maliciously" as "wrongfully, intentionally, and without legal justification or excuse." In re Standard Jury Instructions in Criminal Cases-Report 2019-08, 288 So. 3d 530 (Fla. 2020); Fla. Std. Jury Instr. (Crim.) 8.7(d).

Criminal mischief and other closely related crimes against property prescribing an injury or damage to be done willfully and maliciously have likewise been interpreted as requiring legal malice. §§ 806.10(1), 806.13(1)-(2), Fla. Stat.; Fla. Std. Jury Instr. (Crim.) 12.4; Robinson v. State, 686 So. 2d 1370, 1372 (Fla. 5th DCA 1997) ("We find that the terms 'willfully and maliciously' as used in subsection 806.10(1), Florida Statutes (1995), do not mean that a defendant must harbor actual ill will toward the owner of the property, but rather, that a defendant acted intentionally and without justification or excuse.").

And the term "maliciously" as used in section 790.19, Florida Statutes, governing shooting or throwing missiles into a dwelling, has been interpreted as legal malice. § 790.19, Fla. Stat.; Fla. Std. Jury Instr. (Crim.) 12.4 ("Maliciously" means wrongfully, intentionally, without legal justification or excuse, and with the knowledge that injury or damage will or may be caused to another person or the

property of another person); State v. Kettell, 980 So. 2d 1061 (Fla. 2008).

Lastly, this Court has held that actual malice is not required for a malicious prosecution action. Alamo Rent-A-Car, Inc. v. Mancusi, 632 So. 2d 1352, 1357 (Fla. 1994) ("In an action for malicious prosecution it is not necessary for a plaintiff to prove actual malice; legal malice is sufficient and may be inferred from, among other things, a lack of probable cause, gross negligence, or great indifference to persons, property, or the rights of others.").

Common Law Definition of Extortion

Further, the common law definition of extortion supports Respondent's position. Legal malice, not actual malice, is a required element of extortion. It is a familiar "maxim that a statutory term is generally presumed to have its common-law meaning." Taylor v. United States, 495 U.S. 575, 592, (1990). "Extortion is one of the oldest crimes in Anglo-American jurisprudence." Evans v. United States, 504 U.S. 255, 278 (1992) (Thomas, J., dissenting); see also 3 Edward Coke, Institutes of the Laws of England 149 (1644).

At common law, the offense of extortion concerned public officials who used their office to corruptly obtain money not owed to

them. See 4 Charles E. Torcia, Wharton's Criminal Law § 654 (15th ed. 2018) (collecting cases). "The common-law offense of extortion is said 'to be an abuse of public justice, which consists in any officer's **unlawfully** taking by color of his office, from any man, any money or thing of value that is not due him, or more than is due him, or before it is due.'" Hanley v. State, 125 Wis. 396, 401–402, 104 N.W. 57, 59 (1905) (emphasis added) (quoting 4 W. Blackstone, Commentaries 141 (1769)).

Thus, the common law definition requires that an accused possessed the intent to obtain money unlawfully, without a lawful justification—in other words, legal malice. The common law definition does not require the conduct to be motivated by "ill will" or "evil intent."

Just as in the original common law definition of extortion, the current interpretation of section 836.05, Florida Statutes, should not entail actual malice. This Court should approve the Third District's decision.

Unwarranted Results

Indeed, the plain and ordinary meaning of malice as it relates to extortion is that the threat be done with legal malice, i.e.,

"wrongfully, intentionally, without legal justification or excuse," in order to criminalize the behavior. The extortion statute focuses on the pecuniary interest and unlawfulness of the act and not on an extortionist's feelings toward the victim.

Providing a jury with an actual malice instruction could result in confusion and an unwarranted shift of the jury's focus. Instead of concentrating on the extortionist's pecuniary interest and the unlawfulness of his action, the jurors would erroneously believe that their primary focus should be on the subjective component. Thus, requiring actual malice instead of legal malice would lead to absurd results – the jury would erroneously construe the instruction to require the State to prove both that Petitioner intended to extort money and that he hated the victim.

Such an approach would significantly limit the prosecution of defendants who, for example, acted "with intent to extort money or any pecuniary advantage," but did not know the victim well, never met him or her, or the opposite – appeared to have a great rapport. It also would encourage defenses that would be solely based on the subjective feelings of an accused, instead of his or her pecuniary interest.

The Third District properly interpreted the term "maliciously." Legal malice, not actual malice, is the element of extortion.

Gaylord,[5] *Reed*,[6] *and Carricarte*[7]

Against all this textual evidence, Petitioner cites Gaylord, Reed, and Carricarte in support of his position. 356 So. 2d at 313; 837 So. 2d at 366; 384 So. 2d at 1261. His reliance is misplaced.

In Gaylord, the defendant was not charged with extortion. He was convicted of aggravated child abuse under section 827.03(3), Florida Statutes (1975), which required proof that he maliciously punished the victim. 356 So. 2d at 314. Gaylord challenged the constitutionality of section 827.03(3) on the grounds of vagueness and overbreadth, because the 1975 version of the statute did not define the term "maliciously." Id.

This Court upheld the constitutionality of the statute, finding that the term "maliciously" provided "a definite standard of conduct understandable by a person of ordinary intelligence" and defined

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[5] State v. Gaylord, 356 So. 2d 313 (Fla. 1978).

[6] Reed v. State, 837 So. 2d 366 (Fla. 2002).

[7] Carricarte v. State, 384 So. 2d 1261 (Fla. 1980).

"malice" in the aggravated child abuse context as "ill will, hatred, spite, an evil intent." Gaylord, 356 So. 2d at 314.

However, Gaylord's actual malice standard was eliminated from the aggravated child abuse statute through a statutory amendment. In 2003, the Florida Legislature defined the term "maliciously" as requiring legal malice:

> (4) For purposes of this section, "maliciously" means wrongfully, intentionally, and without legal justification or excuse. Maliciousness may be established by circumstances from which one could conclude that a reasonable parent would not have engaged in the damaging acts toward the child for any valid reason and that the primary purpose of the acts was to cause the victim unjustifiable pain or injury.

§ 827.03(4), Fla. Stat. (2003).

Thus, Gaylord's interpretation of the term "maliciously" has been rejected by the Legislature almost two decades ago. The aggravated child abuse statute is yet another statute, the current interpretation of which supports Respondent's position that legal malice is the proper standard for extortion.

Petitioner's reliance on Reed v. State, 837 So. 2d 366, 368 (Fla. 2002), is similarly misplaced. Reed does not address the definition of the term "maliciously" in extortion cases. Reed predates the statutory

amendment discussed supra. Indeed, the actual malice standard is no longer used in aggravated child abuse cases and should not be used for extortion. § 827.03(4), Fla. Stat. (2003).

Further, Petitioner's reading of Carricarte is erroneous. Carricarte neither involved a jury instruction issue nor did it define the term "maliciously" in the extortion context. Instead, the Carricarte case pertained to a constitutional challenge of the extortion statute based on its alleged vagueness. This Court rejected Carricarte's claim and found the statute constitutional:

> Defendant's contention that the extortion statute is impermissibly vague by virtue of the term "malicious" is without merit. This Court has repeatedly upheld the terms "malice" and "malicious" against a vagueness challenge. See, e.g., State v. Gaylord, 356 So. 2d 313 (Fla.1978); Faust v. State, 354 So. 2d 866 (Fla. 1978); Jordan v. State, 334 So. 2d 589 (Fla. 1976). Just as the elements of malice and intent prevent overbroad application of the statute, they lend sufficient clarity to provide adequate notice of the proscribed activity to persons of ordinary intelligence and understanding. We hold that section 836.05, Florida Statutes (1977), is constitutional.

Carricarte, 384 So. 2d at 1263.

Petitioner argues that by citing Gaylord, this Court adopted now-rejected by the Legislature interpretation of the term "maliciously" as requiring actual malice for the extortion cases. He

also maintains that "[r]ead together, Gaylord and Carricarte teach that to survive a constitutional vagueness challenge the term 'maliciously' as used in the extortion statute must be interpreted as requiring proof of actual, rather than simple legal malice." (Petitioner's Brief at 21).

However, a close reading of the Carricarte opinion does not support Petitioner's arguments. First, this instant case does not involve a constitutional challenge based on vagueness. And even if it did, the statute still provides "adequate notice of the proscribed activity to persons of ordinary intelligence and understanding." Thus, it is constitutional. See Carricarte, 384 So. 2d at 1263.

Second, the citation to Gaylord appears to have been used simply to demonstrate that this Court has repeatedly upheld the term "malicious" against a vagueness challenge. A close look at the Carricarte opinion reveals that this Court has not used a pinpoint citation to the Gaylord's archaic definition of malice. This Court rather simply used the citation to the full case name. And when referring to Gaylord, this Court has chosen a combination of signals[8]

[8] "A signal is a shorthand message to the reader about the relationship between a proposition and the source or authority cited

"see" and "e.g." Such a combination does not symbolize the adoption or approval of all legal definitions contained within the cited cases. Instead, when combined, "see" and "e.g." merely denote that numerous sources indirectly support the Court's proposition. The Writing Center at Georgetown University Law Center, Bluebook Signals Explained at 3, https://www.law.georgetown.edu/wp-content/uploads/2019/08/BLUEBOOK-SIGNALS-EXPLAINED.pdf (2019); Beres v. Daily Journal Corp., 0:22-CV-60123-WPD, 2022 WL 805733, at *4 (S.D. Fla. Mar. 8, 2022) ("[W]hen combined, see, e.g., denotes that numerous sources *indirectly* support the proposition.") (citing Bluebook Signals Explained).

Further, neither of the two cases this Court cited along with Gaylord, Faust v. State, 354 So. 2d 866 (Fla. 1978) and Jordan v. State, 334 So. 2d 589 (Fla. 1976), directly addresses the definition of malice. Instead, they address constitutional challenges of the aggravated child abuse statute or the predecessor to that statute. Thus, just like Faust and Jordan, Gaylord was cited to demonstrate

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for that proposition." THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION B1.2, at 4 (Columbia Law Review Ass'n et al. eds., 21st ed. 2020) (emphasis omitted).

that this Court has repeatedly upheld the term "malicious" against a vagueness challenge.

Finally, the only conclusion that reading Gaylord and Carricarte warrants is that this Court has never adopted the actual malice standard for the extortion cases. The Fifth District erroneously concluded that it was "compelled to follow the Supreme Court's directive in Carricarte" and had to "hold actual malice is the correct standard for extortion." Calamia, 125 So. 3d at 1010.

The Rule of Lenity is a Canon of Last Resort

Petitioner's invocation of the rule of lenity should be rejected. This Court has previously recognized that "the rule of lenity is a canon of last resort." See, e.g., United States v. Shabani, 513 U.S. 10, 17 (1994). It "applies only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute." Id (internal citations omitted). The rule of lenity "certainly should not be applied to produce an absurd or unreasonable result." Davila v. State, 75 So. 3d 192, 198 (Fla. 2011) (internal citation omitted).

Here, the canons of statutory interpretation and the rule against interpreting statutes to reach absurd results resolve any alleged

ambiguity. Indeed, taking the text of section 836.05 as a whole, and considering its context and the discernible purposes of the legislature, mandate a conclusion that the plain meaning of the statutory term "maliciously" is legal malice: i.e., "wrongfully, intentionally, without legal justification."

Because after utilizing traditional canons of statutory construction, the statute is clear, there is no need to resort to a doctrine of last recourse. Petitioner is not entitled to the relief sought, and this Court should approve the Third District's decision applying the approach supported by the majority of the district courts.

Alternatively, Petitioner Failed to Establish Fundamental Error

Finally, Petitioner cannot prevail even under the definition of "malice" he proposes. Indeed, any error in the trial court's instructions to the jury was harmless beyond a reasonable doubt because no reasonable jury could have concluded that Petitioner lacked actual malice. See State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986).

As noted, to act with actual malice means to act "with ill will, hatred, spite, or an evil intent," while legal malice refers to an act taken "intentionally and without any lawful justification." Fla. Std.

Jury Instr. (Crim.) 8.23. By definition, however, a person who threatens to injure another "with intent thereby to extort money or any pecuniary advantage," § 836.05, Fla. Stat.—as the extortion statute requires—has simultaneously acted with the "ill will" or "evil intent" necessary for a finding of actual malice and with the intention and lack of justification required for legal malice.

Put differently, few if any extortion fact patterns will present a case for legal malice but not actual malice; in every instance of a threat for the unjustifiable purpose of extorting money, the jury will rightly conclude that the defendant acted with "ill will" or "evil intent."

That was undoubtedly true here. Petitioner threatened to "ruin [two fellow realtors'] careers . . . unless they paid him $500,000," later upping his demand to $800,000. That conduct was motivated by "ill will" or "evil intent" just as surely as it was "intentional[] and without any lawful justification." No reasonable jury finding one could have failed to find the other.

CONCLUSION

This Court should approve the Third District's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing answer brief has been furnished by email to counsel for Petitioner, John E. Bergendahl, at info@jeblawoffice.com, on June 22, 2022.

/s/ Kseniya Smychkouskaya
Kseniya Smychkouskaya

CERTIFICATE OF COMPLIANCE

I certify that this answer brief complies with the font and word limit requirements set forth in Florida Rules of Appellate Procedure 9.045(b) and 9.210(a)(2)(B). This answer brief was prepared in Bookman Old Style 14-point font and contains less than 13,000 words.

/s/ Kseniya Smychkouskaya
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