

**IN THE SUPREME COURT OF FLORIDA**

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**CASE NO.: SC21-1204**

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

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KEVIN F. TOMLINSON,

*Petitioner,*

vs.

STATE OF FLORIDA,

*Respondent.*

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**REPLY BRIEF OF PETITIONER**

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Respectfully submitted,

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## **REPLY ARGUMENT**

The State, as it must, concedes that Fla. Stat. § 836.05 does not define the term maliciously; and that the statute makes no specific reference to legal malice. [S.Br. 17]. Despite this inherent ambiguity, and contrary to the teachings of this Court, the State proposes that employing a common-sense statutory construction analysis of the statute coupled with the selective adoption of one of several definitions of malice found in Black's Law Dictionary is enough for this Court to conclude that legal malice as opposed to actual malice is the appropriate standard. [S.Br. 17-19]. The State then urges that inapposite interpretations construing the term "maliciously" as meaning legal malice in the context of other Florida statutes,<sup>1</sup> the

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<sup>1</sup> Each of these statutes is readily distinguishable. For example, Fla. Stat. §784.048(7) the aggravated stalking statute, criminalizes certain malicious actions where there is an existing court order specifically prohibiting the defendant to have contact with a victim. Moreover, the activity proscribed by the statute consists almost exclusively of conduct, not speech and does not raise First Amendment concerns. *Burroughs v. Corey*, 92 F.Supp.3d 1201 (M.D. Fla. 2015), affirmed, 647 Fed.Appx. 967 (11th Cir. 2016). The same is of course true of the criminal mischief statutes, Fla. Stat. §§ 806.10(1), 806.13(1)-(2), and the shooting or throwing missiles statute, Fla. Stat. § 790.19, neither of which implicate or seek to punish speech. *Alamo Rent-A-Car, Inc.*

common law history of the crime of extortion<sup>2</sup> and various policy reasons support its position that legal malice as opposed to actual malice is the correct standard. [S.Br.19-25]. What the State conveniently ignores is the unacceptable risk that a too broad construction of the extortion statute potentially criminalizes speech otherwise falling under the protection of the First Amendment to the United States Constitution and Article 1, s.9 of the Florida

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*v. Mancusi*, 632 So. 2d 1352,1357 (Fla. 1994) is a civil case and the Court’s approval of the legal malice standard in a malicious prosecution action also includes language authorizing the finder of fact to draw an inference or presumption of malice in certain situations including where gross negligence or indifference is shown. Permitting the finder of fact to draw such a presumption or inference in a criminal case would violate due process. *Sandstrom v. Montana*, 99 S.Ct. 2450 (1979). However, in contrast, the most recent decision construing the term malice as used in a Florida Statute, *Coleman v. Hillsborough County*, 41 F.4th 1319, 1325 (2022) (decided after the State’s brief was filed) concluded that the terms “bad faith” and “malicious” in the Florida Sovereign Immunity Statute, 768.28(9)(a) are synonymous with each other under Florida law and equate to actual malice.(emphasis added).

<sup>2</sup> Although interesting, the State’s discussion of how the common law crime of extortion “concerned public officials who used their office to corruptly obtain money not owed to them” [S.Br.23], is simply inapplicable.

Constitution. This Court however has always been cognizant of that risk.

*Carricarte v. State*, 384 So.2d 1261 (Fla. 1980) presented this Court with a direct First Amendment vagueness and overbreadth challenge to the Florida extortion statute, Fla. Stat. § 836.05, including a challenge that the term malicious as used in the statute was unconstitutionally vague. To rescue the statute from the vagueness challenge this Court directly cited to *State v. Gaylord*, 356 So.2d 313 (Fla.1978). In *Gaylord*, this Court addressed the argument that the term “maliciously” as used in Fla. Stat. § 827.03(3) was unconstitutionally vague. In rejecting that constitutional challenge, this Court held “We find that the term maliciously does provide a definite standard of conduct understandable by a person of ordinary intelligence. Malice means ill will, hatred, spite, an evil intent.” *Id.* (emphasis added).

By relying on *Gaylord*, this Court in *Carricarte* acknowledged that to avoid a vagueness challenge, the term “maliciously” as used in Fla. Stat. § 836.05 must be narrowly and require construed showing of actual malice rather than merely legal malice. Had the *Carricarte* Court believed that construing the term maliciously to

mean legal malice was sufficient to defeat the vagueness challenge it certainly could have said so. It did not.

The State posits that the legislature’s 2003 amendment of the child abuse statute § 827.03 to define the term maliciously as used in that statute to mean actual malice undercuts the precedential value of *Gaylord*. [S.Br.27]. This argument was considered and rejected in *Calamia v. State*, 125 So.3d 1007, 1010 (Fla. 5th DCA 2013) (“We think that the definition of actual malice, as used in *Gaylord*, is the instruction that should have been used in this case. We do note that the Legislature amended the child abuse statute § 827.03 to change the definition of “maliciously” from actual malice to legal malice. Ch.2003–13, § 1, at 790-91 Laws of Fla. 2003. However, the supreme court has not revisited the definition as set forth in the extortion statute.”). *Id.* at 1010.<sup>3</sup>

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<sup>3</sup> Petitioner recognizes that the *Calamia* court expressed its view that legal malice may be the more appropriate definition. However, it still clearly recognized “we are compelled to follow the Supreme Court’s directive in *Carricarte*. Therefore, we hold that actual malice is the correct standard for extortion...” *Calamia v. State* at 1010.

The State next argues that this Court has recognized that “the rule of lenity is a canon of last resort” and should thus reject Petitioner’s invocation of the rule, citing *United States v. Shabani*, 513 U.S. 10 (1994). [S.Br.31]. The State is wrong. *Shabani* is a federal case interpreting federal law. It was not a decision of this Court as the State contends. Unlike federal law, Florida law includes an express statutory command directing the courts of this state to apply the rule of lenity where, as with Fla. Stat. § 836.05 the statutory language is susceptible of differing constructions. See, Fla. Stat. § 775.021(1), “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. (emphasis added); and *Kasischke v. State*, 991 So.2d 803, 814 (Fla. 2008) (“[T]he Rule is not just an interpretive tool, but a statutory directive.”).

The State has not presented a valid argument demonstrating why actual malice is not the correct standard to be used in jury instructions in all extortion cases. An actual malice standard is consistent with this Court’s prior precedent, avoids any First Amendment concerns, is mandated by the rule of lenity and is

necessary to prevent the state from benefiting from a reduced burden of proof of an essential element of the offense of extortion.

**CONCLUSION**

Based on the arguments and citations of authority presented in Petitioner's Brief on the Merits and this Reply, it is respectfully requested that the Court vacate his convictions and remand the case for a new trial.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the Petitioner’s Reply Brief has been electronically filed with the Clerk of Court via the Florida E-filing portal and furnished to Assistant Attorney General at Kseniya.Smychkouskaya@myfloridalegal.com and CrimAppMIA@myfloridalegal.com on this 22nd day of August, 2022.

/s/ John E. Bergendahl  
John E. Bergendahl

**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 1136 words.

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