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### INTRODUCTORY REMARKS

For this installment of the Recent Developments, we consider six recent Florida Supreme Court decisions. First, we consider *Maddox v. State*,<sup>1</sup> where the court interpreted the phrase “any trial” in section 316.650(9), *Florida Statutes* (2001), as excluding citations for forgery only from matters related to motor vehicles and not literally from “any trial,” despite the statute’s plain language.<sup>2</sup> Next, we consider *Bush v. Holmes*,<sup>3</sup> where the court held the state law authorizing a system of vouchers known as the Opportunity Scholarship Program

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1. 31 Fla. L. Weekly S24 (Fla. Jan. 12, 2006).  
 2. Judith Brodtkin contributed this Note.  
 3. 919 So. 2d 392 (Fla. 2006).

(OSP) violated the Florida Constitution.<sup>4</sup> *Riggs v. State (Riggs II)*<sup>5</sup> is the court's most recent treatment of the exigent circumstances exception.<sup>6</sup> Then, we examine *Florida Department of Revenue v. City of Gainesville*,<sup>7</sup> where the court upheld the facial constitutionality of statutes imposing ad valorem taxes on telecommunication services owned by a municipality.<sup>8</sup> *Costarell v. Florida Unemployment Appeals Commission*<sup>9</sup> examines the court's holding that state agencies are bound by controlling judicial statutory interpretations.<sup>10</sup> Our final Note takes up *Wilson v. Salamon*,<sup>11</sup> where the court created a bright-line rule that court orders entered to resolve good faith motions should automatically be treated as activity, thus precluding dismissal for lack of record activity.<sup>12</sup>

STATUTORY INTERPRETATION—FLORIDA SUPREME COURT INTERPRETS SECTION 316.650(9), *FLORIDA STATUTES*, TO MEAN THAT CITATIONS FOR FORGERY ARE ONLY EXCLUDED FROM MATTERS RELATED TO MOTOR VEHICLES AND NOT LITERALLY “ANY TRIAL”—*Maddox v. Florida*, 31 Fla. L. Weekly S24 (Fla. Jan. 12, 2006).

Statutory interpretation is an important tool that judges use in deciding cases, but unless the statute is facially ambiguous, the courts must yield to the plain meaning put forth by the legislature.<sup>13</sup> When courts start using context, legislative history, and legislative purpose, they head down a slippery slope, which can lead to courts substituting their own judgments for that of the legislature. Statu-

4. Katy Donlan contributed this Note.

5. 918 So. 2d 274 (Fla. 2005).

6. Rachael Kaiman contributed this Note and would like to thank Florida State University College of Law Professor B.J. Priester for his invaluable insights.

7. 918 So. 2d 150 (Fla. 2005).

8. Rachael Kaiman contributed this Note and would like to thank Donna Blanton, Esq. with Radey Thomas Yon & Clark, P.A. for her invaluable insights.

9. 916 So. 2d 778 (Fla. 2005).

10. Katy Donlan contributed this Note and would like to thank Florida State University College of Law Legal Writing Instructor Susan Bodell for her invaluable insights.

11. 923 So. 2d 363 (Fla. 2005).

12. Judith Brodtkin contributed this Note.

13. See, e.g., *Maddox v. State*, 31 Fla. L. Weekly S24, S26 (Fla. Jan. 12, 2006) (Cantero, J., dissenting) (quoting *A.R. Douglass, Inc. v. McRainey*, 137 So. 157, 159 (Fla. 1931) (“When the language of the 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.”)); *McLaughlin v. State*, 721 So. 2d 1170, 1172 (Fla. 1998) (“When the language of the 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.”); *State v. Egan*, 287 So. 2d 1, 4 (Fla. 1973) (“Where the legislative intent as evidenced by a statute is plain and unambiguous, then there is no necessity for any construction or interpretation of the statute and the courts need only give effect to the plain meaning of its terms.”).

tory interpretation should be used only when the plain meaning of the statute would lead to an unreasonable conclusion.<sup>14</sup>

The majority opinion in *Maddox v. State*<sup>15</sup> has blurred the separation of powers within Florida by substituting the court's own interpretation of the statute in place of the legislature's plain meaning. The issue in *Maddox* was whether the phrase "any trial" in section 319.650(9), *Florida Statutes*,<sup>16</sup> was clear and required no interpretation or whether it was ambiguous and required interpretation.<sup>17</sup> The majority chose the latter position, disapproving of the decision in *Dixon v. State*<sup>18</sup> and upholding the result reached by the lower court in *Maddox v. State*.<sup>19</sup> The court reasoned:

When section 316.650 is read in the context in which it is found and in conjunction with related statutory provisions, the reasonable construction of this statutory provision is that the Legislature intended only to exclude traffic citations in a more limited fashion in matters with issues related to the operation, maintenance or use of the motor vehicle. To hold otherwise would expand the scope of this statute unreasonably and lead to absurd results.<sup>20</sup>

This Note explores the reasoning of the majority and dissent. It puts forth the argument that the majority should not have swayed from the plain meaning of the statute because, although the result of applying the plain meaning may not have been ideal, it was not unreasonable. Whether to allow an exception for citations to be introduced into evidence pursuant section 316.650(9), *Florida Statutes*, was a decision for the legislature, not the court.

This case involved a routine traffic stop by a Polk County deputy sheriff.<sup>21</sup> The driver, Robert Maddox, gave the officer a false name ("Nathaniel Lewis Maddox"), and the officer issued an improper lane change citation and a citation for failure to produce proof of insurance to Nathaniel Maddox.<sup>22</sup> During the traffic stop, a second deputy searched the car and found an identification card that identified Maddox as Robert Edwin Maddox.<sup>23</sup> It was discovered that Robert Maddox's driver's license was suspended, so the first deputy kept the first two citations he had issued to Nathaniel Maddox and issued a

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14. *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984).

15. *Maddox*, 31 Fla. L. Weekly at S24 (majority opinion).

16. FLA. STAT. § 316.650(9) (2001) ("Such citations shall not be admissible evidence in any trial.")

17. *Maddox*, 31 Fla. L. Weekly at S24.

18. 812 So. 2d 595 (Fla. 1st DCA 2002).

19. 862 So. 2d 783 (Fla. 2d DCA 2003); *Maddox*, 31 Fla. L. Weekly at S24.

20. *Maddox*, 31 Fla. L. Weekly at S25-26.

21. *Id.* at S24.

22. *Id.*

23. *Id.*

new citation to Robert Maddox for driving with a suspended license.<sup>24</sup> While Maddox was in custody, he admitted that Nathaniel was his brother, and he was charged with two counts of forgery for signing the citations issued to Nathaniel and with two counts of uttering a forged instrument.<sup>25</sup>

The forged traffic citations were allowed into evidence during the trial, and Maddox was convicted. This created a conflict with the First District Court of Appeal's ("First District") decision in *Dixon* where the court held that the language of section 319.650(9), *Florida Statutes*, (2001) was unambiguous and not subject to judicial interpretation.<sup>26</sup> The Second District Court of Appeal ("Second District") addressed the argument that the forged traffic tickets were inadmissible pursuant to section 319.650(9), by concluding that the tickets "were not citations as contemplated by the statute, but rather were documentary evidence of Maddox's criminal conduct."<sup>27</sup>

The Florida Supreme Court upheld Maddox's conviction by resorting to statutory interpretation. The majority explored chapter 316, *Florida Statutes*, entitled "Florida Uniform Traffic Control Law," in which the statute at issue was found.<sup>28</sup> It looked at the purpose of the Act and the description of the bill from when it was enacted in 1971, and it determined that "a strict literal reading of the phrase 'any trial,' as suggested by Maddox and endorsed by the First District in *Dixon*, would inappropriately extend the effects of this statutory provision far beyond the scope of that which was intended by the Legislature."<sup>29</sup> The majority also agreed with the Second District's reasoning.<sup>30</sup>

Another statutory interpretation tool the majority used was to examine in context how the term "any trial" fit within the larger statute and if its meaning was consistent with the entire chapter. The example used by the court was another statute from chapter 316 which states that "neither a crash report nor a statement made in

24. *Id.*

25. *Id.* at S24.

26. *See generally* *Dixon v. State*, 812 So. 2d 595 (Fla. 1st DCA 2002). After being stopped by an officer for several traffic violations, Dixon gave a false name to the officer. The name was placed on the traffic ticket, which Dixon signed using the false name. He was charged with forgery under section 831.01, *Florida Statutes*, (2000) and driving without a valid driver's license. The First District determined that the language of section 319.650(9) was unambiguous and not subject to judicial interpretation. The court held that the language in section 319.650(9) required exclusion of forged citations in the State's prosecution of forgery. *Dixon*, 812 So. 2d 595.

27. The Second District determined that the trial court did not err in allowing the traffic citations into evidence because the purpose of the statute was to protect the person to whom the citation was issued, and the charges of the first two tickets were not pending against anyone because they were withdrawn after it was discovered that Robert was not Nathaniel. *Maddox*, 31 Fla. L. Weekly at S24.

28. *Id.* at S25.

29. *Id.*

30. *See supra* note 18 and accompanying text.

connection with such a report ‘shall be used as evidence in any trial, *civil or criminal.*’<sup>31</sup> The majority construed this as meaning that the phrase “any trial” in section 316.650(9) “was intended to refer to the use of traffic citations in proceedings in which the manner or method of the operation, maintenance or use of a vehicle is the issue in controversy” because it was not followed by “civil or criminal.”<sup>32</sup>

The majority’s final point was that interpreting “any trial” to mean all proceedings in a court of law would lead to “unreasonable or ridiculous” results.<sup>33</sup> Interpreting the statute this way, the majority suggested, would do away with all prosecutions for forgery of traffic citations because in order to convict a person of forgery, the State must show that the alleged forged document is, in fact, a “public document” within section 831.01, *Florida Statutes*,<sup>34</sup> and it would be unable to do that if it could not introduce the actual document.<sup>35</sup> The majority attempted to quell the dissent’s argument that the citation may contain “unflattering, legally irrelevant information” and prejudice the defendant by suggesting that the unflattering information may be redacted if it does not relate to the forgery charge.<sup>36</sup>

Justice Cantero dissented in an opinion in which Chief Justice Pariente and Justice Quince concurred. The dissent agreed with the First District’s holding in *Dixon* and the argument by Maddox that the statute was unambiguous; therefore, it argued that the plain meaning of the statute should have applied to this case.<sup>37</sup> Justice Cantero stated that the statute was simple and clear because the phrase “[a]ny trial” means literally any trial.<sup>38</sup> The dissent concluded that the legislature could have a rational basis for excluding traffic citations from all trials and the decision to allow the use of citations should be left to the legislature.<sup>39</sup> The dissent cited *Dixon* and two other cases where courts held that traffic citations were not admissible in any trial.<sup>40</sup>

The dissent disagreed with the majority’s analysis that since the crash report provision includes the words “civil or criminal” after “any

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31. *Maddox*, 31 Fla. L. Weekly at S25 (citing FLA. STAT. § 316.066(4) (2001)).

32. *Id.*

33. *Id.*

34. FLA. STAT. § 831.01 (2005).

35. *Maddox*, 31 Fla. L. Weekly at S25.

36. *Id.*

37. *Id.* at S26 (Cantero, J., dissenting). The dissent analyzed the plain meaning of the statute as being the most reliable expression of legislative intent and stated if the statute is unambiguous, the court is not authorized to interpret it another way; therefore, the plain meaning must be honored. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* (citing *Dixon v. State*, 812 So. 2d 595 (Fla. 1st DCA 2002)); see *State v. Veilleux*, 859 So. 2d 1224 (Fla. 2d DCA 2003), *review denied*, 880 So. 2d 1212 (Fla. 2004); *State v. Martinez*, 870 So. 2d 18 (Fla. 2d DCA 2003).

trial,” that it is more expansive than “any trial” without the modifiers in section 316.650(9).<sup>41</sup> The dissent argued that “any trial” by itself is “as expansive as possible” and adding a modifier like “civil or criminal” would only emphasize or even restrict the provision’s scope.<sup>42</sup>

The dissent argued that the court should only substitute its own judgment when absolutely necessary and, in this case, the plain meaning of the statute would not lead to an absurd result; therefore, the court should not have substituted its judgment for that of the legislature.<sup>43</sup> The dissent stated that “[t]he absurdity doctrine should be reserved for cases where applying the plain meaning would border on irrationality,” because a broader application of the doctrine would “threaten to undermine the separation of powers.”<sup>44</sup> In this case, citations, while probative in forgery trials, “still pose a substantial risk of prejudice to the defendant,” and the legislature could have decided that the burden outweighed the benefit.<sup>45</sup>

The dissent gave three reasons why the legislature could reasonably allow citations to be purely procedural and not allow them in “any trial.”<sup>46</sup> First, it allows the defendant to confront the officer by ensuring the officer shows up in court and gives firsthand testimony, rather than relying on the ticket.<sup>47</sup> Second, citations should be omitted from “any trial” because it “ensure[s] that officers will testify only about the facts they witnessed, rather than their legal relevance.”<sup>48</sup> Third, excluding citations will protect defendants “from the prejudice caused by unflattering, legally irrelevant information recorded on the citation.”<sup>49</sup> What an officer thinks is factually pertinent to the traffic stop can be different from what a court will find legally relevant.<sup>50</sup>

The dissent also argued that the ticket could prejudice the defendant in a forgery trial because the jury could believe that the defendant actually committed the underlying traffic offense, which could influence its decision on the forgery charge.<sup>51</sup> The dissent pointed out that this discussion does not suggest that traffic citations should be excluded, only that it would not be absurd to exclude them.<sup>52</sup> The dissent reiterated, “In the absence of absurdity, we have a responsibility to the Legislature, which carefully selected the words, and to defen-

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41. *Maddox*, 31 Fla. L. Weekly at S26-27.

42. *Id.*

43. *Id.* at S27.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at S27-28.

48. *Id.* at S28.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

dants, whose liberty possibly hinges upon them, to enforce the statute as written.”<sup>53</sup>

The majority’s holding oversteps the judiciary’s boundary by taking on the legislature’s role. Allowing the judiciary to substitute its own judgment of what a statute means any time it thinks an outcome is unjust is a serious breach of separation of powers.<sup>54</sup> This holding gives power to the judiciary that it should not have, as it could open the door for courts to apply their own interpretations to statutes whenever the outcome does not fit with the courts’ ideals.

The term “any,” has been the center of other statutory interpretation controversies. A federal firearms statute that contained the phrase “any court” caused a circuit split over whether that phrase meant domestic and foreign courts, or just domestic courts.<sup>55</sup> In *Small v. United States*,<sup>56</sup> the Supreme Court put the controversy to rest by holding that the phrase referred only to domestic courts, but as the dissent argued, that decision was unfounded and unwise.<sup>57</sup> For many of the same reasons argued by the dissent in *Small*, the outcome in *Maddox* should have been different.<sup>58</sup>

The dissent in *Maddox* has convincingly argued that the statute’s plain meaning is not absurd and that the plain meaning should have been followed.<sup>59</sup> The cases that have followed *Dixon* and interpreted “any court” to literally mean “any court” are strong evidence that the

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53. *Id.* For a discussion on the circuit split, see Tracey A. Basler, *Does “Any” Mean “All” or Does “Any” Mean “Some”? An Analysis of the “Any Court” Ambiguity of the Armed Career Criminal Act and Whether Foreign Convictions Count as Predicate Convictions*, 37 NEW ENG. L. REV. 147 (2003).

54. Lee G. Lester, Note, *Small v. United States: Defining “Any” as a Subset of “Any.”* 40 U. RICH. L. REV. 631, 650 (2006) (“The fact that the court might have drawn the line differently is not a matter for judicial, but for legislative action. In the wake of *Small*, however, future courts may usurp the power of Congress by following the majority rationale and loosely construing or even inventing new canons of statutory interpretation instead of following the law as it has been codified.”).

55. 18 U.S.C. § 922(g) (“It shall be unlawful for any person . . . who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition . . .”).

56. 125 S. Ct. at 1752 (2005).

57. *Id.*; see also Lester, *supra* note 54, at 631 (siding with the dissent in *Small*).

58. See *Small*, 125 S. Ct. at 1764 (Thomas, J., dissenting) (citing Pub. Citizen v. DOJ, 491 U.S. 440, 470-71 (1989) (Kennedy, J., concurring in judgment) (“[Unpopular results] certainly present no occasion to employ, nor does the Court invoke, the canon against absurdities. We should employ that canon only ‘where the result of applying the plain language would be, in a genuine sense, absurd, *i.e.*, where it is quite impossible that Congress could have intended the result . . . and where the alleged absurdity is so clear as to be obvious to most anyone.’”).

59. For a discussion of the prejudicial value of traffic citations, see Sheryl L. Musgrove & David W. Gross, *Use of a Traffic Citation in a Subsequent Related Civil Proceeding*, 33 IDAHO L. REV. 135 (1996).

statute's plain meaning should have been adhered to in *Maddox*.<sup>60</sup> In addition, the legislature recently amended this statute narrowly to allow the admission of traffic citations to prove forgery and a few other specific instances.<sup>61</sup> If "any trial" really only referred to "proceedings in which the manner or method of the operation, maintenance or use of a vehicle is the issue in controversy,"<sup>62</sup> the legislature could have amended the statute that way, but it did not. Statutes can always be interpreted in some way to seem ambiguous. If courts are allowed to find the slightest ambiguity and tweak the law to favor their outcome, the legislature will become much weaker. Statutes may not always appear to be logical, and some may even seem unwise, but as long as the plain meaning is unambiguous and any rational explanation can be determined, the court should adhere to that plain meaning.

CONSTITUTIONAL LAW—FLORIDA SUPREME COURT HOLDS USE OF PUBLIC MONIES TO FUND PRIVATE ALTERNATIVE TO PUBLIC SCHOOLS VIOLATES THE FLORIDA CONSTITUTION—*Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006).

The Florida Constitution requires that the State provide for "the education of all children residing within its borders . . . a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education."<sup>63</sup> In the most recent case concerning the continuing controversy over school vouchers, the Florida Supreme Court held the state law, authorizing a system of vouchers known as the Opportunity Scholarship Program (OSP), violated this constitutional mandate.<sup>64</sup> In its landmark decision, *Bush v. Holmes*, the Florida Supreme Court became the first court nationwide to hold that the state has "a duty to educate students in public schools."<sup>65</sup>

The OSP was one of several educational reforms at the center of Governor Jeb Bush's A+ Plan for Education, designed to implement standards for student achievement, assess and publish educational performance, and provide a system of accountability for schools based

60. See cases cited *supra* note 40; see also *Sacred Heart Hosp. of Pensacola v. Stone*, 650 So. 2d 676, 681 (Fla. 1st DCA 1995) (holding evaluation based on traffic citation should have been excluded under section 316.650(9), *Florida Statutes*).

61. FLA. STAT. § 316.650(9) (2005) ("Such citations shall not be admissible evidence in any trial, except when used as evidence of falsification, forgery, uttering, fraud, or perjury, or when used as physical evidence resulting from a forensic examination of the citation.")

62. *Maddox v. State*, 31 Fla. L. Weekly S24, S25 (Fla. Jan. 12, 2006).

63. FLA. CONST. art. IX, § 1(a).

64. *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006); see also FLA. STAT. § 1002.38 (2005).

65. Greg Toppo, *Florida Supreme Court Strikes Down School Vouchers*, USA TODAY, Jan. 5, 2006, available at [http://www.usatoday.com/news/nation/2006-01-05-florida-school-vouchers\\_x.htm?POE=NEWISVA](http://www.usatoday.com/news/nation/2006-01-05-florida-school-vouchers_x.htm?POE=NEWISVA).

upon performance results.<sup>66</sup> A cornerstone of this educational initiative is the Florida Comprehensive Assessment Test (FCAT), taken annually by public school students in grades three through eleven.<sup>67</sup> Based upon both student FCAT “performance and progress,” individual schools are graded A, B, C, D or F, with schools receiving an F designated as failing.<sup>68</sup> The OSP provided two alternatives for students who were in public schools found by the State to be failing for two out of four consecutive years. The student could either attend a nonfailing public school, or the student’s share of public education funds could be applied towards tuition for an eligible private school.<sup>69</sup> Requirements for private school eligibility included, among other things, antidiscrimination provisions, compliance with local health and safety codes, curriculum deemed appropriate by a private school accrediting body, and acceptance of a student’s pro rata share of public education funds as full tuition and fees.<sup>70</sup> As the majority in *Bush v. Holmes* pointed out, “the private school’s curriculum and teachers are not subject to the same standards” as public schools.<sup>71</sup>

In *Bush v. Holmes*, parents of children in Florida public schools as well as numerous organizations, including teacher’s unions and the American Civil Liberties Union (ACLU), brought suit in circuit court alleging that the OSP was unconstitutional under article I, section 3 and article IX, sections 1 and 6 of the Florida Constitution, as well as attacking its federal constitutionality under the Establishment Clause of the U.S. Constitution.<sup>72</sup> Before the suit reached the Florida Supreme Court, the U.S. Supreme Court held that a voucher program similar to Florida’s OSP, the Ohio Pilot Project Scholarship Program, did not violate the constitutional requirements of the Establishment Clause.<sup>73</sup> This decision led to a voluntary dismissal of plaintiff’s claims of unconstitutionality under the Establishment Clause.<sup>74</sup> In its decision, the Florida Supreme Court was faced only with the determination of whether the portion of the OSP enabling students of underperforming public schools to use public funding for a private education violated the Florida Constitution.<sup>75</sup>

The majority found the OSP violated the Florida Constitution and based its opinion upon three findings. First, free public schools are

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66. See A+ Plan for Education, [http://eogtmp.sto.fl.gov/html/a\\_\\_plan\\_for\\_education.html](http://eogtmp.sto.fl.gov/html/a__plan_for_education.html) (last visited Mar. 16, 2006).

67. *Id.*

68. *Id.*

69. FLA. STAT. § 1002.38(2)(a), (3) (2005).

70. *Id.* § 1002.38(4).

71. *Bush v. Holmes*, 919 So. 2d 392, 409 (Fla. 2006).

72. *Id.* at 397-99.

73. See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

74. *Bush*, 919 So. 2d at 399.

75. *Id.*

the sole means prescribed by the constitution “for the state to provide for the education of Florida’s children.”<sup>76</sup> Second, the OSP voucher system diverts funding from public schools into private schools to the detriment of the constitutionally required, high quality, free public schools.<sup>77</sup> Finally, because private schools are not subject to the same standards and regulations as public schools, the constitutional requirement of uniformity is not met.<sup>78</sup>

In its precedent holding that public schools are the exclusive means constitutionally authorized for supplying the educational needs of Florida’s children, the court relied almost entirely upon the principles of statutory construction, specifically *in pari materia*, which requires statutes be construed together in order to resolve inconsistencies,<sup>79</sup> and *expressio unius est exclusion alterius*, or “the expression of one thing implies the exclusion of another.”<sup>80</sup> Historically, the court has used *expressio unis* to prevent the legislature from enacting a statute that would defeat the purpose of a constitutional provision prescribing a specific manner of performance.<sup>81</sup> In *Holmes*, the court conceded that application of this principle is limited to situations in which a statute conflicts with the “primary purpose of the relevant constitutional provision,”<sup>82</sup> and it stated (rather than demonstrated) that the OSP at issue presents just such an applicable occasion. Through utilization of both *in pari materia* and *expressio unis*, the court found article IX, section 1(a) serves as both a mandate (it is the “paramount duty of the state to make adequate provision for the education of all children residing within its borders”)<sup>83</sup> and a “restriction on the execution of this mandate”<sup>84</sup> (“made by law for a uniform, efficient, safe, secure and high quality system of free public schools”<sup>85</sup>).

Although the majority opinion represents the current state of the law in this area, its persuasive force was weakened by an impressively reasoned dissent supported by drafter intent. The dissent begins by criticizing the majority’s alleged failure to follow the most fundamental principal of statutory construction, that legislation be presumed constitutional and every effort made to resolve any doubt in favor of constitutionality.<sup>86</sup> It goes on to present the text of article

76. *Id.* at 398.

77. *Id.* at 409.

78. *Id.* at 409-10.

79. BLACK’S LAW DICTIONARY 807 (8th ed. 2004).

80. *Bush*, 919 So. 2d at 407.

81. *See* *Weinberger v. Bd. of Pub. Instruction of St. Johns County*, 112 So. 253, 256 (Fla. 1927).

82. *See* *Bush*, 919 So. 2d at 408.

83. FLA. CONST. art. IX, § 1(a).

84. *Bush*, 919 So. 2d at 406.

85. FLA. CONST. art. IX, § 1(a).

86. *Bush*, 919 So. 2d at 413 (Bell, J., dissenting).

IX, section 1 as plain and unambiguous with no textual exclusivity requirement either expressed or implied<sup>87</sup> and lacking any evidence that voters or drafters intended to preclude the legislature from providing public funds for private alternatives to failing schools.<sup>88</sup> The dissent supported its claims of intended consequence with the comments from one member of the Constitution Revision Commission, who stated the Commission's goal was to "raise the constitutional standard for education," and "does not address" "the education of our children in the state mov[ing] in various directions, whether it be charter schools, private schools, [or] public schools."<sup>89</sup> Likewise, the dissent pointed to comments of other commissioners "that the amendments to article IX should not limit the legislature's authority to determine the best method for providing education in Florida."<sup>90</sup> The dissent provided a compelling case that article IX neither expressly or impliedly limits the legislature's ability to educate children exclusively to public schools, nor was it intended to do so.

In further scrutiny, the reasoning of the majority and its application of *expressio unis* lacks logical flow. As previously mentioned, the court distinguished its failure to follow this tenant of statutory construction in another case based upon its determination that the statute then at issue was not in conflict with the "primary purpose of the relevant constitutional provision."<sup>91</sup> In *Holmes*, however, the court offered a thorough discussion of the language and history of the educational articles of Florida's Constitution ultimately stating that they impose "a maximum duty on the State to provide for education."<sup>92</sup> If one concludes this to be the "primary purpose of the relevant constitutional provision,"<sup>93</sup> it is unclear then why the court chose to apply *expressio unis* without first demonstrating the conflict between the OSP and the State's duty to provide for education.

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87. *Id.* at 416 ("This mandate is to make adequate provision for a public school system. The text does not provide that the government's provision for education shall be 'by or 'through' a system of free public schools.").

88. *Id.* at 416-17.

89. *Id.* at 419.

90. *Id.* at 420; see also Florida Constitution Revision Commission, Meeting Proceedings for January 15th, 1998, at 296-97, <http://www.law.fsu.edu/crc/minutes.html> [hereinafter CRC Jan. 15] (statement of Commissioner Thompson expressing a desire to ensure the legislature retains the freedom to determine how best to provide education); Florida Constitution Revision Commission, Meeting Proceedings for February 26, 1998, at 54-55, <http://www.law.fsu.edu/crc/minutes.html> (statement of Commissioner Evans conveying fear that the heightened importance of education in article IX would transfer power from the voters to the courts); CRC Jan. 15, *supra*, at 262-69 (statement of Commissioner Langley expressing concern that the heightened importance of education in article IX would transform the Florida Supreme Court into the State Board of Education).

91. *Bush*, 919 So. 2d at 408 (majority opinion).

92. *Id.* at 404.

93. *Id.* at 408.

Regardless of how persuasive one finds the court's use of statutory construction to invalidate OSP, the court's second finding appears significantly less persuasive. The majority reasoned that in diverting public funds from public to private schools, "the OSP by its very nature undermines the system of 'high quality' free public schools,"<sup>94</sup> and holds that "[t]he Constitution prohibits the state from using public monies to fund a private alternative to the public school system."<sup>95</sup> However, as the dissent points out, there was no evidence brought in the facial challenge to the OSP that this program was resulting in a less than high quality system of free public schools.<sup>96</sup> Additionally, the dissent noted that while article IX, section 6 has been in Florida's Constitution for over 150 years, it has never been held to proscribe the State from providing public funds to institutions of private education and provided a lengthy list of such occasions.<sup>97</sup>

Finally, the majority based its opinion upon the finding that since private schools are not subject to the same standards, regulation, and control as public schools, they violate the criterion put forth in article IX, section 1(a) that Florida's system of free public schools be uniform.<sup>98</sup> However, this seems to be the majority's least relevant finding as the alternative of public funding for a private education seemingly would not affect the uniformity of the system of free *public* schools required. As the statute appears only to speak to the requirements of this free system of *public* schools, it seems quite a stretch to find the lack of identical qualifications for private schools not in compliance with the uniformity requirement of public schools.

The majority in *Bush v. Holmes* attempted to limit the scope and implications of its decision specifically delineating "Other Programs Unaffected."<sup>99</sup> Here, the court distinguished the OSP from another educational program which provides public funding to private schools for exceptional students where there is a lack of special services in the student's school district.<sup>100</sup> The court stated that such a program for exceptional students is "structurally different from the OSP, which provides a systematic private school alternative."<sup>101</sup> The court did not, however, address other scholarship programs such as the John M. McKay Scholarships for Students with Disabilities Program, the largest and fastest-growing scholarship program in Florida,<sup>102</sup> which allows parents to

94. *Id.* at 409.

95. *Id.* at 408.

96. *Id.* at 415 (Bell, J., dissenting).

97. *Id.* at 421-23.

98. *Id.* at 410 (majority opinion).

99. *Id.* at 411.

100. *Id.*

101. *Id.* at 412.

102. FLORIDA DEPARTMENT OF EDUCATION, OFFICE OF INDEPENDENT EDUCATION & PARENTAL CHOICE, JOHN M. MCKAY SCHOLARSHIPS FOR STUDENTS WITH DISABILITIES

chose whether to send their child to a public or private school on public funding without the requirement that the public school be unable to accommodate the special needs of the student, or Florida's Corporate Tax Credit Scholarship program, which allows tax credits for corporations providing underprivileged students scholarships to attend private schools.<sup>103</sup> While Department of Education statistics show the OSP provided scholarships to only 733 children in the 2005-2006 school year,<sup>104</sup> over 16,144 students took advantage of McKay Scholarships,<sup>105</sup> and 13,497 participated in the Corporate Tax Credit Scholarship program during this same school year.<sup>106</sup> Although the *Bush v. Holmes* opinion seems ominous for these other programs, the educational fate of nearly 30,000 students, for now, remains unknown.

Ultimately, the dissent in *Bush v. Holmes* comes across as the more intellectually honest discussion of the challenged litigation, relevant constitutional provisions, and powers delegated to both the legislature and judiciary. Though this perspective did not prevail, it is unlikely this case will serve as the final word in Florida's ongoing debate over the validity of vouchers. While Governor Bush intends to "look for ways to continue the voucher programs, including private funding, changing state law and amending the Florida Constitution,"<sup>107</sup> this decision will likely serve as difficult precedent for proponents of Florida's two largest scholarship programs to overcome.

CRIMINAL LAW—SCOPE OF THE EXIGENT CIRCUMSTANCES EXCEPTION—FLORIDA SUPREME COURT HOLDS THAT UNDER THE SPECIFIC CIRCUMSTANCES PRESENTED, A WARRANTLESS ENTRY WAS JUSTIFIED BASED UPON A REASONABLE BELIEF OF MEDICAL EMERGENCY—*Riggs v. State (Riggs II)*, 918 So. 2d 274 (Fla. 2005).

The Fourth Amendment<sup>108</sup> protects citizens from unreasonable searches and seizures and generally requires a warrant, based on

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PROGRAM, [http://www.floridaschoolchoice.org/Information/McKay/files/Fast\\_Facts\\_McKay.pdf](http://www.floridaschoolchoice.org/Information/McKay/files/Fast_Facts_McKay.pdf) (last visited Mar. 16, 2006) [hereinafter MCKAY SCHOLARSHIPS].

103. FLORIDA DEPARTMENT OF EDUCATION, OFFICE OF INDEPENDENT EDUCATION & PARENTAL CHOICE, CORPORATE TAX CREDIT SCHOLARSHIP PROGRAM, [http://www.floridaschoolchoice.org/Information/CTC/fast\\_facts.asp](http://www.floridaschoolchoice.org/Information/CTC/fast_facts.asp) (last visited Mar. 16, 2006) [hereinafter CORPORATE TAX CREDIT SCHOLARSHIPS].

104. FLORIDA DEPARTMENT OF EDUCATION, OFFICE OF INDEPENDENT EDUCATION & PARENTAL CHOICE, OPPORTUNITY SCHOLARSHIP PROGRAM, [http://www.floridaschoolchoice.org/Information/OSP/files/Fast\\_Facts\\_OSP.pdf](http://www.floridaschoolchoice.org/Information/OSP/files/Fast_Facts_OSP.pdf) (last visited Mar. 16, 2006).

105. MCKAY SCHOLARSHIPS, *supra* note 102.

106. CORPORATE TAX CREDIT SCHOLARSHIPS, *supra* note 103.

107. Bill Kaczor, *Florida Supreme Court Declares Vouchers Unconstitutional*, MIAMI HERALD, Jan. 5, 2006, available at <http://www.miami.com/ml/miamiherald/13556951.htm>.

108. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

probable cause for a search or seizure.<sup>109</sup> Moreover, the U.S. Supreme Court has specifically stated that “physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.”<sup>110</sup> However, the Amendment does not guarantee that a search of an individual’s home will *never* be made absent consent or a warrant, only that a search will not be “unreasonable.”<sup>111</sup> In accordance with this understanding, the Court has recognized limited exceptions whereby a warrantless entry would be justified, one of which is known as the “exigent circumstances”<sup>112</sup> exception. This exception deals with an “emergency or dangerous situation . . . that would justify a warrantless entry into a home for the purpose of either arrest or search.”<sup>113</sup> Recently, the Florida Supreme Court explored the scope of the exigent circumstances exception in *Riggs v. State (Riggs II)*.<sup>114</sup> Resolving a conflict between the First and Second District Courts of Appeal, the court unanimously held that two sheriff’s deputies acted in conformity with the Fourth Amendment and within the bounds of the exigent circumstances exception when they were called to an apartment complex, found a four-year old child had been wandering there naked and alone, made reasonable inferences that there was a medical emergency of a caretaker, and thus entered an apartment without a warrant.<sup>115</sup> Therefore, the court concluded that the trial court should not have suppressed evidence of marijuana that was in plain view and seized after the warrantless entry.<sup>116</sup> Although the court’s opinion appears simple, straightforward, and persuasive, the result has many potential implications in the area of search and seizure law and for the parameters of the exigent circumstances exception. This Note briefly explores the facts and foundational law related to *Riggs II* and then addresses concerns stemming from the opinion. Ultimately, this Note questions the certainty and confidence with which the court provided its holding and questions whether the exigent circumstances exception has been overbroadened.

In rendering its decision, the court sided with the Second District in *Florida v. Riggs (Riggs I)*,<sup>117</sup> finding that exigent circumstances

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109. *Payton v. New York*, 445 U.S. 573, 585 (1980).

110. *Id.* (quoting *United States v. U.S. Dist. Court*, 407 U.S. 297, 313 (1972)).

111. *See Illinois v. Rodriguez*, 497 U.S. 177, 183 (1990).

112. *Payton*, 445 U.S. at 583.

113. *Id.*

114. 918 So. 2d 274 (Fla. 2005).

115. *Id.* at 282.

116. *Id.* at 283. *See also Davis v. State*, 834 So. 2d 322, 327 (Fla. 2d DCA 2003). “[I]f the police enter a home under exigent circumstances and, prior to making a determination that the exigency no longer exists, find contraband in plain view, they may lawfully seize the illegal items.” *Id.*

117. 890 So. 2d 465 (Fla. 2d DCA 2004).

justified a warrantless entry, and disapproved of *Eason v. State*,<sup>118</sup> the First District's case with similar facts, to the extent that it conflicted with the court's opinion in *Riggs II*.<sup>119</sup> In *Eason*, a woman called the police after taking a child into her home, whom she had found wandering in the parking lot of her apartment complex.<sup>120</sup> The child appeared to be about two or three years old and, with the police nearby, specifically pointed to the front door of an apartment and said his mother was inside.<sup>121</sup> After receiving no response to knocks, the police entered the apartment because they were concerned there may have been a burglary or someone inside in need of help.<sup>122</sup> The officers found the child's caretaker but no emergency, and they also found marijuana and paraphernalia in plain view.<sup>123</sup> The trial court denied *Eason*'s motion to suppress the evidence seized, finding the entry was lawful.<sup>124</sup> The First District reversed, however, concluding that the officers did not have reasonable grounds to believe exigent circumstances existed.<sup>125</sup> The court stated the officers lacked reasonable grounds for such a belief since there was no indication the child had been abused or was in danger of abuse, no evidence suggesting a need for medical assistance, and no evidence of a murder or robbery.<sup>126</sup> Dissenting, Chief Judge Smith agreed with the trial court that the warrantless entry was reasonable, based upon the officers' concern for the condition of the child's mother.<sup>127</sup> Chief Judge Smith expressed the view that the majority's focus on the safety and welfare of the child was misplaced.<sup>128</sup> "[T]his episode developed substantially beyond a mere 'lost child' incident"<sup>129</sup> and the need to act was clear and within the scope of police duties.<sup>130</sup>

In *Riggs I* and *II*, two sheriff's deputies were summoned to a Florida apartment complex at three o'clock one January morning.<sup>131</sup> A four-year-old girl had been seen walking there, naked and alone, although by the time the deputies arrived she was within the custody of local residents.<sup>132</sup> The child could not identify which apartment

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118. 546 So. 2d 57 (Fla. 1st DCA 1989).

119. *Riggs II*, 918 So. 2d at 276.

120. *Eason*, 546 So. 2d at 58.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 59.

126. *Id.* at 58-59.

127. *Id.* at 61 (Smith, C.J., dissenting).

128. *See id.* at 60-61.

129. *Id.* at 61.

130. *Id.* at 60-61 (quoting the scope of police duties that may lead to the need for entry of private premises without a warrant from WAYNE R. LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 6.6 (2d ed. 1987)).

131. *Riggs v. State (Riggs II)*, 918 So. 2d 274, 276 (Fla. 2005).

132. *Id.*

was her own, and the deputies decided to try and find the child's caregiver by searching the three-story complex door by door.<sup>133</sup> When searching the second level, the deputies found that all the doors were closed except one, which was open slightly and through which officers could see some light.<sup>134</sup> After pounding on the door, identifying themselves, and receiving no response, the officers entered the apartment, believing that it was the apartment from which the child had come and that something had happened to the child's caregiver.<sup>135</sup> After entering, the officers found on a coffee table a plastic cigar tube containing seeds, which later were established to be marijuana, and seven potted marijuana plants in the second of three rooms they sequentially checked.<sup>136</sup> In the third room, the officers found Norris Riggs and a woman whom the officers later discovered was the child's babysitter.<sup>137</sup> Riggs was arrested and confessed to growing marijuana but pled not guilty and moved to suppress the evidence of marijuana.<sup>138</sup> At the suppression hearing, the State alleged that exigent circumstances justified the warrantless entry, and thus, the officers were able to seize items in plain view.<sup>139</sup> Basing its ruling on *Eason*, the trial court granted the motion to suppress.<sup>140</sup> On appeal, the Second District reversed, adopting the reasoning of Chief Judge Smith's dissent in *Eason*.<sup>141</sup> Expressing the view that the officers entered the apartment based on their duty to assure the welfare of the child's caregiver and based on circumstances justifying such a concern, the court concluded the warrantless entry was justified and therefore items in plain view could lawfully be seized.<sup>142</sup>

The Florida Supreme Court agreed to review *Riggs I* in order to resolve the conflict between the First and Second Districts related to the application and scope of the exigent circumstances exception. Considering the issue under a de novo standard of review,<sup>143</sup> the court briefly reviewed the history of the exception before beginning its analysis. Recognizing that warrants are generally required to enter an individual's private property, the court noted the narrow circumstances in which the U.S. Supreme Court has applied the exigent circumstances exception, namely for purposes of pursuing a fleeing felon, preventing destruction of evidence, searching after a lawful arrest, and fighting

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133. *Id.*

134. *Id.*

135. *Id.* at 277.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *State v. Riggs (Riggs I)*, 890 So. 2d 465, 467 (Fla. 2d DCA 2004).

142. *Id.* at 467-68.

143. *Riggs II*, 918 So. 2d at 278.

fires.<sup>144</sup> The court followed this by summarizing Florida's *own* application of the exigent circumstances exception, stating that "where safety is threatened and time is of the essence, we have recognized that 'the need to protect life and to prevent serious bodily injury provides justification for an otherwise invalid entry.'" <sup>145</sup> The exigent circumstance presented by both *Eason* and *Riggs I* was a "feared medical emergency."<sup>146</sup> Although not one of the named U.S. Supreme Court exceptions above, the Florida Supreme Court discussed Supreme Court dicta that gave a clear indication the Court would approve of a warrantless entry in response to the belief of a need for immediate medical assistance.<sup>147</sup> The court proceeded to note its own precedent, which has *explicitly* addressed and upheld warrantless entries based upon feared medical emergencies, although such cases did not involve a lost child in an apartment complex.<sup>148</sup> In situations of a feared medical emergency, "the sanctity of human life becomes more important than the sanctity of the home."<sup>149</sup> Finally, the court applied the exception to the circumstances leading up to Riggs' arrest.

Riggs argued the warrantless entry was unreasonable for two reasons: (1) "the deputies lacked a sufficient objective basis for fearing a medical emergency," and (2) there was no basis to link any potential emergency with his apartment.<sup>150</sup> Dispelling the first contention, the court opined that because the girl was only four years old, was alone outside in the middle of the night, and was not wearing any clothes, sufficient evidence existed to infer that there was "grossly negligent supervision or an emergency involving the child's caretaker."<sup>151</sup> Regarding the second claim, the court conceded that the deputies lacked certainty the girl came from Riggs' apartment, but pointed out that certainty is not required when acting upon fear of a medical emergency.<sup>152</sup> In accordance with the text of the Fourth Amendment, the requirement is that "the police reasonably believe that an emergency exists."<sup>153</sup> Based on the child's proximity to the particular apartment complex, the fact of light coming from an open door at three o'clock in the morning, and the lack of response to repeated knocks, the court believed the deputies were justified in their belief of a feared medical

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144. *Id.*

145. *Id.* at 279 (quoting *Arango v. State*, 411 So. 2d 172, 174 (Fla. 1982)).

146. *Id.*

147. *Id.* at 280 (discussing *Mincey v. Arizona*, 437 U.S. 385 (1978) and *Thompson v. Louisiana*, 469 U.S. 17 (1984)).

148. *Id.* at 280-81 (discussing *Zakrzewski v. State*, 866 So. 2d 688 (Fla. 2003), *Turner v. State*, 645 So. 2d 444 (Fla. 1994), and *Richardson v. State*, 247 So. 2d 296 (Fla. 1971)).

149. *Id.* at 281.

150. *Id.* at 282.

151. *Id.*

152. *Id.*

153. *Id.*

emergency.<sup>154</sup> Thus, the court held that the sheriff's deputies acted "reasonably and consistent with the Fourth Amendment," and the trial court erred in suppressing the evidence.<sup>155</sup>

In *Riggs II*, the court found that the circumstances with which the officers were faced, when taken as a whole, led to a reasonable inference that a medical emergency existed. Arguably, however, other inferences were available. As the court suggested itself, possibly the situation was one of negligent supervision,<sup>156</sup> in which case one could argue warrantless entry was not at all necessary but instead child services should have been contacted and the child taken into custody. Possibly the child was able to open the door to the apartment and leave on her own and did so while her caretaker(s) was sleeping. Maybe the child was merely left in the parking lot, abandoned by a parent, and had no link at all to any of the apartments. In spite of the fact that the apartment entered here had its door open and a light on, the fact that the apartment complex where the deputies searched "contained as many as fifty apartments"<sup>157</sup> reduced the likelihood that the wandering child was linked to any one even if the child did live there. Therefore, although the inference made by the deputies was legitimately *one* reasonable inference, the fact that other reasonable inferences existed may detract from the strength of that inference. The court failed to delineate in its opinion how strong a reasonable inference must be to justify a warrantless entry.

Clearly, there is a significant conflict between the strong, albeit rebuttable, presumption that a warrant is needed to enter an individual's private property<sup>158</sup> and the requirement of a reasonable belief of a need for immediate medical assistance to get around that presumption. Given that protecting the privacy of the home is arguably the main purpose behind the wording of the Fourth Amendment,<sup>159</sup> it is questionable that a reasonable inference that a medical emergency exists, when numerous other reasonable inferences also exist, is strong enough to justify a warrantless search. The court in *Riggs II* did not provide guidance regarding whether the existence of multiple reasonable inferences, some of which would not justify a warrantless entry, would prevent any *one* on its own from justifying such an entry. A lack of guidance regarding the strength of the reasonable inference could arguably lead to a slippery slope and the expansion of a doctrine which itself is supposed to be very narrow.

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154. *Id.*

155. *Id.* at 283.

156. *Id.* at 282.

157. *Id.* at 276.

158. See *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984); *Illinois v. Rodriguez*, 497 U.S. 177, 191 (1984); *Payton v. New York*, 445 U.S. 573, 585 (1980).

159. See *supra* text accompanying note 111.

As Chief Judge Smith addressed in his dissent in *Eason*, “the police have ‘complex and multiple tasks to perform’”<sup>160</sup> besides the responsibility of identifying and dealing with those who have violated the law.<sup>161</sup> For example, they are relied on to bring assistance to those threatened with physical harm, resolve conflict, and establish a sense of security in a community.<sup>162</sup> In deciding whether the entry is reasonable based on the exigent circumstances exception, courts must look at the totality of existing circumstances and base the analysis of reasonableness on that with which the officer was faced.<sup>163</sup> Although a homeowner might believe the only reasonable belief that could justify entry of a home would be near certainty of an emergency, assessing reasonableness from a homeowner’s perspective fails to take account for the multiple roles of police officers, their work experience, and the speed with which they must often make the decision to enter private property or postpone an entry to get a warrant. Failing to give officers latitude and deference in making such decisions could arguably hinder an officer’s ability to act according to his belief of what is necessary, and it could ultimately work against the interests of those whom he is trying to protect. Therefore, while the failure of the court to lay out more specific guidelines regarding what constitutes a reasonable belief has the drawback of exposing the exception to overreaching, it is advantageous in that it respects the domain of police officers and their need to act according to the varying demands that arise from their numerous and varied responsibilities.

As quoted in *Riggs II*, the U.S. Supreme Court has said, “Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. . . . It was done so that an objective mind might weigh the need to invade that privacy in order to *enforce the law*.”<sup>164</sup> An additional question thus raised by this case is whether the scrutiny applied to a warrantless entry differs between situations where a police officer is entering for a law enforcement purpose and situations where an officer enters for a non-law enforcement purpose, such as the feared medical emergency circumstance at issue in *Riggs II*. In the former situation, there is arguably a greater possibility and desire on the part of police officers to find evidence that may prove guilt of a crime, for which the consequences to the individual whose privacy was invaded may be severe. The U.S. Supreme Court stated in *United States v. United States Dis-*

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160. *Eason v. State*, 546 So. 2d 57, 60 (Fla. 1st DCA 1989) (Smith, C.J., dissenting) (citing LAFAYE, *supra* note 130, § 6.6).

161. *Id.*

162. *Id.*

163. *See id.* at 60-61.

164. *McDonald v. United States*, 335 U.S. 451, 455 (1918) (emphasis added).

*strict Court*,<sup>165</sup> “[Executive officers] charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. . . . Unreviewed executive discretion may yield too readily to *pressures to obtain incriminating evidence* and overlook potential invasions of privacy and protected speech.”<sup>166</sup> Exigent circumstances related to feared medical emergencies can be distinguished. Although invasions of privacy are always a concern, when dealing with non-law enforcement exigent circumstances, the officers generally lack intent to gather evidence or make an arrest, as they are entering for the purposes of providing what they believe will be needed emergency services. Thus, it is possible a court will be more lenient in its review of such cases because the intent behind the search and the circumstances leading to the search do not generally pose the same risks to the individual. In *Hornblower v. State*,<sup>167</sup> the Florida Supreme Court addressed this aspect of the exception when it stated, “the ‘emergency exception’ permits police to enter and investigate private premises to preserve life, property, or render first aid, *provided they do not enter with an accompanying intent either to arrest or search*.”<sup>168</sup> It is unclear how the presence of a law enforcement objective along with a feared medical emergency would alter the analysis. Ultimately, the justification for a law enforcement-based or non-law enforcement-based warrantless entry will probably hinge on whether the court views that “the need to act expeditiously is essential.”<sup>169</sup>

If the court’s ruling in *Riggs II* finds further conflict in lower courts, a future possibility is to modify the ruling by adopting an approach taken in other jurisdictions. Some federal courts have explicitly labeled the feared medical emergency as a variant of the exigent circumstances exception, calling it the emergency aid exception.<sup>170</sup> And some of these courts have set out more detailed parameters for when a warrantless search falls within the exception. An example of such a test is found in *Bloom v. City of Scottsdale*,<sup>171</sup> an unpublished opinion from the Ninth Circuit Court of Appeals. In *Bloom*, the court set out three factors which determine whether the exception is triggered:

- (1) The police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assis-

165. 407 U.S. 297, 317 (1972).

166. *Id.* (emphasis added).

167. 351 So. 2d 716 (Fla. 1977).

168. *Id.* at 718 (emphasis added).

169. *Id.*

170. See *New Jersey v. Frankel*, 847 A.2d 561 (N.J. 2004); see also Joseph L. Hubbard Jr., Comment, *Expanding the Emergency Aid Doctrine in State v. Frankel: Warrantless Seizure of Privacy Interests or Justifiable Assurances of Protection?*, 28 AM. J. TRIAL ADVOC. 213, 216-22 (2004).

171. No. 91-15472, 1992 WL 258883 (9th Cir.).

tance for the protection of life or property. (2) The search must not be primarily motivated by intent to arrest and seize evidence. (3) There must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched.<sup>172</sup>

The first factor was explicitly addressed by the court in *Riggs II*, the second seems to have been implicitly considered (and was mentioned when discussing court precedent), but it is not clear if the Florida Supreme Court did (or would) require a finding of near probable cause to associate the emergency with the place to be searched in order to justify the warrantless entry.

Hypothetically, one may wonder how *Riggs II* might affect a missing adult person's case. For example, assume an individual called the police station to report a female friend who had been missing for several days from work. This missing person failed to call in but is known to call in on the rare occasions she will be out; there was no answer at the woman's door when her friend went to visit, although her car is sitting outside; the trash can is sitting by the road, when the trash was picked up several days before; and the woman has not answered her home or cell phone or returned calls in several days. Would a warrantless entry be justified under the exigent circumstances exception? It is not clear from the *Riggs II* opinion. Arguably, one can reasonably infer from such facts that the woman may have suffered from some kind of emergency and be in need of assistance but unable to request it. But there are numerous other explanations why the woman might be temporarily unreachable for several days, including reasons that have nothing to do with a need for emergency assistance. And even if the woman is in need of assistance, it is unknown whether the inferences link up strongly enough with her house, justifying immediate warrantless entry. Additionally, if the woman has already been missing for several days, a slightly longer delay to obtain a warrant may not make a difference.

In *United States District Court*, the Supreme Court stated that one of its primary functions in resolving the case was "to examine and balance the basic values at stake in this case: the duty of Government to protect the domestic security, and the potential danger posed by unreasonable surveillance to individual privacy and free expression."<sup>173</sup> In *Riggs II*, the Florida Supreme Court similarly had to balance competing interests. There, the competing interests were the duty of police officers to provide aid combined with the expectation of the public to receive aid in emergency situations and the pri-

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172. *Id.* at \*3-4 (citing *Arizona v. Fisher*, 686 P.2d 750, 760 (Ariz. 1984), *cert. denied*, 469 U.S. 1066 (1984)).

173. *United States v. U.S. Dist. Court*, 407 U.S. 297, 314-15 (1972).

vacy interests and property rights of individuals. The ripple effects of the court's opinion remain to be seen, but in the specific circumstances of *Riggs II*, the court decided that “[the] resulting invasion of privacy is one that prudent, law-abiding citizens can accept as the fair and necessary price of having the police available as a safety net in emergencies.”<sup>174</sup> Although the opinion in *Riggs II* was brief, straightforward, and unanimous, this Note shows the underlying complexity of the issue and the possible complications that may flow from its resolution.

TAXATION—EXEMPTIONS FOR MUNICIPALLY OWNED PROPERTY—FLORIDA SUPREME COURT HOLDS THAT STATUTES IMPOSING AD VALOREM TAXES ON TELECOMMUNICATIONS SERVICES OWNED BY A MUNICIPALITY ARE NOT FACIALLY UNCONSTITUTIONAL—*Florida Department of Revenue v. City of Gainesville (Revenue II)*, 918 So. 2d 250 (Fla. 2005).

*Florida Department of Revenue v. City of Gainesville (Revenue II)*,<sup>175</sup> recently decided by the Florida Supreme Court, involved a challenge by the City of Gainesville (“City”) against state statutory provisions that mandated municipalities pay ad valorem taxes on property owned and used by the municipalities to provide telecommunications services.<sup>176</sup> The City made a facial challenge to the relevant provisions, claiming the obligatory tax was unconstitutional under article VII, section 3(a) of the Florida Constitution.<sup>177</sup> Article VII, section 3(a) provides an exemption from taxation for “property owned by a municipality and used exclusively by it for municipal or public purposes.”<sup>178</sup> In this case, the focus of the court’s analysis “hinge[d] on whether providing two-way telecommunications services to the public always serves ‘municipal or public purposes.’”<sup>179</sup> Holding six to one that that ad valorem taxation of a municipality’s telecommunications services is *not* facially unconstitutional, the court reversed the First District Court and remanded with directions to reverse the summary judgment granted to the City by the trial court.<sup>180</sup> The court emphasized its determination was narrow, concluding merely that “a municipality does not as a matter of law engage in an activity essential to the welfare of the community” in providing telecommunication services.<sup>181</sup> Given the high standard that must be met to find a statute facially unconstitu-

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174. *Riggs v. State (Riggs II)*, 918 So. 2d 274, 282-83 (Fla. 2005).

175. 918 So. 2d 250 (Fla. 2005).

176. *Id.*

177. *Id.* at 255.

178. FLA. CONST. art. VII, § 3(a).

179. *Revenue II*, 918 So. 2d at 256.

180. *Id.* at 266.

181. *Id.* at 253.

tional, the majority opinion in one sense is not surprising. However, as pointed out by the dissent and lower courts, the majority opinion is somewhat disconcerting because it appears to alter the longstanding state definition of "municipal purpose" and makes questionable whether other municipal services will be able to withstand challenges to their tax-exempt status.

Local governments in Florida receive their primary source of revenue through ad valorem taxes levied on real property and tangible personal property; therefore, critical tax dollars are lost when government-owned property is incorrectly classified as exempt.<sup>182</sup> In Florida, the total value of government-exempt property owned by municipalities totaled approximately \$58.5 billion in 2004.<sup>183</sup> Ad valorem means literally "according to the value,"<sup>184</sup> and this type of tax has two parts. The first component is the rate at which the tax will be imposed, and the second element is the assessed value of the taxable property, generally determined by a property appraiser.<sup>185</sup> Multiplying these two values provides the amount of tax that will be imposed.<sup>186</sup>

In 1995, the Florida legislature enacted legislation enabling governmental entities to sell two-way telecommunication services to the public.<sup>187</sup> Two years later, the ability of government entities to exercise that right became contingent upon the payment of ad valorem taxes or equivalent fees, which was set out in section 2 of chapter 97-197, *Laws of Florida*, and which created section 166.047, Telecommunications Services, *Florida Statutes* (1997).<sup>188</sup> In order for a municipality to receive or hold a certificate from the Public Service Commission to operate a telecommunications facility and in order for such services to satisfy the public purpose requirement under article VIII, section 2(b) of the Florida Constitution (which establishes municipal authority),<sup>189</sup> the municipality is required to pay ad valorem taxes on such a facility. In addition, the 1997 legislation amended a prior statute to establish that a municipality providing two-way telecommunications services to

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182. David M. Hudson, *Governmental Immunity and Taxation in Florida*, 9 U. FLA. J.L. & PUB. POLY 221, 228 (1998).

183. State of Florida Department of Revenue, Assessed Values of Real, Personal, and Railroad Property by Municipality for 2004 and 2003, 74, available at <http://www.myflorida.com/dor/property/databk.html> (follow "2004 Assessment Data by Municipality" hyperlink under "Top Data Book Requests").

184. 71 AM. JUR. 2D *State and Local Taxation* § 18 (2005).

185. Hudson, *supra* note 182, at 228.

186. *Id.*

187. Fla. Dep't of Revenue v. City of Gainesville (*Revenue II*), 918 So. 2d 250, 253 (Fla. 2005) (citing FLA. STAT. § 364.02(12) (1995)).

188. *Id.*

189. "Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law. Each municipal legislative body shall be elective." FLA. CONST. art. VIII, § 2(b).

the public does not constitute an exempt use for ad valorem tax purposes as set out in section 196.199(1)(c), *Florida Statutes* (1995).<sup>190</sup> In sum, “[t]he purpose and effect of this legislation is to make property owned and used by a municipality for a telecommunications business subject to ad valorem property taxation.”<sup>191</sup>

Operating under the fictitious name of Gainesville Regional Utilities, the City obtained certificates to operate as a public telecommunications provider and sold telecommunications infrastructure and integrated telecommunications services to the public.<sup>192</sup> Due to the legislative changes above, the City was subject to ad valorem taxation on property providing these services. The City filed suit in 2000, contending the two portions of the recent law directly conflicted with article VII, section 3(a) of the Florida Constitution, which gives municipalities certain exemptions from ad valorem taxation and states in pertinent part: “All property owned by a municipality and used exclusively by it for municipal or public purposes shall be exempt from taxation.”<sup>193</sup> The trial court agreed with the City, granting summary judgment and finding the sections facially unconstitutional; the First District affirmed, with a dissent from Judge Ervin.<sup>194</sup> Maintaining its position on the appeal to the Florida Supreme Court, the City contended a facial violation existed because the relevant provisions made property that was used for municipal or public purposes taxable, which is expressly prohibited in the Florida Constitution.<sup>195</sup> The Department of Revenue (“Department”) based its argument on Judge Ervin’s dissent and argued for “a narrower construction of the ‘municipal or public purposes’ that would exclude a municipality’s telecommunications business that competes with the private sector for customers.”<sup>196</sup>

The Florida Supreme Court reviewed the case de novo, recognizing that in order to find a statute facially unconstitutional, there must be “no set of circumstances . . . under which the statute would be valid.”<sup>197</sup> As mentioned previously, the crux of the court’s analysis was on whether the two-way telecommunications services always satisfy “municipal or public purposes,” so that the property would qualify for the exemption from ad valorem taxation set out in article VII, section 3(a) of the Florida Constitution.<sup>198</sup> Because “municipal or

190. *Revenue II*, 918 So. 2d at 254 (noting that certain exceptions existed but were not applicable to this case); Fla. Dep’t of Revenue v. City of Gainesville (*Revenue I*), 859 So. 2d 595, 597 (Fla. 1st DCA 2003).

191. *Revenue II*, 918 So. 2d at 254.

192. *Id.*

193. FLA. CONST. art. VII, § 3(a) (emphasis added); see also *Revenue II*, 918 So. 2d at 255.

194. *Id.* at 255.

195. Answer Brief for Appellee at 7, *Revenue II*, No. SC03-2273.

196. *Revenue II*, 918 So. 2d. at 256.

197. *Id.*

198. *Id.*

public purposes” is not defined in article VII, section 3(a), the court first had to establish a definition and then proceed to determine whether telecommunications services fell within it.<sup>199</sup>

In establishing the definition, the court first looked to how the term “municipal purpose” was construed under the Florida Constitution of 1885, in order to give historical perspective and context to article VII, section 3(a), which was adopted in the 1968 revision to the Florida Constitution.<sup>200</sup> The 1885 Constitution provided two provisions for tax exemptions for property used for municipal purposes, both of which the court found to be non-self-executing.<sup>201</sup> The court explained that under those provisions it “deferred to the Legislature’s authorization of municipal functions and clear intention to exempt property used therefore from ad valorem taxation.”<sup>202</sup> Additionally, the court held that competition with the private sector did not automatically prevent a municipal purpose from being exempt “if the Legislature determined that the activity was *essential* to the welfare of the municipality.”<sup>203</sup>

The 1968 revision to the Florida Constitution led to the current article VII, section 3(a), which provides the exemption from ad valorem taxation for property used for “municipal or public purposes.”<sup>204</sup> In contrast to the provisions from the 1885 Constitution, the court explained article VII, section 3(a) is self-executing and does not require that the legislature declare an activity meets a municipal purpose to qualify for the tax exemption.<sup>205</sup> Furthermore, the 1968 revision requires that exempt property be used by the municipality that owns it, whereas a provision in the 1885 Constitution did not mandate ownership and use by the municipality as long as other conditions were met.<sup>206</sup> After examining the history of the revision and relevant case law, the court concluded that separate tests applied when dealing with private interests in municipally owned property and when dealing with property both owned and used solely by the municipality.<sup>207</sup> In the latter, which is relevant to the City’s case, the question is “whether ‘municipal or public purposes’ under article VII, section 3(a) of the 1968 Constitution is as broad as ‘municipal purposes’ under the corresponding provisions of the 1885 Constitution”

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199. *Id.*

200. *Id.* at 257-59.

201. *Id.* at 258.

202. *Id.* at 259.

203. *Id.* (emphasis added).

204. *Id.* The addition of public purposes is irrelevant, as the Florida Supreme Court previously held that “public purposes” and “municipal purposes” were synonymous. *Id.* at 261.

205. *Id.* at 259.

206. *Id.*

207. *Id.* at 259-61.

as interpreted in court precedent.<sup>208</sup> Answering this, the court stated that the framers of article VII, section 3(a) did not intend to narrow the definition of municipal purposes from its previous interpretation; they merely wanted to require both ownership and exclusive use of property by the municipality.<sup>209</sup> This was a legislative response to a 1965 case holding that municipal property leased to a corporation qualified under the old provision.<sup>210</sup>

The Florida Supreme Court next looked to the interpretation of “municipal purposes” under article VIII, section 2(b) of the Florida Constitution, because the City argued that “municipal or public purposes” under the tax exemption provision should receive the same construction.<sup>211</sup> In examining precedent dealing with article VIII, section 2(b), the court explained it had recognized under that provision “the broad sweep of municipalities’ inherent power”<sup>212</sup> and the absence of any required authorization from the legislature to exercise its authority.<sup>213</sup> But the court refused to apply the same construction to “municipal or public purposes” under article VII, section 3(a) for the purposes of an ad valorem tax exemption. Because the definition of “municipal purposes” as interpreted under article VIII, section 2(b) had been “imprecise”<sup>214</sup> and because that provision and article VII, section 3(a) “serve different functions,”<sup>215</sup> the court expressly distinguished precedent interpreting what constitutes a municipal purpose under each.<sup>216</sup> In essence, an activity could satisfy the requirement for “municipal purposes” under article VIII, section 2(b) but not satisfy the requirement for “municipal or public purposes” under article VII, section 3(a), thus leaving it subject to ad valorem taxation.

Basing its definition on how “municipal or public purposes” was interpreted by the court in prior decisions dealing with the constitutional tax exemption, the court concluded the term “encompass[es] activities that are *essential* to the health, morals, safety, and general welfare of the people within the municipality.”<sup>217</sup> In applying this definition to the challenged provisions, the court could not say that it was unconstitutional on its face. Although the stated goals of opening telecommunications services to competition were to “provide customers with freedom of choice, encourage the introduction of new tele-

208. *Id.* at 261.

209. *Id.*

210. *Id.* at 259-61; *see also* Daytona Beach Racing & Recreational Facilities Dist. v. Paul, 179 So. 2d 349 (Fla. 1965).

211. *Revenue II*, 918 So. 2d at 261-62.

212. *Id.* at 262.

213. *Id.*

214. *Id.* at 263.

215. *Id.*

216. *See id.* at 262-63.

217. *Id.* at 264 (emphasis added).

communications service, encourage technological innovation, and encourage investment in telecommunications infrastructure,<sup>218</sup> the court stated that the law enables municipalities to provide such services irrespective of whether the service promotes any of the goals.<sup>219</sup> Thus, since it is possible a municipal telecommunications service would fail to promote the stated aims of section 365.01(3), *Florida Statutes*, such property would not be exempt from ad valorem taxation because it would fail to serve a “municipal or public purpose.”<sup>220</sup> Therefore, the court held that the challenged legislation was not unconstitutional on its face, rendering no opinion on how it would be viewed as applied.<sup>221</sup>

Justice Anstead wrote a dissent, in which he disagreed with the narrow construction of “municipal purpose.” Although the majority stated the definition includes only those activities that are “essential to the health, morals, safety, and general welfare of the people within the municipality,”<sup>222</sup> Justice Anstead argued that “this definition appears both arbitrary and without support from our case law, and it represents an unprecedented challenge to the broad discretion and authority of local government and home rule traditionally favored in Florida.”<sup>223</sup> He cited largely to Chief Judge Wolf’s opinion for the First District Court of Appeal, which set out the Florida Supreme Court’s line of decisions that broadly interpret “municipal purpose.”<sup>224</sup> He further opined that the majority ruling threatens the very purpose of the tax exemption—to encourage municipalities to use property owned by them to serve their citizens.<sup>225</sup> Anstead also stressed that the 1968 revision to the Florida Constitution was made merely to prevent private parties benefiting from the tax exemption, not to alter the exemption as applied to the municipality itself.<sup>226</sup> Because of this, Justice Anstead argued that the court should not have altered the meaning of “municipal purposes” as applied to property owned and used by a municipality to serve its citizens from how it was construed prior to the 1968 revision.<sup>227</sup> Additionally, Justice Anstead questioned the ability of other public services, such as parks, pools, and zoos, to maintain their tax-exempt status based on the majority ruling.<sup>228</sup> Finally, even using the majority’s definition of “municipal or public services,” Justice Anstead

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218. FLA. STAT. § 364.01(3) (2004).

219. *Revenue II*, 918 So. 2d at 265.

220. *Id.*

221. *Id.* at 266.

222. *Id.* at 265.

223. *Id.* at 266 (Anstead, J., dissenting).

224. *Id.* at 266-67.

225. *Id.* at 267.

226. *Id.* at 268.

227. *Id.* at 268-69.

228. *Id.* at 270.

argued that telecommunications services meet the requirement that the services are essential, providing one more reason for finding the legislation unconstitutional.<sup>229</sup>

Two aspects of the majority opinion are somewhat confusing and arguably inconsistent. To begin with, as Justice Anstead pointed out in his dissent, the majority's use of precedent for narrowly construing "municipal purpose" is contradicted by language in the cases it uses to support such an assertion.<sup>230</sup> The majority cited *State ex rel. Harper v. McDavid*<sup>231</sup> to explain how the court interpreted "municipal purposes" regarding tax exemption cases in the past.<sup>232</sup> That case involved a challenge to legislatively authorized ad valorem tax exemption for municipalities establishing and operating low-rent housing units.<sup>233</sup> There, the court opined:

What constituted a municipal purpose is a legislative question that should not be interfered with by the courts in the absence of a clear abuse of discretion. . . . [T]he time was when municipal purpose was restricted to police protection or such enterprises as were strictly governmental, but that concept has been very much expanded . . . .<sup>234</sup>

Although *McDavid* used the terminology "essential to the health, morals, protection, and welfare of the municipality," the court cited to another case that listed golf courses and office buildings among a sample list showing what types of city projects would constitute a "municipal purpose."<sup>235</sup>

Based on the above description and the examples provided, it seems there is an inconsistency between the majority's assertion that it would construe "municipal or public purposes" under article VII, section 3(a) in accordance with "the definition utilized by the Court in its prior decisions on the constitutional tax exemption"<sup>236</sup> and that it would construe municipal purposes as activities that are "essential," encompassing "the concept of great need or necessity."<sup>237</sup> In *Saunders v. City of Jacksonville*,<sup>238</sup> the court deferred to a legislative decision exempting from ad valorem taxation property owned by a municipality's public utility that provided services in a different

229. *Id.* at 272-73.

230. *Id.* at 266-70.

231. 200 So. 100 (Fla. 1941).

232. *See Revenue II*, 918 So. 2d at 264.

233. *McDavid*, 200 So. at 101.

234. *Id.* at 102.

235. *Id.* (citing *State v. City of Tallahassee*, 195 So. 402 (Fla. 1940)); *Revenue II*, 918 So. 2d at 270 (Anstead, J., dissenting).

236. *Revenue II*, 918 So. 2d at 263 (majority opinion).

237. *Id.* at 264.

238. 25 So. 2d 648 (Fla. 1946).

county.<sup>239</sup> The court stated specifically that although the act might enable the city to compete with private utilities that must pay taxes that was not enough to declare it invalid.<sup>240</sup> Likewise, in *Revenue II*, the majority stated that governmental-proprietary activities are not necessarily outside the bounds of what constitutes “municipal or public purposes.”<sup>241</sup> When a government has a proprietary function, however, it seems difficult to reconcile the service provided with the notion of “essential” as the majority claims to define it. Although numerous types of services may be needed in a general sense, if a government is competing with private service providers, whether it is truly “necessary or indispensable”<sup>242</sup> that the municipality provide the same service becomes more tenuous.

The majority in *Revenue II* also cited *City of Sarasota v. Mikos*<sup>243</sup> as another case conveying its interpretation of “municipal or public purpose.” There, the court held that “vacant land held by a municipality is presumed to be in use for a public purpose if it is not actually in use for a private purpose on tax assessment day.”<sup>244</sup> Although the land was not being used at all, but was merely being held for alleged future public uses, the court deferred to the legislative determination that it was being held for future public needs and, thus, it constituted a municipal purpose and was exempt from ad valorem taxation.<sup>245</sup> Again, as Justice Anstead highlighted, it is difficult to see the broad interpretation of “municipal or public purposes” in that case as aligning with the alleged “basic, necessary, or indispensable” requirement set out by the majority.<sup>246</sup> Because precedent suggests a more lenient and broad construction of “municipal or public purposes,” it seems the majority did not adhere to its asserted position that it would continue to interpret the term in accordance with past history; the majority in reality seems to have narrowed the definition in *Revenue II*.

The Department relied heavily on *Sebring Authority v. McIntyre*<sup>247</sup> in arguing for a narrower construction of “municipal or public purposes.”<sup>248</sup> Based on that case and *Williams v. Jones*,<sup>249</sup> the Department further contended that the “governmental-governmental/governmental-proprietary

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239. *Id.* at 650-51.

240. *Id.* at 650.

241. *See Revenue II*, 918 So. 2d at 259.

242. *See id.* at 264 (quoting MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 396 (10th ed. 1999)).

243. 374 So. 2d 458 (Fla. 1979).

244. *Id.* at 460.

245. *See id.* at 459-61.

246. *Revenue II*, 918 So. 2d at 270 (Anstead, J., dissenting).

247. 783 So. 2d 238 (Fla. 2001).

248. *See* Reply Brief for Appellant at 1-3, *Revenue II*, Case No. SC 03-2273 (Fla. 2005).

249. 326 So. 2d 425 (Fla. 1975).

standard” should be applied to the statutes being challenged here.<sup>250</sup> Under that test, “article VII, section 3(a) does not permit municipal property leased to private entities for governmental-proprietary activities to be tax exempt,”<sup>251</sup> proprietary activities being those generally operated for profit. However, as the First District pointed out, that case and others put forth to support a narrower construction “involve situations where municipal property is being leased or utilized by a private entity”<sup>252</sup> and not as to municipal property owned and used by the municipality itself. The Florida Supreme Court explicitly noted a clear distinction between the two scenarios, concluding that “the ‘governmental-governmental test’ governs eligibility for the constitutional tax exemption in article VII, section 3(a)”<sup>253</sup> and “was never intended to apply to property both owned and used exclusively by a municipality.”<sup>254</sup> Although the court said it would not apply that test to the statutes regarding telecommunications services, the court ultimately agreed with the Department on the resolution of the issue.

The majority pointed out that telecommunications services differed from other services that precedent categorized as falling under the scope of “municipal or public purposes,” such as electrical power and public parks, in that telecommunications services were not provided by the public sector throughout history.<sup>255</sup> However, it is not entirely clear why that distinction matters given that (a) the court said a municipal purpose could be served despite the fact that the activity competed with the private sector, and (b) the focus is on the whether the service is essential rather than how it has historically been provided.<sup>256</sup>

Ultimately, the court stated that because a municipality *could* enter the market without furthering the goals stated under section 364.01(3), which laid out the legislature’s reasoning behind allowing municipalities to enter the telecommunications market to begin with, it was possible a municipality would not provide a service essential to the health, morals, safety and general welfare of its citizens.<sup>257</sup> Again, it is not entirely clear why providing telecommunications services, *even if* it furthers one of the three listed goals of introducing new levels of service, fostering innovation, or encouraging infrastructure investment, automatically means the service does not serve a “municipal or public purpose.”

250. Reply Brief for Appellant at 3-12, *supra* note 248.

251. *McIntyre*, 783 So. 2d at 248.

252. *Dep’t of Revenue v. City of Gainesville (Revenue I)*, 859 So. 2d 595, 599 (Fla. 1st DCA 2003).

253. *Revenue II*, 918 So. 2d at 260.

254. *Id.* at 261.

255. *Id.* at 265.

256. *See Revenue I*, 859 So. 2d at 601.

257. *Revenue II*, 918 So. 2d at 265.

The standard that must be met to find a statute facially unconstitutional is very high—the court must find that there is no “set of circumstances under which the challenged enactment might be upheld.”<sup>258</sup> Therefore, to a certain extent the decision is not entirely surprising, irrespective of the ambiguities mentioned above. Whether “municipal or public purpose” under article VII, section 3(a) is defined narrowly or broadly, it is not illogical for the court to conclude a set of circumstances *could* exist where a municipality would provide telecommunications services under circumstances where those services are neither “essential” nor even for the “comfort, convenience, safety and happiness of the citizens.”<sup>259</sup>

Yet, Justice Anstead in his dissent argued plausibly that even following the majority’s narrower interpretation of “municipal or public purpose” exemption from ad valorem taxation, these provisions still satisfy the requirement.<sup>260</sup> He noted the relevance of telecommunications services for the purposes of education, to broadcast warnings of emergencies, and to enable citizens to call the police or fire department.<sup>261</sup> Moreover, the First District pointed out that municipalities, to enter the telecommunications market, are issued certificates from the *Public Service Commission*, which in itself suggests the services are for the welfare of citizens.<sup>262</sup> Furthermore, as the trial court noted, the absence of a municipal monopoly in this area is irrelevant to the need for the services. Telecommunications, if anything, are “more analogous to such services as electricity and water, long recognized as serving valid municipal and public purposes.”<sup>263</sup> Thus, Justice Anstead contested the majority’s definition of “municipal or public purposes” and whether telecommunications fits within that definition if applied.

The outcome of this case could potentially increase litigation and affect public policy. To begin with, the statutes survived in this case under a facial challenge, with no opinion given regarding how an as-applied challenge would be decided. Any municipality wanting to challenge ad valorem taxes placed on its telecommunications services will therefore have to challenge it on the latter basis in hopes of pre-

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258. *Id.*

259. *Revenue I*, 859 So. 2d at 599 (emphasis omitted) (citing *Greater Orlando Aviation Auth. v. Crotty*, 775 So. 2d 978 (Fla. 5th DCA 2000) and *Page v. Ferandina Beach*, 714 So. 2d 1070 (Fla. 1st DCA 1998)). This is a broader interpretation given to the term “municipal or public purpose.”

260. *See Revenue II*, 918 So. 2d at 271-73 (Anstead, J., dissenting).

261. *Id.* at 272.

262. *Revenue I*, 859 So. 2d at 600 (stating that “the provision of telecommunications services for the benefit of city residents constitutes a valid municipal purpose pursuant to any reasonable interpretation of the term ‘municipal purpose.’ The best evidence in this regard is the statute itself . . .”).

263. *Id.* (citing the trial court opinion).

venting the imposition of the taxes. Furthermore, the Florida legislature could, in theory, pass similar laws requiring ad valorem taxation of other municipal services, such as parks, pools, and zoos, on the basis that it is possible under “some set of circumstances” that those services also fail to serve a “municipal or public purpose.”<sup>264</sup> Again, if similar legislation to that challenged in *Revenue I* were passed respecting other services, an increase in as-applied challenges to such laws could emerge. Moreover, although the court did not consider public policy implications, as legitimately that was not the issue presented to it, the imposition of ad valorem taxes on property owned and used by the municipality to provide services to its citizens could make utility services more expensive to provide and may not “truly level the playing field.”<sup>265</sup> In such cases, the statutes challenged in *Revenue II* and any similarly passed legislation will serve as a disincentive for municipalities to provide services to its citizens.

Ultimately, it appears that the construction of “municipal or public purpose” with regards to tax exemption cases may be imprecise, just as the court claimed the construction of “municipal purpose” is under article VIII, section 2(b) of the Florida Constitution.<sup>266</sup> The majority, however, decided that the definition was not imprecise and that it could construe a definition of “municipal or public purposes” for the purposes of ad valorem tax exemption in article VII, section 3(a). Based on precedent, the majority concluded the phrase requires that the government activity is “essential.” It then found that telecommunications services do not necessarily constitute essential services and rejected the facial challenge to the statutes at issue. As the First District and the dissent noted, however, whether “municipal or public purpose” requires that the government activity is essential is debatable, and whether telecommunications services are essential if such a definition is imposed is also debatable. The case leaves uncertain what government services will continue to constitute a “municipal or public purpose” in order to be exempt from ad valorem taxation and may affect municipal decisions dealing with the provision of public services.

ADMINISTRATIVE LAW—FLORIDA SUPREME COURT HOLDS STATE AGENCIES ARE BOUND BY CONTROLLING JUDICIAL STATUTORY INTERPRETATIONS—*Costarell v. Florida Unemployment Appeals Commission*, 916 So. 2d 778 (Fla. 2005).

As a fundamental tenant of American jurisprudence, once a point of law has been resolved by judicial decision, it is then binding upon

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264. See *Revenue II*, 918 So. 2d at 270-71 (Anstead, J., dissenting).

265. See Answer Brief for Appellee at 11, *Revenue II*, Case No. SC 03-2273 (Fla. 2005).

266. See *supra* text accompanying note 215.

courts of lesser jurisdiction.<sup>267</sup> Within Florida, a decision from any district court of appeal is binding upon all Florida trial courts so long as interdistrict conflict does not exist.<sup>268</sup> In *Costarell v. Florida Unemployment Appeals Commission*, the Florida Supreme Court made clear that this framework extends into the field of administrative practice, where state agencies are bound by statutory interpretations by courts of the state.<sup>269</sup>

In *Costarell*, the issue before the court was whether the failure of a claimant to file weekly claims once the claimant had been determined ineligible for benefits by the Florida Unemployment Appeals Commission ("Commission") precluded the claimant from receiving benefits even upon successful appeal.<sup>270</sup> The Third District Court of Appeal ("Third District") faced this same question on three previous occasions and the court consistently ruled a claimant could not be denied benefits upon successful appeal of an ineligibility ruling,<sup>271</sup> because, as the Florida Supreme Court pointed out, a claimant "would ordinarily and reasonably believe it would be a useless act to continue to file weekly claims."<sup>272</sup>

The issue first came before the Third District in *Savage v. Macy's East, Inc. (Savage I)*,<sup>273</sup> where the court determined that the Commission had wrongfully held the claimant, Savage, did not qualify for compensation.<sup>274</sup> Following this decision, the Commission continued to deny the claimant benefits based upon her failure to file weekly claims following her ineligibility determination by the Commission and during the subsequent appeal.<sup>275</sup> The Third District then issued another opinion in *Savage v. Macy's East, Inc. (Savage II)*,<sup>276</sup> in response to Savage's motion to enforce the *Savage I* court's mandate in which the court rejected the Commission's claims regarding the weekly filings and explained that the Commission "had no authority to deviate" from the court's prior ruling "directing that the claimant receive benefits now that she had been determined to be properly eligible."<sup>277</sup> Again this issue came before the Third District in *Dines v. Florida Unemployment Appeals Commission*,<sup>278</sup> where the court held,

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267. *Wood v. Fraser*, 677 So. 2d 15, 19 (Fla. 2d DCA 1996).

268. *Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992).

269. 916 So. 2d 778, 782 n.2 (Fla. 2005) (citing *Mikolsky v. Fla. Unemployment Appeals Comm'n*, 721 So. 2d 738, 740 (Fla. 5th DCA 1998)).

270. *Id.* at 782 n.1.

271. *See id.* at 779-80.

272. *Id.* at 783.

273. 708 So. 2d 689 (Fla. 3d DCA 1998).

274. *Costarell*, 916 So. 2d at 779 (citing *Savage I*, 708 So. 2d at 689).

275. *Id.*

276. 719 So. 2d 1208 (Fla. 3d DCA 1998).

277. *Costarell*, 916 So. 2d at 779-80.

278. 730 So. 2d 378 (Fla. 3d DCA 1999).

as previously “said in dictum” in *Savage II*, “that the denial of benefits on this ground is entirely erroneous.”<sup>279</sup>

Despite the Third District’s *Savage II* and *Dines* rulings remaining the prevailing law, Mr. Costarell, like the claimants in both previous cases, had successfully appealed his declaration of ineligibility only to be subsequently denied benefits by the Commission due to his failure to file weekly claims after his denial and during the pendency of his appeal.<sup>280</sup> Mr. Costarell then filed a pro se appeal, and the Second District Court of Appeal (“Second District”) affirmed the Commission’s action.<sup>281</sup> The case then came before the Florida Supreme Court based upon certified conflict between the Second District’s ruling and the Third District’s holding in *Dines*.<sup>282</sup>

The question before the Supreme Court of Florida in *Costarell* was whether weekly filings must be continued upon denial of benefits in order to qualify for unemployment compensation once the claimant was ultimately deemed eligible.<sup>283</sup> The majority concluded that while the plain language of the statute does require claimants file claims weekly, the absence of a mandate to do so once a claimant has been determined ineligible relieves the claimant of the continuing obligation.<sup>284</sup> The court pragmatically reasoned that “without an express statutory directive to do so,” an ineligible claimant would see no reason to continue filing claims following an adverse eligibility ruling.<sup>285</sup>

The dissenting opinion in *Costarell* instead relied upon the plain language of the two relevant statutory provisions.<sup>286</sup> According to the text of one of these statutes at the time, unemployed individuals were eligible for compensation only if a claim had been made with respect to the week.<sup>287</sup> Furthermore, the second provision provided that payment was contingent upon the claimant reporting at least bi-weekly.<sup>288</sup> The dissent reasoned that in the absence of any estoppel argument legally excusing Mr. Costarell’s noncompliance, he “failed to meet these express, unambiguous statutory conditions for the receipt of UC benefits” for the weeks in question.<sup>289</sup>

Ultimately, the issue of weekly filings was decided by the legislature subsequent to the events that gave rise to this suit.<sup>290</sup> In a 2003

279. *Id.* at 379.

280. *Costarell*, 916 So. 2d at 781-82.

281. *Id.* at 782.

282. *Id.* at 779.

283. *Id.* at 782 n.1.

284. *Id.* at 782.

285. *Id.* at 783.

286. *See id.* at 783-84 (Bell, J., dissenting).

287. *Id.* at 784.

288. *Id.*

289. *Id.*

290. *Id.* at 783 (majority opinion).

amendment, the legislature expressly provided that claimants are required to continue filings while their appeals are pending.<sup>291</sup>

Although the differing views of the majority and dissent offer an interesting look into the divergent judicial philosophies that currently make up the court, the most interesting aspect of this decision came in the majority's stinging rebuke of the Commission's action in this case, which the court presented as the Commission's systemic denial of justice to "claimants who are typically unrepresented by counsel and are both unaware of and are not told of their rights under the law."<sup>292</sup>

In its opinion quashing the Second District's previous ruling in *Costarell* and affirming *Dines*, the Florida Supreme Court reissued a stern admonishment from the Third District in response to the Commission "ignor[ing] . . . the established law," going so far as to suggest the matter may justify further action on the part of the legislature, state executive branch, or Secretary of Labor.<sup>293</sup> The Florida Supreme Court further pointed out that the Commission made no attempt to explain its failure to follow the established law, offering only the same arguments put forth in previous cases, which this court rejected as well.<sup>294</sup> Finally, the court cautioned the Commission "that it too is bound by the rule of law" and "express[ed] dismay" that it "would show so little regard for the controlling holdings of an appellate court of the State of Florida."<sup>295</sup> So that such objectionable conduct might not occur in the future, the court made perfectly clear the Commission's duty of deference:

An agency of this state, such as the Commission, must follow the interpretations of statutes as interpreted by the courts of the state. Like trial courts, if there is a controlling interpretation by a district court of appeal in this state, the Commission must follow it, even if the court of appeal is located outside the district of the trial court. If there is a conflict between interpretations by different courts of appeal, that may provide a basis to reach the supreme court for a final interpretation. Thereafter, the supreme court's in-

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291. *Id.*; FLA. STAT. § 443.091 (2005) ("[E]ach claimant must continue to report regardless of any appeal or pending appeal relating to her or his eligibility or disqualification for benefits.").

292. *Costarell*, 916 So. 2d at 780 (quoting *Savage v. Macy's East, Inc.*, 719 So. 2d 1208, 1210 n.2 (Fla. 3d DCA 1998)).

293. *Id.* (quoting *Savage*, 719 So. 2d at 1210 n.2). The court goes on to provide a lengthy string citation of cases from every district court of appeal in which the Commission was reversed upon the issue of misconduct. *Id.*

294. *Id.* at 782.

295. *Id.*

terpretation of the statute must prevail, barring future legislative changes to the statute.<sup>296</sup>

Though both the majority and dissent offer an interesting discussion of the statutory scheme relied upon by the Commission regarding weekly filings,<sup>297</sup> the implications of this case are mostly limited to its administrative procedure aspects as the legislature has now settled the issue of the necessity of weekly filings.

PROCEDURAL LAW—FLORIDA SUPREME COURT CREATES A BRIGHT-LINE RULE THAT COURT ORDERS ENTERED TO RESOLVE GOOD FAITH MOTIONS SHOULD AUTOMATICALLY BE TREATED AS ACTIVITY, THUS PRECLUDING DISMISSAL—*Wilson v. Salamon*, 923 So. 2d 363 (Fla. 2005).

The danger of inconsistency arises when courts interpret rules of procedure and statutes. Even when a court interprets a rule or statute so as to make it seem clear, another court may come along and misinterpret the previous court's decision. Whenever the plain meaning of a statute is unambiguous, it should be adhered to in order to avoid inconsistency. The fewer subjective decisions a court has to make, the less chance there is for prejudice. *Wilson v. Salamon*<sup>298</sup> resolved a procedural issue, and the decision will greatly impact lawsuits because it will allow many more lawsuits to remain on the docket that would have previously been dismissed.

The issue was whether court orders filed to resolve good faith motions are automatically treated as activity or whether a trial court must continue to review its own orders to determine if they are passive.<sup>299</sup> The Florida Supreme Court held that court orders filed to resolve good faith motions should automatically be treated as activity, and the cases in which these orders are filed should not be dismissed.<sup>300</sup> The court adopted this bright-line rule and abandoned past precedent where an inquiry was made into whether the activity was active and "calculated to hasten the suit to judgment,"<sup>301</sup> or whether it was passive and should be dismissed.

The facts of this case are that Ms. Wilson filed a negligence claim on March 15, 2001, against Dr. Eva J. Salamon and Bond Clinic, P.A., alleging that her daughter was injured at birth.<sup>302</sup> The defendants filed an answer, and on June 25, 2001, Kenneth Levine, an attorney from Massachusetts, filed a motion to appear *pro hac vice* as

296. *Id.* at 782 n.2 (quoting *Mikolsky v. Unemployment Appeals Comm'n*, 721 So. 2d 738, 740 (Fla. 5th DCA 1998)) (footnotes omitted).

297. FLA. STAT. § 443.091(1)(a) (2002).

298. 923 So. 2d 363 (Fla. 2005).

299. *Id.*

300. *Id.* at 363-64.

301. *Gulf Appliance Distribs., Inc. v. Long*, 53 So. 2d 706, 707 (Fla. 1951).

302. *Wilson*, 923 So. 2d at 364.

co-counsel for Ms. Wilson; however, an order was never entered on this motion.<sup>303</sup> On October 29, 2001, the defendants objected to certain interrogatories and filed responses to requests for production.<sup>304</sup> Then there was no activity in the case until Vivian Sparacio, the partner of Mr. Levine filed a similar motion to appear *pro hac vice* as co-counsel for Ms. Wilson, which was granted by an order filed on April 4, 2002.<sup>305</sup> After this there was no activity until the defendants moved to dismiss the action on November 4, 2002.<sup>306</sup>

The Second District Court of Appeal (“Second District”) affirmed the trial court’s decision to dismiss the action holding that a motion to appear *pro hac vice* was not “activity” that would preclude dismissal under rule 1.420(e), *Florida Rules of Civil Procedure*.<sup>307</sup> The Second District also certified the question to the Florida Supreme Court as one of great public importance.<sup>308</sup> In overturning the Second District, the Florida Supreme Court held that all good faith trial court orders filed to resolve motions should preclude dismissal, and no inquiry should be made into whether the activity was active or passive.<sup>309</sup> In reaching its decision, the majority looked at the history of rule 1.420(e) and determined to adhere to its plain meaning.<sup>310</sup> Rule 1.420(e) was adopted in 1966 by the Florida Supreme Court:

All actions in which it does not affirmatively appear from some action taken by filing of pleadings, order of court or otherwise that the same is being prosecuted for a period of one year shall be . . . dismissed by the court on its own motion or on motion of any interested person . . . after notice to the parties; provided that actions so dismissed may be reinstated on motion for good cause, such motion to be served by any party within one month after such order of dismissal.<sup>311</sup>

This rule replaced a similar Florida statute.<sup>312</sup> In 1976, the court positively rephrased the rule and removed the term “affirmatively,” replacing it with a condition that activity must appear “on the face of the record” to preclude dismissal.<sup>313</sup> The court said that it did this because judges were befuddled by what “affirmatively” meant and were

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303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.* at 363-64.

310. *Id.* at 369.

311. *In re* Fla. Rules of Civil Procedure 1967 Revision, 187 So. 2d 598, 624 (Fla. 1966).

312. The rule replaced section 45.19(1), *Florida Statutes* (1965), which was repealed in 1967.

313. *In re* The Florida Bar, Rules of Civil Procedure, 339 So. 2d 626, 629 (Fla. 1976).

making arbitrary judgments conflicting with the purpose of the rule.<sup>314</sup> The rule, as interpreted by the court reads:

In all actions in which it appears on the face of the record that no activity by filing of pleadings, order of court, or otherwise has occurred for a period of 10 months . . . shall be dismissed by the court on its own motion or on the motion of any interested person . . . after reasonable notice to the parties, unless a party shows good cause in writing at least 5 days before the hearing on the motion why the action should remain pending. Mere inaction for a period of less than 1 year shall not be sufficient cause for dismissal for failure to prosecute.<sup>315</sup>

The majority indicated that the court's 1951 opinion, in which the old statute was interpreted, is to blame for the confusion.<sup>316</sup> In *Gulf Appliance Distributors, Inc. v. Long*, the court held that an order allowing for the withdrawal and substitution of counsel was not sufficient activity to preclude dismissal under section 45.19(1), *Florida Statutes*.<sup>317</sup> The *Gulf Appliance* court attempted to define "affirmatively" when it stated that the requirement meant "some active measure taken by [the] plaintiff, intended and calculated to hasten the suit to judgment."<sup>318</sup> The court in *Wilson* held that *Gulf Appliance* should no longer be the standard because that case was decided based on the old rule and the court has since taken out the term "affirmatively" from the rule.<sup>319</sup> The court reasoned that it is a simple question of interpreting the plain meaning of rule 1.420(e), but lower courts have continued to be influenced by *Gulf Appliance*.<sup>320</sup> The majority urged that where courts have not been adhering to the purpose of the statute, stare decisis need not be followed.<sup>321</sup> The court indicated that the meaning of current rule 1.420(e) was properly construed in *Metropolitan Dade County v. Hall*, where Justice Wells noted that the rule only requires a simple review of the record to determine whether "[t]here is either activity on the face of the record or there is not."<sup>322</sup>

The majority justified its decision by balancing competing policy issues. The court's first and foremost concern, as provided in the

314. *Wilson*, 923 So. 2d at 365.

315. FLA. R. CIV. P. 1.420(e).

316. *Wilson*, 923 So. 2d at 365.

317. *Gulf Appliance Distribs., Inc. v. Long*, 53 So. 2d 706, 707 (Fla. 1951).

318. *Id.* at 707 (citing *Argusta Sugar Co. v. Haley*, 112 So. 731, 732 (La. 1927)).

319. *Wilson*, 923 So. 2d at 365.

320. *Id.* at 366 (citing *Moossun v. Orlando Reg'l Health Care*, 826 So. 2d 945, 946 (Fla. 2002)).

321. *Id.* at 367 ("Although stare decisis is fundamentally important in our system of justice, it is not 'an ironclad and unwavering rule' so that we must bend to the 'voice of the past, however outmoded or meaningless that voice may have become.'") (citing *Weiland v. State*, 732 So. 2d 1044, 1055 n.12 (Fla. 1999)).

322. 784 So. 2d 1087, 1090 (Fla. 2001).

Florida Constitution, is to “be open to every person for redress of any injury”<sup>323</sup> and to resolve cases on the merits.<sup>324</sup> The second, and lesser concern, which is addressed by rule 1.420(e), is that cases filed and left inactive will be weeded out so as not to hinder the first objective.<sup>325</sup> The majority felt it had created a clear, bright-line test for courts by allowing judges to simply dismiss “cases in which no record activity took place within a year” rather than having to guess whether an order is passive or active.<sup>326</sup> The majority also stated that it balanced the two policy issues by allowing a good faith showing as to why the case should not be dismissed for inactivity.<sup>327</sup> The majority held that the order in *Wilson*, which granted the second motion to appear *pro hac vice*, appeared on the face of the record, and so dismissal of the case per rule 1.420(e) was not proper.<sup>328</sup>

Justice Pariente concurred and concluded that “increased attention to judicial case management and less emphasis on arbitrary application of rule 1.420(e) better serves the administration of justice and the goal of deciding cases on the merits.”<sup>329</sup> Justice Pariente noted that rule 1.420(e) is not as critical a tool for managing the docket as it used to be because of several other rules of court that have recently put more emphasis on judicial case management.<sup>330</sup> Justice Pariente expressed confidence that judges have adequate tools to manage their cases and argued that the majority’s construction of rule 1.420(e) will allow judges to focus on what Justice Pariente believes is most important issue—that is, “what the parties are doing to bring the case to resolution.”<sup>331</sup>

Justice Bell concurred in part and dissented in part. He agreed with the majority that a bright-line test is appropriate for pleadings or orders of the court, but he indicated that trial judges should still have discretion for the “or otherwise” language in the rule.<sup>332</sup> Justice Bell agreed with Justice Wells in the dissent that abiding by the rule for anything besides a pleading or order of the court “will have bad and unfair consequences for many who are subjected to lawsuits that are not fairly and with due diligence progressed to final judgment.”<sup>333</sup> Jus-

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323. FLA. CONST. art. I, § 21.

324. *Wilson*, 923 So. 2d at 367-68.

325. *Id.* at 368.

326. *Id.*

327. *Id.*

328. *Id.* at 369.

329. *Id.* (Pariente, C.J., concurring).

330. *Id.* at 369-70.

331. *Id.* at 370.

332. *Id.* at 371 (Bell, J., concurring in part and dissenting in part).

333. *Id.*

tice Bell indicated that rule 1.420(e) should be interpreted on a case-by-case basis and that any error made by the judge can be remedied.<sup>334</sup>

Justice Wells dissented based on his belief that the majority's bright-line rule will have "bad and unfair consequences" for people dragged into lawsuits that are not pursued in a timely manner.<sup>335</sup> Justice Wells stated that the ad hoc motion in this case should not have been considered "activity" because it did nothing to advance the case towards a resolution.<sup>336</sup> Justice Wells argued that the two-step test laid out in *Del Duca v. Anthony*<sup>337</sup> was interpreted correctly by the Second District in *Metropolitan Dade County v. Hall*.<sup>338</sup> The test from *Del Duca* is (1) whether there has been recorded activity for the year preceding the motion; and (2) if there has been no record, the plaintiff can establish good cause why the action should not be dismissed.<sup>339</sup> The Second District interpreted *Metropolitan Dade County v. Hall* as holding that the first step only requires the court to look at whether there was activity, not to analyze whether that activity was passive or active.<sup>340</sup> Justice Wells cited this interpretation of *Hall* as incorrect and found the interpretation of *Hall* in *Sheen v. Time Inc. Magazine Co.*<sup>341</sup> correct.<sup>342</sup> In *Sheen*, the court concluded that the first part of the test in *Del Duca*, if there is some sort of activity, involves deciding whether the activity "constitutes sufficient record activity to preclude dismissal under rule 1.420(e)."<sup>343</sup> The court in *Sheen* held that *Hall* only dealt with the second step of the *Del Duca* test—the good cause analysis—and that the court "has not receded from *Del Duca*, which teaches that discovery activity filed of record does not always qualify as sufficient record activity for purposes of rule 1.420(e)."<sup>344</sup>

Justice Wells contended that the majority's bright-line test will lead to results for defendants that are "akin to slow-drip water torture."<sup>345</sup> He reasoned that if any activity qualifies as activity that precludes dismissal under 1.420(e), the defendant will be unduly burdened with a stagnant lawsuit that can put his life on hold for a long time.<sup>346</sup> Justice Wells rejected the argument that the defendant can take on the task of moving the case for trial because it would impose on the defendant the burden of paying "substantial and over-

334. *Id.*

335. *Id.* (Wells, J., dissenting).

336. *Id.*

337. 587 So. 2d 1306, 1308-09 (Fla. 1991).

338. *Wilson*, 923 So. 2d at 371-72.

339. *Id.* at 372 (citing *Del Duca*, 587 So. 2d at 1308-09).

340. *Id.*

341. 817 So. 2d 974, 976-78 (Fla. 3d DCA 2002).

342. *Wilson*, 923 So. 2d at 372.

343. *Sheen*, 817 So. 2d at 977.

344. *Id.* at 978 n.4.

345. *Wilson*, 923 So. 2d at 373.

346. *Id.* at 374.

whelming expenses . . . to end a process that [he] did not initiate”; and it is, fundamentally, the plaintiff’s responsibility to bring the claim forward.<sup>347</sup> Justice Wells stated that if a defendant moves for trial, he will be prejudiced by the jury in a case that the plaintiff has not pursued.<sup>348</sup> Also, Justice Wells expressed his belief that the new bright-line rule will allow plaintiffs to abuse the system and extend cases indefinitely, which will prejudice the defense because of witnesses whose memories fade or who move away.<sup>349</sup> Justice Wells would have relied on the court’s prior precedent that “required . . . the party bringing a claim to take some type of activity . . . which can be considered as designed in good faith to prosecute the case . . . to an ultimate conclusion.”<sup>350</sup> Justice Wells admitted that there are some problems with the precedent of the court and suggested that amending the current rule was the best way to solve these problems.<sup>351</sup> He suggested adopting a rule that would provide a bright-line test but with a shorter time limit that would encourage parties who bring claims to be efficient.<sup>352</sup>

The issue of how to interpret rule 1.420(e) has plagued Florida courts for years, and the bright-line test created by the majority will help to alleviate this uncertainty and put the focus of these cases back on the merits. In *Moossun v. Orlando Regional Health Care*,<sup>353</sup> the Florida Supreme Court tried to answer the question of what constituted activity that would preclude dismissal under rule 1.420(e).<sup>354</sup> In that case, the court arbitrarily held that a case management conference ordered by the judge did not constitute record activity, and the case was dismissed.<sup>355</sup> In reaching its decision, the court disapproved of two lower court cases that had held that case management conferences were record activity.<sup>356</sup> In the dissent, Justice Lewis made a good point that courts have held lesser “record activity” as sufficient to preclude dismissal, such as a defendant’s amended answer and a letter sent to a judge and placed in the file.<sup>357</sup> Having judges determine whether activity is sufficient to move litigation toward resolution is a practice of “arbitrary efficiency,” which will

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347. *Id.*

348. *Id.*

349. *Id.*

350. *Id.*

351. *Id.*

352. *Id.* at 374-75.

353. 826 So. 2d 945 (Fla. 2002).

354. *Id.*

355. *Id.* at 951.

356. *Id.* at 950 (citing *Samuels v. Palm Beach Motor Cars Ltd. by Simpson, Inc.*, 618 So. 2d 310 (Fla. 4th DCA 1993), and *Miami Beach Awning Co. v. Heart of the City, Inc.*, 565 So. 2d 739 (Fla. 3d DCA 1990)).

357. *Id.* at 953 (Lewis, J., dissenting).

cause many cases that should be decided on their merits to be thrown out prematurely at the whim of a judge.<sup>358</sup>

The argument that it is not fair to the defendant to keep cases on the docket when the plaintiff is not actively pursuing the case is a valid concern, but unless the court can come up with a foolproof test to decide what activity is sufficient to preclude dismissal, the plaintiff will be just as prejudiced, if not more so, by a non-merit based dismissal of his or her case. Also, the old interpretation of rule 1.420(e) puts attorneys and their clients at a disadvantage because attorneys have no reasonably certain way of knowing what actions are sufficient to preclude dismissal.<sup>359</sup> Attorneys should not have to play a guessing game as to what activity will be considered "record activity." Further, the Florida Supreme Court should not have to grant certiorari to every case involving rule 1.420(e) to decide how the rule should be interpreted, and the new bright-line test prevents this scenario. The old interpretation, without more concrete guidance from the court about how to determine record activity, is too ambiguous and affords judges too much leeway as arbitrary gatekeepers. The bright-line test that the majority puts forth is more manageable, and it will help courts objectively apply rule 1.420(e).

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358. *Id.* at 954.

359. Petitioner's Initial Brief on the Merits at 10, *Moossun v. Orlando Regional Health Care*, 826 So. 2d 945 (Fla. 2002) (No. SC 00-1472).