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IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC21-1204

Lower Tribunal No(s).: 3D18-1982;
132015CF0163540001

KEVIN F. TOMLINSON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

_____/

PETITIONER'S BRIEF ON THE MERITS

Respectfully submitted,

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PETITIONER'S BRIEF ON THE MERITS

Preliminary Statement

The Petitioner Kevin F. Tomlinson will be referred to as "Petitioner" or "Mr. Tomlinson." The Respondent, the State of Florida will be referred to as "the State."

Reference to the Record will be made by citing to the document as it appears by name in the record before this Court and then to the specific page of the document.

STATEMENT OF THE CASE AND OF THE FACTS

Statement of the Case

Following a short-term extortion investigation, an armed cadre of Miami Beach Police Department (MBPD) officers arrested the Appellant, Kevin Tomlinson, at his residence shortly after midnight on August 7, 2015. Tomlinson had no prior criminal history or history of violence, and the officers knew he had consulted counsel with regard to matters related to the investigation. [TT: Vol.7:683].

On September 3, 2015, the State of Florida filed a four count Information charging Mr. Tomlinson with the following offenses:

Count 1: Depriving an Officer of Means of Protection or Communication in violation of Fla. Stat. 843.025;

Count 2: Resisting an Officer With Violence to His/Her Person in violation of Fla. Stat. 843.01;

Counts 3-4: Extortion in violation of Fla. Stat. 836.05.

[R:22-27].

Due to the fact that there was a long term close personal relationship between the Miami-Dade County State Attorney and one of the alleged victims and her husband, (Jill and Robert Hertzberg), on November 16, 2015, two Broward County Assistant State

Attorneys were designated pursuant to a Governor's Executive Order of Assignment to prosecute the case. [R:30].

The case proceeded to trial on June 19, 2018. Defense motions for judgment of acquittal were made pursuant to Fla. R. Crim. P. 3.380 and denied at the close of the State's case [R:677-678] and again at the close of all the evidence in the case. [R:824]. The trial concluded on June 22, 2018, when the jury returned its verdict finding Mr. Tomlinson not guilty as to Counts 1 and 2 and guilty as to Counts 3 and 4. [R:253].

Mr. Tomlinson's sentencing hearing was held on August 31, 2018. At the conclusion of the hearing the court departed from the low-end guideline of 19.5 months [R:261-262] and imposed concurrent terms of two years house arrest with electronic monitoring followed by fifteen years' probation. In addition to the standard conditions of probation, two special conditions were imposed (1) barring Mr. Tomlinson from employment in the real estate industry during the term of his house arrest and probation and (2) restricting his ability to use social media, including Facebook, Twitter and the like. [R:263-269].

Mr. Tomlinson appealed his extortion convictions to the Third District Court of Appeal arguing, inter alia that the trial court's denial of the defense request to instruct the jury that actual malice is an element of the offense of extortion under Fla. Stat. 836.05 was fundamental error requiring reversal of his convictions.

On June 30, 2021, the Third District Court of Appeal rejected the above argument. During the course of its opinion, that court acknowledged that although malice is an essential element of the offense of extortion under Fla. Stat. 836.05 the statute does not define the term. Then, relying on the decisions of the Fourth District Court of Appeal in *Alonso v. State*, 447 So.2d 1029, 1030 (Fla. 4th DCA 1984) and the Second District Court of Appeal in *Dudley v. State*, 634 So.2d 1093, 1094 (Fla. 2d DCA 1994) that generally defined malice in the context of the extortion statute as legal malice rather than actual malice, held (1) that legal malice is the more appropriate standard to be applied in extortion cases; and (2) that the trial court's instruction defining the malice element of the crime of extortion as legal malice was not fundamental error.

On September 20, 2021, Mr. Tomlinson filed his Amended Jurisdictional brief contending that the decision of the Third District

Court of Appeal approving instructing the jury using the lower standard of legal malice rather than actual malice was in direct conflict with the decision of the Fifth District Court Appeals in *Calamia v. State*, 125 So.3d 1007 (5th DCA 2013). *Calamia* squarely held that in an extortion case it is fundamental error to instruct the jury that legal malice rather than actual malice is the correct standard. On February 7, 2022, this Court entered an Order accepting jurisdiction of this case.

Statement of the Facts

Jill Hertzberg and Jill Eber are Miami Beach realty partners (trade name "the Jills") who are contractually affiliated with the real estate brokerage firm Coldwell Banker. The Jills specialize in high end properties which usually have a value in excess of $5,000,000.00. Kevin Tomlinson is a Miami Beach realtor who, like the Jills, specialized in high end properties. [TT:Vol.7:754].

In early 2015, Mr. Tomlinson discovered that the Jills had been involved in altering and falsifying data in the Multiple Listing Service ("MLS") for over four years. The MLS is a comprehensive database owned and operated by the Miami Association of Realtors (MAR). [TT:Vol.6:521]. The MLS provides critical information to MAR

member realtors including the complete sale and listing history of all properties in Miami Dade County. [TT:Vol.7:745].

In April 2015, Mr. Tomlinson filed a formal complaint with the Miami Association of Realtors ("MAR") detailing how the Jills had deliberately altered and falsified the sale and listing history of MLS listings involving 51 separate high-end properties.[1] [TT: Vol.3:228-229;Vol.4:390].

Following their receipt of the MAR Complaint, the Jills consulted several lawyers some of whom also represented Coldwell Banker. [TT:Vol.5:456]. In June 2015 the Jills filed a lengthy written response to the MAR complaint. [TT:Vol. 3:237]. In their response, they admitted that numerous property listing histories in the MLS database had been altered and falsified but claimed ignorance as to exactly what had occurred and the nature and extent of the adverse impact their massive data falsification had on MAR members and the public. Nonetheless they admitted responsibility. [TT: Vol.4:390-397]. By altering and falsifying the MLS data the Jills were able to

[1] The unauthorized alteration or falsification of data in a computer database belonging to a third party such as MAR is a felony under Florida law. *See* Fla. Stat. 815.04(1)(2) and 815.06(1)(b).

retain several otherwise expired listings and sell and receive substantial commissions on at least ten high end properties. [TT: Vol.4:397].

On July 15, 2015, Jill Hertzberg received a phone call from Mr. Tomlinson. During the call he explained that he was not a monster, felt bad about what he had done (filing the MAR Complaint), and that when he did it, people in his office were excited they were going to get "the Jills." Now, however, he felt differently and wanted to meet with her and explain his actions. [TT: Vol. 3:238-239].

Over the next couple of days, Mr. Tomlinson and Ms. Hertzberg exchanged text messages and emails referencing their plans to meet and discuss the situation. [TT: Vol. 3:244]. Ultimately, they agreed to meet on July 16th at her residence. [TT: Vol. 3:250-251].

When Mr. Tomlinson arrived for the meeting at the Hertzberg residence there were several people present including some of her family members and a film/video crew that was there to shoot a promotional video. Ms. Hertzberg and Mr. Tomlinson retreated to her bedroom so they could have more privacy. [TT: Vol. 3:252-253].

Ms. Hertzberg testified that their meeting started off friendly [TT: Vol. 3:253]. Mr. Tomlinson explained to her that he could make

this (MAR Complaint) go away. She responded, telling him he couldn't make it go away, but he could make it less terrible when they (the Jills) went before the MAR grievance committee. He disagreed, again telling her he could make it go away. [TT:Vol.3:255].

Mr. Tomlinson then told her that she was going to pay him money. Ms. Hertzberg replied that she was not going to pay him money, and was happy to go before MAR. His response was to the effect that, "listen sister, you are going to pay me money because if you don't, I'm going to ruin your career, that's the end of the Jills." He added that she was going to pay him $250,000.00 and that Jill Eber was going to pay him $250,000.000 [TT: Vol. 3:256-270].

According to Ms. Hertzberg, Mr. Tomlinson then stated, "I am going to ruin your whole reputation." "I am going to call the Wall Street Journal. I am going to tell them all about this." 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 be able to make a living." In response she told him, I am going to call Jill Eber right now and I want you to say to her what you just said to me. [TT: Vol. 3:257-260].

Ms. Hertzberg then placed a call to Jill Eber who was on vacation in the Turks and Caicos. She put the call on speakerphone and Mr. Tomlinson essentially reiterated what he had just told Ms. Hertzberg. [TT: Vol. 3:257-260].

When the call concluded Ms. Hertzberg told Mr. Tomlinson they were done, and he should leave. As he was walking out the door, he told her I will accept 200 from you and 200 from Jill and that's it. In response she told him she was leaving on vacation the next day and would be in touch with him. [TT: Vol. 3:262].

Ms. Eber testified as to her recollection of the call she received while she was in the Turks and Caicos. She essentially reiterated Ms. Hertzberg's testimony about that event and added that she felt shaken as a result of what she perceived were threats made by Mr. Tomlinson. [TT: Vol. 5:441-443-447].

Following the meeting, Ms. Hertzberg called her attorney and decided they would report the incident to the police. [TT: Vol. 3:263-264]. On July 17, 2015, she left for vacation.

Ms. Hertzberg returned from her vacation on July 28, 2015, and at different times that day she and Ms. Eber went to the Miami Beach Police Department with their attorney to provide written statements

and discuss the situation. [TT: Vol. 5:447]. The detectives assigned to the case and Ms. Hertzberg agreed she would try to contact Mr. Tomlinson and engage him in recorded telephone conversations. On July 28th Ms. Hertzberg sent Mr. Tomlinson a text message asking him to call her. He did not respond. She followed up by sending several additional text messages and eventually on August 2nd a recorded telephone conversation took place between Ms. Hertzberg and Mr. Tomlinson. [TT:Vol.3:275, 277][State's Ex.5 and 6 - recorded call and transcript].

During the August 2nd telephone conversations Ms. Hertzberg and Mr. Tomlinson continued their discussions concerning the resolution of the MAR Complaint and touched on matters that had been discussed during the July 16th meeting at her residence. At various points in the recorded conversation, Mr. Tomlinson asked Ms. Hertzberg to have her attorney call his attorney and settle the issue. [State's Ex.6, R:74, 85-86, 88-90]. Ms. Hertzberg agreed to do that and Mr. Tomlinson gave her the name of his attorney, David Haber. Neither Ms. Hertzberg nor her attorney made any effort to contact Mr. Haber. [State's Ex. 6, R:89-90].

The August 2nd recorded call was followed by two additional recorded calls, one on August 3rd [State's Ex. 7 – transcript] and another on August 5th, [State's Ex.8 – transcript].[2] Prior to the August 5th call, one of the detectives instructed Ms. Hertzberg to try to have her and Mr. Tomlinson revisit the conversation they had during their July 16th meeting at her residence. [TT: Vol. 3:295].

During the August 3rd telephone conversation Mr. Tomlinson explained that his attorneys were like "rabid dogs and saw a lucrative lawsuit against Coldwell Banker and the Jills. [State's Ex. 7 – R:99]. He again suggested that their attorneys should meet. Once again Ms. Hertzberg and her counsel made no effort to contact Mr. Haber as Mr. Tomlinson requested. [State's Ex. 7 – R:116].

During the August 5th call Ms. Hertzberg told Mr. Tomlinson that she had spoken to Jill Eber and they were at a point where they just wanted to this to be over with and to go back to the original offer. Mr. Tomlinson asked, "that would be the four?" She said yes, 200 each. The call concluded with Mr. Tomlinson telling her "ok, let me

[2] Several minutes of the August 3d conversation were not recorded for reasons that the State's witness could not explain. [TT: Vol. 4:359-361, Vol. 6:561].

get right back to you, I will call you within the hour." [State's Ex.8 - R:143-144].

Mr. Tomlinson did not call her back. Instead, he sent her a text message telling her he was in a dramatic quandary with his attorney and that it was urgent for the three of them (Mr. Tomlinson, Ms. Hertzberg and Ms. Eber) to meet in the morning. [State's Ex. 1 – R:56].

On the morning of August 6th, Mr. Tomlinson sent a text message to Ms. Hertzberg telling her that he wanted to meet with her and her husband (a practicing attorney and former Dade County Assistant State Attorney) and that he wanted to have Beth Butler (one of his mentors in the real estate industry) attend the meeting. Ms. Hertzberg refused to have others present for the meeting. A meeting between Ms. Hertzberg and Mr. Tomlinson was scheduled for 7:00 p.m. that evening at her residence. [State Ex. 1 – R:57].

Prior to the meeting, Miami Beach Police Department detectives set up a recording device in the residence. [R:305-306]. They also instructed Ms. Hertzberg to write a check to Mr. Tomlinson in the amount of $400,000 and give it to him during the meeting. [TT: Vol. 4:320-321].

During the meeting, Mr. Tomlinson informed Ms. Hertzberg that he and three other realtors were contemplating filing a class action lawsuit against her and Ms. Eber as well as Coldwell Banker. [State's Ex. 9 – transcript R:151-153]. In light of the contemplated class action lawsuit, Mr. Tomlinson was now asking for $800,000 to resolve the dispute. Ms. Hertzberg then tendered him a check for $400,000. However, he refused to take it, telling her that he would not accept any money until he was certain that the potential class action could be resolved, that the MAR Complaint could be dismissed, and their attorneys could prepare the appropriate releases. [State's Ex. 9 – R:166, 169-170, 173-174].

After leaving the residence Mr. Tomlinson sent an email to MAR informing them that a settlement had been reached. [State's Ex.10 - R:182]. He followed that email with a text to Ms. Hertzberg regarding releases. [State's Ex.1 - R:58].

The following day Mr. Tomlinson sent Ms. Hertzberg a text telling her he found a class action attorney that could assist in finalizing the settlement. [State's Ex.1 - R:59 - R:312-313]. In the late afternoon of August 7th Ms. Hertzberg received a text from Mr. Tomlinson questioning whether the settlement was going forward.

[State's Ex. 1 - R:60 - R:313]. She did not respond. Mr. Tomlinson then sent an email to MAR informing them that no agreement had been reached and that the grievance against the Jills would proceed. [R:314][State's Ex.11 – R:184].

Beth Butler has been involved in the real estate industry at a management level for over 20 years. She has known Mr. Tomlinson that long and described him as a highly successful innovative realtor who has a reputation for honesty and integrity. [TT: Vol 7:687]. She has known the Jills for about 20 years and is aware that their reputation for truthfulness and integrity is neither good nor positive. Real estate agents that work in their market have difficulty trusting them. They do not have a reputation for being ethical. [TT: Vol. 7:693].

Ms. Butler explained that the MLS is the working tool realtors use to get their information. It is a vital part of the real estate business. [TT: Vol. 7:698]. Included within the data in the MLS database is information detailing the number of days a property has been on the market. Days on market is a reflection of the condition of the relevant market; it is also a reflection of how accurately the property is priced and of current market activity. [TT: Vol. 7:699].

Ms. Butler confirmed that she accompanied Mr. Tomlinson to a meeting with an attorney, David Haber. When he heard what had occurred with regard to the situation involving the Jills and Coldwell Banker he brought in his partner and they were interested in bringing a class action lawsuit. [TT: Vol. 7:716].

Ms. Butler explained that when a realtor has an exclusive listing contract to sell a client's property that information appears on the MLS. When the exclusive listing contract expires, that information is put out on the MLS "Hot Sheet". Realtors commonly use the Hot Sheet as a prospecting tool. When a property appears on the Hot Sheet realtors will frequently call the owner of the property where the listing has just expired and offer their services to sell the property. [TT: Vol. 7:718-719]. She estimated that the market value of the 51 properties the Jills had kept off the Hot Sheet by manipulating and falsifying MLS date was approximately $300,000,000.00 [TT: Vol. 7:717].

Ester Percal has been in the real estate business for 40 years and at one point owned her own brokerage firm. She first met Mr. Tomlinson when he worked at her firm. She, like the Jills and Mr. Tomlinson specialize in high end properties. [TT: Vol. 7:755].

Ms. Percal has known the Jills for a number of years and knows their reputation for truthfulness is not great; [TT: Vol. 7:747] and they have a reputation of not being truthful. [TT: Vol. 7:752].

Ms. Percal described the MLS as being like a Bible for realtors. It is the source of all the information that a realtor needs to sell real estate, understand real estate, analyze real estate, and explain real estate. [TT: Vol. 7:745]. The MLS will normally show how many times a property has been sold, listed for sale, listed for sale without being sold and the number of days it has been on the market. It will also show price reductions and whether it was taken off the market and then put back on the market. [TT: Vol. 7:753].[3]

She also explained how the Hot Sheet works and that if a realtor wanted to legitimately prevent a property from appearing on the Hot Sheet all that needed to be done was to cancel the listing prior to its expiration date. [TT: Vol. 7:757].

Ms. Percal, testified that she, along with Mr. Tomlinson and other realtors met with David Haber two or three times. Mr. Haber and his partner were very interested in filing a class action lawsuit

[3] Because of the Jills data manipulations and falsifications this information as well as the properties themselves disappeared from the MLS.

and continued to encourage her and the other realtors to retain the firm to file the suit. She paid a $5,000.00 retainer to the firm. [TT: Vol. 7:765-766]. She initially met with Mr. Haber because she was very disappointed and upset with how the real estate business was impacted as of the result of the MLS being manipulated by the Jills. [TT: Vol. 7:765-766].

Juan Carlos Otoya was a long-time employee of the Jills and used his technical expertise to alter and falsify data in the MLS database. To access the database, he used an administrator or broker level code that was given to him by one or both of the Jills. [TT: Vol.7:791-794].

Over the course of a four-year period Mr. Otoya accessed the MLS database and altered and falsified information on 51 separate properties where the Jills' exclusive listing contracts were about to expire. He did so to prevent each property from appearing on the Hot Sheet. Each of the alterations and falsifications was done on the request of one of the Jills. [TT: Vol.7:795-796, 797-800]. Once he altered and falsified the information each of the 51 properties disappeared from the MLS data base.

To ‘disappear’ an expiring property, its listing and all information concerning the property itself, Mr. Otoya routinely altered a number of the MLS data fields including, as an example, altering and falsifying the designated area code for the property. For example," area 30" which is Miami Beach would be changed to "area 11" which is a fictional area that doesn’t exist (or the code for Alapattah). The city code or ZIP Code would be altered or falsified; the correct folio number of the property would be replaced with a fake number; the property subdivision name would be changed to a fake one; the legal description of the property would be altered and replaced with a false description; the street name and address would be altered. [TT: Vol.7:797-801].

Mr. Otoya knew that the MLS database and the data in the database belonged to MAR and conceded that he never received permission from MAR to access the database and alter and falsify property information. [TT: Vol.7:801]. Although at trial he denied telling the Jills how he was keeping properties from appearing on the Hot Sheet, in his pretrial deposition he admitted that he had told the Jills he was changing the city field and folio numbers. [TT: Vol. 7:806-808]. After the MAR complaint was filed Coldwell Banker revoked the

administrative or broker level access that had been provided to the Jills and certain other high-end brokers. [TT: Vol. 7:810-811].

SUMMARY OF ARGUMENT

On not less than two occasions this Court has addressed vagueness or overbreadth challenges to criminal statutes employing the term maliciously as an element of a criminal offense.

In *State v. Gaylord*, 356 So.2d 313 (Fla. 1978) the defendant was charged with aggravated child abuse with having "maliciously punished" a child in violation of Fla. Stat. 827.03(3). In rejecting the defendant's challenge that the statute was unconstitutionally vague and overbroad, this Court held that the term "maliciously" provides "a definite standard of conduct understandable by a person of ordinary intelligence." Id. at 313. The Court went on to explain that malice in this context "means ill will, hatred, spite, an evil intent." Id. at 313.

Despite the clear and unequivocal holding of this Court in *Gaylord*, that the term maliciously equaled to actual malice the term maliciously was subsequently defined as legal malice in standard jury instruction for aggravated child abuse:

> "'[m]aliciously' means wrongfully, intentionally, without legal justification or excuse." Fla. Standard Jury Inst. (Crim.) 227 (1992).

This definition sanctioning a lesser standard of malice was expressly rejected in *Reed v. State*, 837 So.2d 366 (Fla. 2002) where this Court held that the definition provided in the standard jury instruction was erroneous and that the correct definition should be that malice means "ill will, hatred, spite, an evil intent." Id. at 369. The Court also observed that using the inaccurate definition of legal malice provided in the standard jury instruction reduced the state's burden of proof on an essential element of the offense charged and that the failure to use the correct definition was fundamental error in cases in which the essential element of malice was disputed at trial. Id. at 369.

In *Carricarte v. State*, 384 So.2d 1261 (Fla. 1980) this Court addressed a challenge that the term "maliciously threatens" in the extortion statute, Fla. Stat. 836.05 was unconstitutionally vague.

This Court rejected the challenge citing to its previous decision in *State v. Gaylord* which made it clear that to thwart a constitutionally based vagueness challenge, the term "maliciously" in

a criminal statute must be interpreted as requiring proof of actual malice, i.e., proof that the charged conduct involved "ill will, hatred, spite or evil intent."

Read together, *Gaylord* and *Carricarte* teach that to survive a constitutional vagueness challenge the term "maliciously" as used in the extortion statue must be interpreted as requiring proof of actual malice rather than simple legal malice. Moreover, a jury must be instructed that actual malice is the correct standard in an extortion case. The Fifth District Court of Appeal has agreed actual malice is the correct standard, holding in *Calamia v. State*, 125 So.2d 1007 (5th DCA 2013) that in an extortion case it is fundamental error to instruct a jury that legal malice rather than actual malice is the correct standard ("we are compelled to follow the Supreme Court's directive in *Carricarte* and "hold actual malice is the correct standard for extortion.")

This Court should now resolve the conflict presented in this case and hold that in an extortion prosecution pursuant to Fla. Stat. 836.05 actual malice is the correct standard and the jury must be so instructed.

ARGUMENT

THE COURT'S FAILURE TO INSTRUCT THE JURY THAT ACTUAL MALICE IS AN ELEMENT OF THE OFFENSE OF EXTORTION UNDER FLA. STAT. 836.05 IS FUNDAMENTAL ERROR REQUIRING REVERSAL OF MR. TOMLINSON'S CONVICTIONS FOR EXTORTION AS CHARGED IN COUNTS 3 AND 4 OF THE INFORMATION.

Fla. Stat. 836.05, Extortion, threats, provides in pertinent part as:

> "whoever, either verbally or by a written or printed communication, maliciously threatens to accuse another of any crime or offense, or by such 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, or to impute any deformity or lack of chastity to another, with intent thereby to extort money or any pecuniary advantage whatsoever, or with intent to compel the person so threatened, or any other person, to do any act or refrain from doing any act against his or her will, shall be guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084".

Section 836.05 does not define the term “maliciously.” Nor as it relates to the crime of extortion is the term "maliciously" elsewhere defined in the Florida statutes. Moreover, Florida Standard Jury Instruction 8.23 explains that the appellate courts are in conflict over the correct definition of the term:

Instruction 8.23 provides in pertinent part Definition of “maliciously.” The appellate courts are in conflict as to whether the extortion statute requires actual malice or legal malice. In the absence of clarification from the legislature or the Florida Supreme Court, trial judges must choose one of the following:

> *Dudley v. State,* 634 So. 2d 1093 (Fla. 2d DCA 1994)*;*
>
> *Alonso v. State,* 447 So. 2d 1029 (Fla. 4th DCA 1984).
>
> **“Maliciously” means intentionally and without any lawful justification.**
>
> *Calamia v. State,*125 So. 3d 1007 (Fla. 5th DCA 2013).
>
> **“Maliciously” means with ill will, hatred, spite, or an evil intent.**
>
> *Florida Standard Jury Instruction 8.23.*

During the charge conference Mr. Tomlinson requested that the jury be instructed that the term "maliciously" as used in the statute requires proof that the threatening communication be made with actual malice. [TT: Vol.7:836-837]; the prosecution argued that legal malice was the appropriate definition. [TT: Vol.7: 836-837]. The trial court denied the instruction requested by the defense and instead instructed the jury on legal malice. [TT: Vol.7: 856-857]. That error requires reversal of Mr. Tomlinson's extortion convictions.

On not less than two occasions this Court has addressed vagueness or overbreadth challenges to criminal statutes employing the term maliciously as an element of a criminal offense.

In *State v. Gaylord*, 356 So.2d 313 (Fla. 1978) the defendant was charged with aggravated child abuse with having "maliciously punished" a child in violation of Fla. Stat. 827.03(3). In rejecting the defendant's challenge that the statute was unconstitutionally vague and overbroad, this Court held that the term "maliciously" provides "a definite standard of conduct understandable by a person of ordinary intelligence." Id. at 313. The Court went on to explain that malice in this context "means ill will, hatred, spite, an evil intent." Id. at 313.

Despite the clear and unequivocal holding of this Court in *Gaylord*, that the term maliciously equaled to actual malice the term maliciously was subsequently defined as legal malice in the standard jury instruction for aggravated child abuse:

> "'[m]aliciously' means wrongfully, intentionally, without legal justification or excuse."

Fla. Standard Jury Inst. (Crim.) 227 (1992).

This definition sanctioning a lesser standard of malice was expressly rejected in *Reed v. State*, 837 So.2d 366 (Fla. 2002) where this Court held that the definition provided in the standard jury instruction was erroneous and that the correct definition should be that malice means "ill will, hatred, spite, an evil intent." Id. at 369. The Court also observed that using the inaccurate definition legal malice provided in the standard jury instruction reduced the state's burden of proof on an essential element of the offense charged and that the failure to use the correct definition was fundamental error in cases in which the essential element of malice was disputed at trial. Id. at 369.

In *Carricarte v. State*, 384 So.2d 1261 (Fla. 1980) this Court addressed inter alia, a challenge that the term "maliciously" in the

Fla. Stat. § 836.05, the extortion statute, was unconstitutionally vague.

In *Carricarte*, a representative of the Coco Plum Development Company acting in concert with the state attorney's office, engaged the defendant, a resident of the development, in a recorded phone conversation. During that conversation the defendant made the following statement: "if you do not hire me as your lawyer and if you do not pay me a fee to be your lawyer, I will do a number of things to you, including attempting to stop your marina, go to the Miami Herald and see that articles against the project are printed and will organize and represent the people who live in the development against the construction of the marina."

Based on the above conversation, Mr. Carricarte was charged with extortion in violation of Fla. Stat. 836.05. In his defense he raised constitutional vagueness and overbreadth challenges to the extortion statute contending inter alia, that it was impermissibly vague by virtue of its use of the term "maliciously."

This Court rejected Carricarte's challenge noting that statute was not overbroad simply because it could include arguably lawful statements given that a conviction required proof of two additional

elements - malice and intent. *Id.* at 1263. This Court next rejected the contention that the extortion statute was impermissibly vague by virtue of the inclusion of term "malicious" stating,

> "This Court has repeatedly upheld the terms malice and malicious against a vagueness challenge." Citing *State v. Gaylord*, 356 So.2d 313 (Fla. 1978).

As we have explained above, *State v. Gaylord* made it clear that to thwart a constitutionally based vagueness challenge, the term "maliciously" in a criminal statute must be interpreted as requiring proof of actual malice i.e., that the conduct involved "ill will, hatred, spite or an evil intent." Accord, *Reed v. State*, 837 So.2d at 369. By citing to, and relying on, *Gaylord*, this Court adopted the same definition of "maliciously" in rejecting the vagueness challenge to the extortion statute raised in *Carricarte.*

Read together, *Carricarte* and *Gaylord* teach that to survive 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.

The Fifth District Court of Appeal has agreed. In *Calamia v. State*, 125 So.3d 1007 (5th DCA 2013) the Court was asked to decide

whether the trial court had erroneously denied the defendant's request to instruct the jury that actual malice was the correct standard in an extortion prosecution pursuant to Fla. Stat § 836.05 and instead instructed the jury that legal malice was the appropriate standard. Based on its reading of *Carricarte v. State* and *State v. Gaylord*, the Court held that actual malice was the correct standard in an extortion prosecution and reversed the defendant's extortion conviction. *State v. Calamia*, at 1009-10.

The decision below directly conflicts with the decision of the Fifth District Court of Appeal in *Calamia v. State*, 125 So.3d 1007 (5th DCA 2013). Contrary to the Third District Court of Appeal which has now adopted the lower standard of legal malice, *Calamia* squarely held that in an extortion case it is fundamental error to instruct the jury that legal malice rather than actual malice is the correct standard. *Calamia v. State*, 125 So.3d at 1009-10.

Prior to the Third District Court of Appeal's decision in this case, the only case squarely addressing the issue whether an actual malice or legal malice instruction is appropriate was *Calamia v. State*. Although the court below correctly observed that the *Calamia* court may have noted that it believed that legal malice is the more

appropriate definition, it nonetheless held to the contrary, recognizing it was compelled to follow this Court's decision in *Carricarte v. State*, 384 So.2d 1261 (Fla. 1980). *See Calamia*, 125 So. 3d at 1010 ("we are compelled to follow the Supreme Court's directive in *Carricarte*" and "hold actual malice is the correct standard for extortion").

The Third District Court of Appeal's reliance on the Fourth District Court of Appeal's decision in *Alonso v. State*, 447 So.2d 1029 (Fla. 4th DCA 1984), and the Second District Court of Appeal's decision in *Dudley v. State*, 634 So.2d (Fla. 2d DCA 1994), is misplaced for the reason that neither of those decisions, unlike *Calamia*, addressed the specific issue in this case, i.e., whether the trial court should give an actual malice instruction in an extortion case especially, where, as here, the defendant had requested an actual malice instruction.

In *Alonso v. State*, 447 So.2d 1029 (Fla. 4th DCA 1984), the defendant challenged the trial court's jury instruction on extortion arguing only that a correct definition of malice required the state to show that the defendant acted "with the knowledge that injury or damage will or may be caused to another person or the property of

another person." After the court rejected that argument, it simply observed *in dicta* that the malice requirement is satisfied if the threat is made willfully and purposely to the prejudice and injury of another. *Id.* (citing Black's Law Dictionary, 4th Ed.). In *Alonso*, the defendant never raised the issue of whether actual versus legal malice was the appropriate standard, that issue was never briefed and the Court therefore, did not squarely address that issue.

Nor did *Dudley v. State*, 634 So.2d 1093 (Fla.2d DCA), address the issue raised by Mr. Tomlinson in this case. Rather, the *Dudley* Court addressed a double jeopardy challenge based on the argument that the elements of a conviction under Fla. Stat. § 836.10, criminalizing making a written threat to kill or do bodily injury are subsumed within the offense of extortion under Fla. Stat. § 836.05. The defendant in *Dudley* never challenged the trial court's jury instruction defining malice, and once again, the issue was never briefed or squarely addressed or decided by the Court.

Although in 2013, the *Calamia* court certified that its decision was in conflict with the decisions of the Fourth District Court of Appeals in *Alonso* and the Second District Court of Appeals in *Dudley*, this Court declined to address the apparent conflict at that

time. Instead, in 2014 the Florida Supreme Court Standard Jury Instruction Committee proposed Florida Standard Jury Instruction 8.23 Extortion, to provide alternative definitions for the term malice. The proposed instruction provides in pertinent part:

> The appellate courts are in conflict as to whether the extortion statute requires actual malice or legal malice. In the absence of clarification from the legislature or the Florida Supreme Court, trial judges must choose one of the following:
>
> *Dudley v. State*, 634 So.2d 1093 (Fla. 2d DCA 1994);
>
> *Alonso v. State*, 447 So.2d 1029 (Fla. 4th DCA 1984).
>
> "Maliciously" means intentionally and without any lawful justification.
>
> *Calamia v. State*, 125 So.3d 1007 (Fla. 5th DCA 2013).
>
> "Maliciously" means with ill will, hatred, spite, or an evil intent.

To the extent the Third District Court of Appeal relied on the perceived correctness of a legal malice instruction because of its inclusion in 8.23, that reliance was inappropriate. As this Court

explained in its July 14, 2014 Opinion authorizing the use of the proposed instruction,

> In authorizing the publication and use… [of Florida Standard Jury Instruction 8.23], we express no opinion on [its] correctness and remind all interested parties that this authorization forecloses neither requesting additional or alternative instructions or contesting the legal correctness of these instructions. We further caution all interested parties that any comments associated with the instructions reflect only the opinion of the Committee and are not necessarily indicative of the views of this Court as to their correctness or applicability.

This Court's caveat strikes a familiar chord. *See e.g.*, *Reed v. State*, 837 So.2d 366, 369 (Fla. 1978) holding that a standard jury instruction on aggravated child abuse promulgated subsequent to *State v. Gaylord* incorrectly used a definition of legal rather than actual malice as commanded by *Gaylord*.

In addition to this Court's holdings in *Gaylord v. State* and *Carricarte v. State* as well as the Fifth District Court of Appeal's

decision in *Calamia v. State* there are other compelling reasons why an actual malice standard should be adopted.

Fla. Stat. 775.021(1) and the application of the Rule of Lenity compel that the term "maliciously" as used in the extortion statute, Fla. Stat. 836.05 be construed as meaning actual malice rather than legal malice. As we have explained, the statute fails to define the term maliciously and there are two competing definitions – actual malice and a lower standard, legal malice.

The Rule of Lenity dictates that "[W]hen criminal statutes are subject to competing, albeit reasonable, interpretations, they must be strictly construed… most favorably to the accused." *Polite v. State*, 973 So.2d 1107, 1111 (Fla.2007) This principle of statutory construction is codified in Fla. Stat. 775.021(1) which provides that, "The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused."

As this Court recognized in *Polite v. State*, the Rule of Lenity is a "fundamental tenet of Florida law regarding the construction of criminal statutes, which weighs in favor of the defendant." Id. at

1112. Then in *Kasischke v. State*, 991 So.2d 803, 814 (Fla. 2008) this Court observed [T]he Rule is not just an interpretive tool, but a statutory directive," and explained,

> The Rule requires that "[a]ny ambiguity or situations in which statutory language is susceptible to different constructions must be resolved in favor of the person charged with an offense." *State v. Byars*, 823 So.2d 740, 742 (Fla. 2002) (*emphasis added*). As we have emphasized before, "[o]ne of the most fundamental principles of Florida law is its penal statutes must be strictly construed according to their letter. Id. (quoting *Perkins v. State*, 576 So.2d 1310, 1312 (Fla. 1991) "Indeed, our system of jurisprudence is founded on a belief that everyone must be given sufficient notice of those matters that may result in deprivation of life, liberty or property." *Perkins*, 576 So.2d at 1312; *see also*, *United States v. Santos*, 553 U.S. 507, 514 (plurality opinion) ("Under a long line of our decisions, the tie must go to the defendant. The Rule of Lenity requires ambiguous criminal statutes to be interpreted in favor of the defendants subjected to them.");

> *State v. Winters*, 346 So.2d 991, 993 (Fla. 1977) ("Penal statutes must be strictly construed in favor of the accused where there is a doubt as to their meaning and must be sufficiently explicit so that men of common intelligence may ascertain whether a contemplated act is within or without the law and so that the ordinary man may determine what conduct is proscribed by the statute.")

Id.

Finally, Florida Standard Jury Instructions 8.23 by providing for the use of a legal malice definition of maliciously, invites trial courts to give an instruction that impermissibly reduces the state's burden of proof. As the *Calamia* court correctly observed that "To convict a defendant, the State must prove all essential elements of guilt beyond a reasonable doubt." 125 So. 3d at 1010-11. And that "It is fundamental error to use the definition of legal malice when that of actual malice is appropriate <u>because it reduces the State's burden on an essential element of the offense charged</u>." (emphasis added). *Id.* at 1011. See also, *Reed v. State* (use of inaccurate definition of legal malice provided in standard instruction impermissibly reduced

state's burden of proof on an essential element of the offense charged).

This Court should now resolve the conflict presented in this case and decide the correct standard to be used in all extortion cases is actual malice. An actual malice standard is consistent with this Court's prior precedent, is mandated by the Rule of Lenity and is necessary to prevent the state from benefitting from a reduced burden of proof of an essential element of the offense of extortion.

CONCLUSION

Based on the foregoing argument and citations of authority it is respectfully requested that the Court vacate Mr. Tomlinson's conviction and remand the case for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that in compliance with Fla.R.App.P. Rule 9.210(a)(2) the foregoing Brief was written using 14 point in Bookman Old Style and contains 6836 words.

By: */s/ John E. Bergendahl*
John E. Bergendahl

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Petitioner's Brief on the Merits was filed via the Florida E-filing portal and a copy mailed to Assistant Attorney General, Michael Mervine at CrimAppMIA@myfloridalegal.com, on this **28th** day of April, 2022.

By: */s/ John E. Bergendahl*
John E. Bergendahl

APPENDIX

Third District Court of Appeal

State of Florida

Opinion filed June 30, 2021.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-1982
Lower Tribunal No. F15-16354

Kevin F. Tomlinson,
Appellant/Cross-Appellee,

vs.

The State of Florida,
Appellee/Cross-Appellant.

An Appeal from the Circuit Court for Miami-Dade County, Milton Hirsch, Judge.

Law Offices of John E. Bergendahl, and John E. Bergendahl, for appellant/cross-appellee.

Ashley Moody, Attorney General, and Brian H. Zack, Assistant Attorney General, for appellee/cross-appellant.

Before FERNANDEZ, LINDSEY and GORDO, JJ.

GORDO, J.

Kevin Tomlinson appeals his conviction and sentence for extortion and the State of Florida cross-appeals the imposition of a downward departure sentence. We affirm the judgment and sentence in all respects and write solely to address Tomlinson's argument that the trial court committed fundamental error in instructing the jury that the elements of extortion required legal malice rather than actual malice.

FACTS AND PROCEDURAL HISTORY

In August 2015, Kevin Tomlinson was arrested and charged with two counts of extorting fellow real estate brokers, Jill Hertzberg and Jill Eber ("the Jills"). The criminal case arose after Tomlinson allegedly discovered that the Jills were manipulating data in a shared listing service and filed a complaint against the Jills with the Miami Association of Realtors ("MAR"). Tomlinson later attempted to extort the Jills by threatening to ruin their careers and to file a class action against their brokerage firm unless they paid him upwards of $500,000.00. Between July 15, 2015, and August 7, 2015, Tomlinson made repeated demands for payment and requested an increased sum of $800,000.00 to make the MAR complaint "go away." Following a controlled call and in-person communications captured via police surveillance, Tomlinson was arrested and charged. At trial, the jury was instructed on the elements of extortion and furnished the definition of legal malice. Tomlinson

was found guilty on both counts of extortion and received a downward departure sentence.

LEGAL ANALYSIS

Tomlinson contends the trial court committed fundamental error by denying the defense request to instruct the jury that actual malice was an element of extortion under section 836.05, Florida Statutes (2020).

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 . . . .

Although malice is an essential element of the crime, the statute does not define the term.

> In law 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.

Seese v. State, 955 So. 2d 1145, 1149 (Fla. 4th DCA 2007). 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 v. State, 447 So. 2d 1029, 1030 (Fla. 4th DCA 1984) (citing Black's Law Dictionary, 4th Ed.); see also Dudley v. State, 634 So. 2d 1093, 1094 (Fla. 2d DCA 1994).

In 2013, however, the Fifth District reluctantly[1] created a conflict with Alonso and Dudley, holding that "[i]t is fundamental error to use the definition of legal malice when that of actual malice is appropriate because it reduces the State's burden on an essential element of the offense charged." Calamia v. State,125 So. 3d 1007, 1011 (Fla. 5th DCA 2013). The court certified a question of great public importance to the Florida Supreme Court, reading: "IS THE STATE REQUIRED TO PROVE ACTUAL MALICE TO SUSTAIN A CONVICTION FOR THE CRIME OF EXTORTION UNDER SECTION 836.05, FLORIDA STATUTES?" Id.

[1] "Although we think that 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. Therefore, we hold actual malice is the correct standard for extortion and certify conflict with Alonso and Dudley." Calamia v. State, 125 So. 3d 1007, 1010 (Fla. 5th DCA 2013).

The Florida Supreme Court declined to exercise its discretionary jurisdiction to review the case either as an express and direct conflict of decisions or as a certified question of great public importance. As such, the conflict remains unresolved. In 2014, the Florida Supreme Court Standard Jury Instruction Committee amended Florida Standard Jury Instruction 8.23 for "Extortion" to provide alternative definitions for the term, recognizing:

> The appellate courts are in conflict as to whether the extortion statute requires actual malice or legal malice. In the absence of clarification from the legislature or the Florida Supreme Court, trial judges must choose one of the following:
>
> Dudley v. State, 634 So. 2d 1093 (Fla. 2d DCA 1994); Alonso v. State, 447 So. 2d 1029 (Fla. 4th DCA 1984).
>
> "Maliciously" means intentionally and without any lawful justification.
>
> Calamia v. State,125 So. 3d 1007 (Fla. 5th DCA 2013).
>
> "Maliciously" means with ill will, hatred, spite, or an evil intent.

We conclude that the trial court did not commit fundamental error by instructing the jury on legal malice and, in fact, find that legal malice is the more appropriate standard to be applied in extortion cases. As explained by the Florida Supreme Court: "The extortion statute prohibits . . . utterances or communications which constitute malicious threats to do injury to another's

person, reputation, or property. Furthermore, the threats must be made with the intent to extort money or the intent to compel another to act or refrain from acting against his will." Carricarte v. State, 384 So. 2d 1261, 1263 (Fla. 1980) (citations omitted). 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, 447 So. 2d at 1030. 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, 955 So. 2d at 1149.

In so finding, we reject the rationale employed by our sister court in Calamia. We observe that the court in Calamia itself reasoned that legal malice is the more appropriate standard, and that post-Calamia, district courts have continued to rely on Alonso and Dudley. See Dudziak v. State, 149 So. 3d 61 (Fla. 4th DCA 2014); O'Flaherty-Lewis v. State, 230 So. 3d 15 (Fla. 4th DCA 2017). Moreover, we are persuaded by the reasoning in

Seese,[2] concluding that "the plain meaning of the statutory term maliciously is legal malice: i.e. 'wrongfully, intentionally, without legal justification'" in the aggravated stalking context, where there is no statutory definition for the term. "Malicious behavior goes beyond intent to cause injury to include behavior that is 'without just cause or excuse.'" Johnstone v. State, 298 So. 3d 660, 664 (Fla. 4th DCA 2020) (quoting Khan v. Deutschman, 282 So. 3d 965, 968 (Fla. 1st DCA 2019)).

We conclude that the conduct the extortion statute intends to criminalize, pertinent in the instant case, is threatening an injury to the reputation of another with the intent to extort money or compel another to pay a sum of money against her will intentionally and without a lawful justification.

Affirmed.

[2] This Court has cited Seese with approval in Johnson v. State, 273 So. 3d 62 (Fla. 3d DCA 2018), and Fernandez v. State, 263 So. 3d 224 (Fla. 3d DCA 2019), both of which are stalking cases.