ISSUE BOOKLET

2011 Florida High School

Appellate Program

A collaborative court education project of

The Florida Law Related Education Association, Inc.

with assistance from
The Florida Bar Law Related Education Committee

sponsored with assistance from

The Florida Bar Foundation
The Florida Bar Appellate Practice Section

Case materials authored by
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Tampa, Florida

Special thanks to
Supreme Court of Florida
District Courts of Appeal
Alan Lazerow

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FLORIDA HIGH SCHOOL
APPELLATE COMPETITION
2011 REGISTRATION FORM

_____ Yes, we would like to submit a brief for the Appellate Competition. Teams are limited to two students per brief. Briefs must be received in Tallahassee by March 25th, 2011.

I. Student's Name: _____

School: _____

Address: _____

City: _____ State: _____ Zip: _____ County: _____

E-mail: _____ Phone: _____ Fax: _____

II. Student's Name: _____

School: _____

Address: _____

City: _____ State: _____ Zip: _____ County: _____

E-mail: _____ Phone: _____ Fax: _____

III. Teacher's Name: _____

School:_____

Address: _____

City: _____ State: _____ Zip: _____

E-mail: _____ Phone: _____ Fax: _____

IV. Attorney Coach's Name: _____

Address: _____

City: _____ State: _____ Zip: _____

Firm Name: _____

E-mail: _____ Phone: _____ Fax: _____

Brief submitted on behalf of: (Check One)

Appellant/Petitioner or Appellee/Respondent

Return 3 copies of this form and 3 copies of the brief to the address listed below.

The Florida Law Related Education Association, Inc.
2930 Kerry Forest Parkway, Suite 202
Tallahassee, Florida 32309
Phone: (850) 386-8223
Fax: (850) 386-8292

Rules and Guidelines

Introduction

An appeal from a trial court to an appellate court normally involves two components: a written brief and an oral argument. In this exercise, you will prepare a brief which will serve as the basis of an oral argument. The top brief writers in each Appellate District will have the opportunity to present oral arguments in each District Court of Appeal. Selected teams will advance in the competition to the state level, with the statewide finalists having the opportunity to present oral arguments in the Florida Supreme Court in Tallahassee (expenses to be covered). District competitions will be held in April 2011 and the State Finals will be held in May 2011 (the FLREA website will be updated in January with specific dates). Each team may submit only one brief. In determining which side you choose, you should read and analyze the cases cited in the case materials.

A. Rule 1: Teams

1. Each team must consist of two students.

2. Each team will submit only one brief for either the petitioner or respondent.

3. Teams will need to prepare oral arguments for the party they wrote a brief supporting.

4. Teams may use attorney coaches and teachers as advisors to guide them through the process of preparing the brief and oral arguments; however, the writing of the briefs must be the sole work of the students. Attorneys and teachers are strictly prohibited from writing any portion of the brief.

5. Team Roster

   Team rosters should be completed and submitted to the competition coordinator before the date of the competition. At registration, teams will be identified only by code.

6. Roll Call

   Before a round of competition begins, the students should submit their roll call sheets, found in the packet, to the judges. No information identifying the team, beyond the students' names and team code, should appear on the form.

B. Rule 2: The Packet

1. Students should assume the moot court packet is complete and factual. Briefs which challenge the validity of issues beyond the scope of the issues questioned in the moot court packet will not be entertained. Students should not reference information contained in the mock trial materials unless so stated in the moot court packet. The moot court and mock trial packets are not interchangeable.

2. Students may only utilize the case law referenced in the moot court packet. Any deviation is a rules violation.

3. Students may not construct additional facts not found in the moot court packet specifically. Any information utilized that cannot be fairly inferred from the moot court information packet will be considered beyond the scope, and therefore, a rules violation. Students cannot cite information from the mock trial materials if not explicitly found in the moot court packet.

C. Rule 3: Competition Format

1. This competition is composed of two phases: (1) the brief-writing phase; and (2) the oral argument phase.

D. Rule 4: The Brief

1. Three copies of the students' brief must be submitted to The Florida Law Related Education Association by March 25, 2011.

2. Each brief should follow the format of the enclosed brief outline. Failure to adhere to the format may lead to disqualification. The entire brief must be no longer than 15 pages, letter-sized 8 ½" x 11." Format the text by allowing one-inch margins. All briefs must be typed and double-spaced. The type style should be Times New Roman 12 point font and each paragraph should be indented. Page numbers should appear centered at the bottom of each page. A cover page should identify "Brief for Petitioner" or "Brief for Respondent" and list the participants' names, school, address, telephone numbers, and email addresses.

3. Pursuant to Rule 2, briefs may not include any case law beyond what is presented in the packet and may not include any manufactured or researched facts beyond what is found in the moot court packet specifically.

4. Legal citation is not required, but is encouraged. Information on legal citations can be found in the appendices of the packet.

E. Rule 5: The Oral Argument

1. Two students must participate for a team per round. Both students must speak and address one of the two questions in each round.

2. Each team is given 20 minutes to present their case, as outlined below:

Speaker	**Time Limit**
Petitioner	*15 minutes*
Attorney - Question 1	7 minutes 30 seconds
Attorney - Question 2	7 minutes 30 seconds
Respondent	*20 minutes*
Attorney - Question 1	10 minutes
Attorney - Question 2	10 minutes
Petitioner - Rebuttal	*5 minutes*

3. Rounds will start on time. If a team, or a portion of the team, fails to appear within ten minutes of the time indicated, the team will compete with an incomplete team. If no student from a team appears within that time limit, the team will be judged to have forfeited the round, and bye round scoring will apply to the other team.

4. Two students will present during any one round of competition. Each student will address one of the two questions presented in the brief. Both students must speak during the oral argument. If the second student does not speak during the course of the oral argument, that student will receive a score of zero (0).

5. No communication should occur between students participating in the round and other team members, coaches, or anyone else in the audience outside the bar. Any communication with anyone outside of the partner student during that round will constitute a rules violation.

6. Students should display dignity and respect to the judges, staff, and other competition personnel.

   Additionally, teams should respect each other. By the time of competition, everyone will have worked very hard to get into competition. Respect should extend to all competitors.

7. Dress should be professional, courtroom attire.

8. During oral arguments, students will be scored based on the criteria found on the score sheet in the packet.

9. Scores and winners will not be disclosed after a round, but verbal critiques will be given.

F. Rule 6: Videotaping/Photography

1. Cameras and recording devices are permitted in certain courtrooms; however, the use of such equipment may not be disruptive **and must be approved in advance of the competition by The Florida Law Related Education Association, Inc.**

2. When one team requests to videotape during a trial, the opposing team must be consulted and their permission granted prior to taping.

G. Rule 7: Viewing an Argument

1. Team members, alternates, attorney coaches, teacher coaches, and any other persons directly associated with a team, except those authorized by the State Advisory Committee, are not allowed to view other teams in competition so long as their team remains in the competition.

2. Judges should maintain order in the courtroom. If observers are disorderly, they will be asked to vacate the premises.

H. Rule 8: Decisions

1. All decisions of the judges are final.

I. Rule 9: Team Advancement

1. Teams will be scored on their written briefs and their oral argument presentations.

2. During the scoring of the written briefs, the panel of evaluators will give each brief a numerical score consistent with the score sheet located on the website. The scores from each of the judges in the panel will be added together to determine the top two to four briefs. The top two to four teams in each district will be given the opportunity to compete in the district competition.

3. During the oral argument competition, a panel of judges will score student performances in each round. The team that receives the higher score from that panel will be awarded that panel's ballot.

4. At the end of the competition, all the ballots will be calculated and the team with the highest number of ballots will advance to the state competition.

5. In the event of a tie, all teams' point scores will be calculated with the highest cumulative points winning. If that results in a tie, the teams' point averages will be found.

6. Briefs will be scored and a Best Brief award presented at the state competition consistent with the practices outlined herein.

7. The state finals will incorporate one preliminary round and one final round of competition. The top two teams will be determined by the panel of DCA judges evaluating the preliminary rounds. These top two teams will meet in the final round of competition. The team receiving the most ballots in the final round will win the competition.

J. Rule 10: Effect of a Bye Round

1. A "bye" becomes necessary when an odd number of teams are present for the tournament. For the purpose of advancement and seeding, when a team draws a bye or wins by default, the winning team for that round will be given a win and the number of ballots and points equal to the average of all winning team's ballots and points of that same round.

K. Rule 11: Eligibility

1. All students on a team must be enrolled in the same public or private school in the district for which they are competing.

2. Students must be enrolled in a Florida high school in order to be eligible.

Note: All questions should be submitted in writing to ABPflreaED@aol.com

Sources of Legal Research

The legal authorities you will be using as your source of research and for purposes of citing to the Court are included or referenced in the case materials.

You may also read articles and legal authorities from other sources and jurisdictions to get ideas and arguments for your brief, but these materials may only be used to get ideas or to enhance your understanding of the legal issues. They may not be cited as authority in this contest. Your Attorney Coach may wish to suggest reading material. While you are encouraged to explore other sources, there is no requirement that you do so.

Information on research using primary and secondary sources is enclosed in the Appendices for your review.

Additionally, you can utilize on-line research through a variety of sources. You should be able to find most of the cited cases at **www.findlaw.com**, under Laws: Cases and Codes. From the Findlaw "Cases and Codes" page, scroll down and click on the U.S. Supreme Court link and pull all cases with (i.e. 123 U.S. 456). For all Circuit Court cases a ___F.2d, F.3d or F.Supp., click on the applicable Circuit Court link. For example, *Doe v. v. Dept. of Pub. Safety*, 271 F.3d 38, 60 (2d Cir. 2001) would be found under the **Second Circuit**.

Remember that in preparing your brief, you can only use the legal authorities included or referenced in these materials. You can research other authorities but you should only use authorities cited in these materials in preparing your briefs and arguments.

Relevant Legal Authority

In developing briefs and oral arguments, student competitors may utilize any authority cited in the mock appellate opinion included in the case materials, including federal and state case law (and various authorities cited therein), federal and state constitutional provisions, federal and state statutes, law review or journal articles, and attorney general opinions. Students should be careful to explore the authorities independently as opposed to relying solely on the context in which they are presented in the fact pattern.

Students may also utilize the following authorities:

Travis v. State, 700 So. 2d 104 (1997)

In re: Holder, 945 So. 2d 1130 (2006)

Iowa Code § 321.276

Fla. Stat. § 316.003

State v. Shank, 795 So. 2d 1067 (2001)

R.I. Gen. Laws § 6-49-3

Morton v. State, 988 So. 2d 698 (2008)

Whitaker v. Department of Insurance & Treasurer, 680 So. 2d 528 (1996)

Op. Atty. Gen. Fla. 2010-22-1 (2010)

Fla. Stat. § 814.484

Note that section 316.90, Florida Statutes, and the two attorney general opinions referenced in the case materials are fictional. They appear on the next few pages and are not accessible online.

Regarding the facts of the underlying case, the students do not need any facts other than what is provided in the mock appellate opinion.

Title XXIII. Motor Vehicles (Chapters 316-325)
Chapter 316. State Uniform Traffic Control (Refs and Annos)

F.S.A. 316.90

§ 316.90. Use of text messaging device while driving prohibited

Currentness

Definitions

(a)(1) In this section the following words have the meanings indicated.

(2) "9-1-1 system" has the meaning stated in § 316.91, Fla. Stat.

(3) "Text messaging device" means a hand held device used to send a text message or an electronic message via a short message service, wireless telephone service, or electronic communication network.

Use of text messaging device while driving prohibited

(b) Subject to subsection (c) of this section, a person may not use a text messaging device to write or send a text message while operating a motor vehicle in motion or in the travel portion of the roadway.

Global positioning systems or contact of 9-1-1 systems

(c) This section does not apply to the use of:

(1) A global positioning system; or

(2) A text messaging device to contact a 9-1-1 system.

End of Document

OPINION OF THE ATTORNEY GENERAL OF FLORIDA

Number: AGO 2010-22-1
Date: February 3, 2010
Subject: Amendment to Senate Bill 321

The Honorable James E. Mason, Jr.
251 Lindhurst House Office Building
Tallahassee, FL 32399-1700

Dear Representative Mason:

You have asked for advice concerning House Bill 192, "Motor Vehicles - Reading Text Message While Driving - Prohibition." Specifically, you have asked whether section 316.90, Florida Statutes, applies to the sending of e-mails and similar messages while driving. It is my view that existing law does apply to e-mail and other messages as well as text messages. It is also my view, however, that it would be advisable to clarify the matter.

Transportation Article § 316.90 was enacted by Chapter 195 (House Bill 72) of 2007. As introduced, it would simply have provided that:

> A person may not use a text messaging device to write, send, or read a text message while operating a motor vehicle.

The House Environmental Matters Committee reported the bill favorable with amendments that (1) created exceptions for use of a GPS and for calling 9-1-1; (2) deleted the prohibition on reading text messages; (3) limited the restriction to actions taken while in motion or in the travel portion of the highway; and (4) defined the term "text messaging device" to mean:

> a hand held device used to send a text message or an electronic message via a short message service, wireless telephone service, or electronic communication network.

House Bill 192 would add the reading of text messages to the section, but would not otherwise alter it.

The term "text message" ordinarily refers to the exchange of brief written messages between mobile phones over cellular networks, Wikipedia: http://en.wikipedia.org/wiki/Text_messaging. The term includes both messages sent using short message service and messages including images, video, and sound content. *Id.*

Around the time that Chapter 195 of 2007 took effect, this office began to get inquiries from the press concerning whether it applied to e-mails, "tweets," and similar communications that do not fall within the literal definition of "text message." I advised that it does, based on the extremely broad definition of "text messaging device" that had been incorporated into the bill. This definition includes machines capable of sending an "electronic message" as well as a "text message," and includes the use of an "electronic communications network" as well as short message services and wireless telephone services.

I continue to believe that this advice is correct. The matter is not, however, completely clear. As a result, I would recommend clarifying language if the section is to be amended.

Sincerely,

Bill Morgan

Bill Morgan
Attorney General

OPINION OF THE ATTORNEY GENERAL OF FLORIDA

Number: AGO 2010-42-1
Date: April 5, 2010
Subject: Amendment to Senate Bill 321

The Honorable E J. Patterson
416 Robertson Senate Office Building
Tallahassee, FL 32399-1700

Dear Senator Patterson:

You have asked for advice concerning an amendment to Senate Bill 321, "The Representative John Anderson Electronic Communications Traffic Safety Act of 2010." Specifically, you have asked how the amendment changed the bill. It is my view that the effect of the amendment is to take all forms of sending messages by use of a handheld telephone, including text messaging, SMS, and e-mail, out of Senate Bill 321, whether they are covered by the prohibition in section 316.90, Florida Statutes, or not.

As discussed in my March 19, 2010 letter to you, Senate Bill 321 prohibits any use of a handheld telephone by a school bus driver, or by a person who is 18 years old or older and has a provisional license, while operating a motor vehicle, and prohibits any other driver of a motor vehicle that is in motion from using his or her hands to "use a handheld telephone other than to initiate or terminate a wireless telephone call or to turn on or turn off the handheld telephone." The bill as introduced would have covered any service that uses normal wireless telephone transmission to convey information, whether it is talking, texting, e-mailing or posting on Facebook or a similar Internet social networking site. It would also include use of the GPS function on a Blackberry or similar device that is also "used to access wireless telephone service," but would not include the use of a traditional GPS like a Garmin.

The amendment in question, SB0321/613823/1, by Senator Slater, altered the scope provision of new § 316.91 to specify that it does not apply to "use of a handheld telephone as a text messaging device as defined in § 316.90 of this subtitle." The amendment was described on the floor as making it clear that the bill does not cover text messaging, that text messaging would continue to be covered by section 316.90, Florida Statutes, and that it would remain a primary offense.[1] It does have this effect, but it also takes actions out of § 316.91 that are not covered by §316.90.

Section 316.90(a)(3), Florida Statutes, defines the term "text messaging device" as "a hand held device used to send a text message or an electronic message via a short message service, wireless telephone service, or electronic communication network." Thus, under the amendment, any person, including a school bus driver or a person who is 18 years old or older and has a provisional license, would be covered by § 316.90 rather than § 316.91 when using their handheld telephone to send a text message, or an electronic message via a short message service, wireless telephone service, or electronic communications network. Section 316.90(b) prohibits a person from using "a text messaging device to write or send a text message while operating a motor vehicle in motion or in the travel portion of the roadway." It does not prevent a person from reading text messages, or from using the buttons on the phone to scroll through a message or bring up another message. Thus, the prohibition in § 316.90 is clearly narrower than that which would have been imposed by § 316.91.

In addition, § 316.90 is not exactly a model of clarity. While the definition of "text messaging device" includes a variety of ways to send messages, the actual prohibition refers only to text messages. This office has taken the position that all forms of messaging mentioned in the definition of "text messaging device" are included in the prohibition of text messaging, but has also suggested that clarifying

[1] Senate Proceedings, Monday March 22, 2010 at 2:21:20 *et seq.*

language would be advisable. Letter to the Honorable James E. Mason, Jr. dated February 3, 2010. It is not impossible that a court could give the prohibition a more narrow reading, with the result that the use of e-mail would not be covered by either section.

Sincerely,

Bill Morgan

Bill Morgan
Attorney General

Format of the Brief

Each brief should follow the format of the enclosed brief outline. Failure to adhere to the format may lead to disqualification. The entire brief must be no longer than 15 pages, letter-sized 8 ½" x 11." Format the text by allowing one-inch margins. All briefs must be typed and double-spaced. The type style should be Times New Roman 12 point font and each paragraph should be indented. Page numbers should appear centered at the bottom of each page. A cover page should identify "Brief for Petitioner" or "Brief for Respondent" and list the participants' names, school, addresses, telephone numbers, and email addresses.

Do not be overly concerned with legal citation; mistakes will not hurt your score. You may even choose not to use legal citation, so long as you make it clear what case you are referencing.

If you do try to use legal citation, here are some pointers - you may want to use the ***Blue Book, a Uniform System of Citation,*** (18th ed., 2005), which should be available at any local law library for reference. However, you may simply follow the form of citation used in the sample brief.

When first citing a U.S. Supreme Court case, you should cite to the U.S. Reporter. For example, on page 6 of the sample brief, the petitioner cites to "*Jones v. United States*, 463 U.S. 354, 364 (1983)." The number 463 is the volume number, "U.S." stands for the U.S. Reporter, the books in which the Supreme Court cases are published, 354 is the first page of the cited case, and 364 is the exact page in the case upon which either the quoted language or the referenced portion of the case appears. *All subsequent cites* to the same case, immediately following that full cite, should be "*See id*." cites. However, if the referenced portion of the case is on a different page, your cite should appear as "*See id*. at _____" (that specific page on which the quote or reference is located).

If a case has been previously cited but not immediately previously cited, then a shortened cite form should be used. For example, in the sample brief, *Jones v. United States*, is cited on page 6, followed by a "*See id*." cite. Then on page 7, the *United States v. Ward* case is cited in its entirety. The petitioner then must again cite to *Jones v. United States*. If the petition were to use a "*See id*." cite there would be confusion because the reader would assume that the petitioner was referring to the *Ward* case, the immediately preceding case. Therefore, the petitioner abbreviated the case name and simply lists the
volume number of the U.S. Reporter, 463 and only the specific page in the case on which the reference appears after the word "at." If the petitioner went on to cite to the *Jones* case again, he or she could once again use a simple "*See id*. at _____" cite.

Again, it is not necessary that you follow the exact legal citation form used in the sample brief. Do the best you can. We are more concerned with the arguments you choose to make.

You will note that on the cover page of the sample brief, in the lower right hand corner, the petitioner's attorney has only identified himself or herself as counsel for petitioner. **You should include your full name, followed by the names and address of your high school, telephone numbers, and email addresses where you can be reached both at school and home.**

Brief should conform to the following outline:

I. Cover Page

II. Table of Authorities

III. Opinion Below

IV. Constitutional and Policy Provisions Involved

V. Questions Presented

VI. Statement of the Case

VII. Summary of the Arguments

VIII. Argument

a. Question I

b. Question II

IX. Conclusion

Sections of the Brief

Cover Page

Follow the guidelines and see sample cover page.

Table of Authorities

- List cases you used in your arguments to support your position.
- List relevant constitutional and policy provisions.

Opinion Below

Include a short statement of the proceedings in the lower court/court below and the ruling or judgment of the trial court which is being appealed from.

Constitutional and Policy Provisions Involved

Spell out the relevant provisions in the U.S. Constitution and policy provisions involved in the case from either the perspective of the petitioner or respondent.

Questions Presented

Recite the two constitutional questions or issues on appeal before this Court.

Statement of the Case

This will encompass a statement of the important issues and facts before the Court from either Petitioner's or Respondent's perspective. This section should incorporate (1) a concise (one or two sentences if possible) introductory explanation of the general nature of the case as a lead-in to the brief; (2) a short statement of the proceedings in the court below and the ruling or judgment of the trial court which is being appealed from; (3) a concise statement of the issues before the Court on appeal from the Petitioner's or Respondent's perspective; and (4) a concise statement of the important facts. This section should be presented in a light favorable to your side and contentions in your case.

Summary of Argument

Include three or four paragraphs highlighting a summary of your arguments supporting either the Petitioner's or Respondent's position. Essentially this is a short synopsis of your arguments which will follow. See below.

Arguments

This portion of the brief should discuss your position on the facts, arguments, and legal authorities (statutes and case law) which support your position on the questions presented. If the case law is favorable to your side, show how the prior cases are applicable to the facts or analysis of that case from the present case. You may wish to select the cases which most strongly support your arguments.

Conclusion

This part is a short summary of your answers to the issues on appeal (the questions presented) and should consist of only a few sentences. It is a very concise statement of why you want the appellate court to agree with you. The conclusion should also state what specific relief is being requested.

Submitting the Brief

Briefs should be submitted in the required format to The Florida Law Related Education Association, Inc. and should be **received by March 25, 2011**. The winning brief writers will be notified for dates of the local oral arguments.

Submit all briefs to the following address.

The Florida Law Related Education Association, Inc.
2930 Kerry Forest Parkway, Suite 202
Tallahassee, Florida 32309
850-386-8223
Fax 850-386-8292

DISTRICT COURT OF APPEAL OF FLORIDA
SIXTH DISTRICT

RILEY GARDNER,

Appellant,

v. Case No.: 6D10-0427

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed November 20, 2010.

An appeal from the Circuit Court for the Twenty First Judicial Circuit in and for Crist County, Florida.

TANNER, Judge.

Appellant Riley Gardner ("Gardner"), the defendant below, was charged with and convicted of reckless driving and using a text messaging device while driving, in violation of section 316.90, Florida Statutes. Prior to the conviction, Gardner had moved to dismiss the count for violation of section 316.90, arguing that the statute was unconstitutionally vague and overbroad. The trial court denied the motion. Gardner now appeals his conviction, arguing that the court erred in finding that section 316.90 is constitutional. For the reasons stated below, we agree and reverse the trial court's order.

I. Facts and Procedural History

In the early morning hours of May 12, 2008, Gardner was driving a motor vehicle containing other teenagers as passengers. Gardner was on Legend Parkway in Crist County when he lost control of his vehicle. The vehicle jumped a curb and hit a telephone pole, resulting in significant injuries to at least one of the passengers.[2]

After the accident, Officer Adrian Knight of the City of Springfield Police Department arrived on the scene to investigate. Multiple witnesses, including passengers in the car, reported that Gardner was "texting" on his cell phone while driving at the moment he lost control of the car. Further investigation revealed that Gardner had an Apple iPhone and had been communicating with his girlfriend, Taylor Bowling, that morning via a "chat" session on his iPhone's Facebook application or "app," as it is commonly called. Officer Knight determined that Gardner had been writing an instant message to Ms. Bowling via the Facebook application on his cell phone at the time he lost control of the vehicle. Officer Knight arrested Gardner for

[2] One of the passengers, Sidney Young, filed a civil lawsuit against Gardner in 2009. That lawsuit – styled *Sidney Young v. Riley Gardner*, Case No. 09-009-H – is still pending in the Twenty First Judicial Circuit in and for Crist County.

reckless driving and violation of section 316.90, Florida Statutes, which prohibits the use of "a text messaging device to write or send a text message while operating a motor vehicle in motion or in the travel portion of the roadway."

Gardner was subsequently charged with reckless driving and using a text messaging device while driving in violation of section 316.90. Gardner moved to dismiss the count under section 316.90, arguing that the statute is unconstitutionally vague as to the meaning of its term "text message" and unconstitutionally overbroad for its application to drivers who are parked or stopped in a roadway. The trial court rejected Gardner's arguments, found the statute constitutional, and denied the motion. Gardner was subsequently convicted of violating section 316.90.

II. Standard

"A trial court decision on the constitutionality of a statute is reviewed by the *de novo* standard, because it presents a pure issue of law. The appellate court is not required to defer to the judgment of the trial court." *State v. Wells*, 965 So. 2d 834, 837 (Fla. 1st DCA 2007). Therefore, this Court reviews the constitutionality of section 316.90 without deference to the trial court or the presumption that the trial court's decision was correct. That being said, "[i]f it is reasonably possible to do so, a court is obligated to interpret statutes in such a manner as to uphold their constitutionality." *Id.*

On appeal, Gardner argues that section 316.90 violates due process rights under the Article I, Section 9 of the Florida Constitution and the Fifth and Fourteenth Amendments of the United States Constitution, because it is (1) vague as to what is meant by the statute's term "text message"; and (2) overbroad in prohibiting the use of a text messaging device while a vehicle is stopped or parked. We address each argument in turn.

III. Vagueness

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *State v. Shank*, 795 So. 2d 1067, 1070 (Fla. 4th DCA 2001); *accord Wyche v. State*, 619 So. 2d 231, 236 (Fla. 1993). "The requirements of due process are not fulfilled unless the language of a penal statute is sufficiently definite to apprise those to whom it applies of the conduct it prohibits." *Bertens v. Stewart*, 453 So. 2d 92, 93 (Fla. 2d DCA 1984). "It is constitutionally impermissible for a statute to contain such vague language that a person of common intelligence must speculate about its meaning and subject himself to punishment if his guess is wrong." *Id.*

The vagueness doctrine, however, is intended to combat more than inadequate notice to citizens of what conduct is prohibited. As another appellate court has explained:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges,

> and juries for resolution on an *ad hoc* and subjective basis with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.

Shank, 795 So. 2d at 1070 (quotations omitted); *accord City of Pompano Beach v. Capalbo*, 455 So. 2d 468, 470 (Fla. 4th DCA 1984). There are thus three underlying policies of the vagueness doctrine: (1) fair notice of the conduct prohibited; (2) clear standards for those enforcing the law; and (3) avoiding the unintended consequence of citizens refraining from exercising lawful expression for fear of violating the law.

Section 316.90 provides, in relevant part, that "a person may not use a text messaging device to write or send a text message while operating a motor vehicle in motion or in the travel portion of the roadway." § 316.90(b), Fla. Stat. The source of debate in this appeal concerns the meaning of the term "text message." Gardner argues that a "text message" could mean one or more of any number of things. Its meaning could be limited to what "text message" commonly refers to in everyday language, which is a short message sent from one cell phone to another over a cellular network, typically via a short messaging service (SMS). Or, the term could mean a SMS message, as well as e-mail, a post or message on a social networking website such as Facebook or Twitter, or a variety of other communications that can be done on a modern day cell phone. On the other hand, the State argues that the term is clear, when read in context, and refers to any type-written messages from the sender to another person or group of people.

The term "text message" is not defined in the statute. The Legislature's failure to define this term, however, does not necessarily render the statute unconstitutionally vague. Undefined statutory terms are to be construed according to their plain and ordinary meaning. *Bertens*, 453 So. 2d at 94. This can be ascertained by reference to a dictionary, *State v. Barnes*, 686 So. 2d 633, 637 (Fla. 2d DCA 1996), as well as "case law or related statutory provisions that define the term," *Bertens*, 453 So. 2d at 94.

The Merriam-Webster Online Dictionary defines the term "text message" as "a short message sent electronically, usually from one cell phone to another." Text Message, http://www.merriam-webster.com/dictionary/text%20message (last visited December 22, 2010). This definition certainly suggests that "text message" is most often used to refer to a short message sent from one cell phone to another via a cellular network. But because it uses the term "usually," the definition must be construed to mean that there are other forms of "text messages." "A short message sent electronically" can mean any number of things, including an e-mail or a post or message to a social networking website. Consulting the definition of "message" is not much help, as that word is defined as "a communication in writing, speech, or by signals." Message, http://www.merriam-webster.com/dictionary/message (last visited Apr. 4, 2010). Essentially, then, the dictionary provides for a definition of "text message" that is "a short communication sent electronically." With that definition, one could reasonably conclude that any conceivable communication on a cell phone could be considered a "text message." *See* Alan Lazerow, Near Impossible to Enforce at Best, Unconstitutional at Worst: The Consequences of Maryland's Text-Messaging Ban on Drivers, 17 Rich. J.L. & Tech. 1, 25 (2010). Indeed, one could argue that simply opening an internet browser on a cell phone could constitute sending a "text message," since "internet" is defined as a form of "electronic *communications* network."

Internet, http://www.merriam-webster.com/dictionary/internet (last visited Apr. 4, 2010) (emphasis added); Lazerow, 17 Rich J.L. & Tech. at 25.

The commonly understood meaning of "text message," however, does not include the breadth of activities that can reasonably be encompassed within the dictionary definition. *Se. Fisheries Ass'n, Inc. v. Dep't of Natural Res.*, 453 So.2d 1351, 1353 (Fla. 1984) ("In determining whether a statute is vague, common understanding and reason must be used.") In everyday language, "text message" refers to a short message sent from one cell phone to another over a cellular network. Lazerow, 17 Rich J.L. & Tech. at 26. It is not typically meant to include using a cell phone to post or send a message on social networking websites, or even to send an e-mail. *Id.* This common understanding is reflected by the regular use of the words "text" or "texting" to refer exclusively to sending a message from one cell phone to another, whereas the words "post," "posting," "e-mail" and "e-mailing" refer to engaging in the other activities mentioned. *Id.*

As for case law definitions of the term, the parties have not cited any to us, nor have we been able to find any such cases with our own research. Likewise, there are no related statutory provisions that define the term "text message." We note that the Legislature has used the term "text message" in other, unrelated statutes. Although the term is not defined in those statutes, the context suggests that the Legislature intended the term to have its commonly understood meaning – *i.e.*, a short message sent from one cell phone to another via a cellular network – and to not include other messages such as e-mail. *E.g.*, § 106.143(f), Fla. Stat. ("[d]istributed as a text message or other message via Short Message Service"); § 874.03, Fla. Stat. (defining "electronic communication" as including "text messages . . . electronic mail messages . . . and instant message real-time communications with other individuals through the Internet or other means").

As the dissent points out, section 316.90 defines the term "text messaging device" as "a hand held device used to send a text message or an electronic message via a short message service, wireless telephone service, or electronic communication network." § 316.90(a)(3). On the one hand, because of the reference to electronic communication networks (*e.g.*, the internet), this definition can be read to suggest that the legislature intended that any messages that can be sent from a cell phone are prohibited while driving. Thus, the reasoning goes, this broad definition of "text messaging device" should lead to a similarly broad interpretation of "text message." On the other hand, this definition refers to a "text message *or* electronic message," which can be read to suggest that a text message is different from, or merely one form of, an electronic message. Does this definition suggest that either a text message or an electronic message can be sent via an electronic communication network such as the internet? Or does it suggest that a text message can be sent via a SMS or wireless telephone service, and an electronic message can be sent via an electronic communication network? In light of the varying implications of this definition, we do not believe that section 316.90(a)(3) clarifies the meaning of the term "text message"; instead, it adds to the confusion.

Given the above discussion, we find that section 316.90, Florida Statutes, is unconstitutionally vague because a person of common intelligence must speculate about what conduct is prohibited. The only conduct that the statute seems to clearly prohibit is using a cell phone to write or send a short message to another cell phone over a cellular network. But beyond that, a citizen is left hopelessly in doubt.

One could reasonably conclude, as Gardner apparently did, that the statute only prohibits writing and sending phone-to-phone messages. At the same time, one could reasonably conclude that the statute prevents all forms of messaging on a cell phone, whether over a cellular network or the internet. Based on the purpose of the legislation, we could guess that the Legislature intended the latter, but this Court "is not a super-legislature that second guesses what a legislature really meant to say; the legislated language speaks for itself." *Capalbo*, 455 So. 2d at 469. Here, the legislated language is vague and subject to multiple interpretations.

In coming to our conclusion today, we are mindful of the important safety concerns that underlie section 316.90. Distracted driving is a significant problem in our state that no doubt leads to many injuries and deaths. But, "no matter how laudable a piece of legislation, or rule, may be in the minds of those who sponsor them, objective guidelines and standards must appear expressly in, or be within the realm of reasonable inference from, the language of the law or rule." *Bertens*, 453 So. 2d at 9. We are also guided by the principle that, despite the general presumption in favor of a statute's constitutionality, "[w]hen construing a penal statute against an attack of vagueness, where there is doubt, the doubt should be resolved in favor of the citizen and against the state." *Wells*, 965 So. 2d at 838. We think this principle is particularly applicable where, as here, free speech rights are implicated by the statute in question.

IV. Overbreadth

Gardner also argues that section 316.90, Florida Statutes, is unconstitutionally overbroad. Although the doctrines of vagueness and overbreadth appear to overlap at times, they are different in scope. As the Florida Supreme Court explained:

> Too often, courts and lawyers use the terms 'overbroad' and 'vague' interchangeably. It should be understood that the doctrines of overbreadth and vagueness are separate and distinct. The overbreadth doctrine applies only if the legislation is susceptible of application to conduct protected by the First Amendment. The vagueness doctrine has a broader application, however, because it was developed to assure compliance with the due process clause of the United States Constitution.

Se. Fisheries, 453 So. 2d at 1353 (citations and quotations omitted). Here, the statute in question implicates free speech rights under the First Amendment; therefore, both the doctrine of vagueness and the doctrine of overbreadth apply.[3]

"Generally, a statute that has the potential to criminalize constitutionally protected, innocent activity as well as illegal, unprotected activity is impermissibly overbroad, and violates due process." *State v. Montas*, 993 So. 2d 1127, 1131 (Fla. 5th DCA 2008); *accord Siplin v. State*, 972 So. 2d 982, 989 n. 8 (Fla. 5th DCA 2007) ("Generally, it violates substantive due process to criminalize purely innocent conduct.") (citing *State v. Giorgetti*, 868 So. 2d 512 (Fla.2004)). "In the context of the First Amendment, an overbroad statute is one that restricts

[3] It is clear that free speech rights apply to electronic communications. *See Simmons v. State*, 886 So. 2d 399, 404 (Fla. 2004) ("The analysis for protection of speech under the First Amendment is the same when the speech occurs in a computer chat room with text messaging as when the speech occurs in a normal room with everyone physically present speaking audibly.").

protected speech or conduct." *Montas*, 993 So. 2d at 1130. "Even if speech or conduct is unprotected by the First Amendment, the overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process." *Id.* (quotations omitted).

If a statute potentially implicates protected speech, then it is unconstitutionally overbroad unless it "is supported by a compelling governmental interest and is narrowly drawn to protect that interest." *Id.*; *accord Wyche*, 619 So. 2d at 234 ("When lawmakers attempt to restrict or burden fundamental and basic rights such as these, the laws must not only be directed toward a legitimate public purpose, but they must be drawn as narrowly as possible.").

The parties do not dispute that section 316.90 potentially implicates and restricts protected speech, since a person writing or sending a text message could very well be engaging in a number of forms of speech protected by the First Amendment. Nor do the parties dispute that the statute is intended to serve a compelling interest (the safety of drivers on the road). The source of debate is whether the statute is narrowly tailored to serve that purpose.

As Gardner points out, section 316.90 applies not only to persons operating a motor vehicle "in motion," but also to those operating a vehicle "in the travel portion of the roadway." § 316.90(b), Fla. Stat. The statute thus prohibits the writing or sending of text messages even when the vehicle is parked or stopped, so long as it is "in the travel portion of the roadway." So, for example, text messaging is prohibited if a vehicle is at rest at a stop light, in a severe traffic jam, waiting for a train to pass, or even when a vehicle is stalled or inoperable due to a technical problem.

We agree with Gardner that section 316.90 is unconstitutionally overbroad because it restricts a person's right to communicate even when the motor vehicle is not in motion.[4] The purpose of the legislation is to prevent drivers from being distracted by text messaging and causing accidents that result in serious injuries and death. These safety concerns, however, are not substantially at issue when a motor vehicle is not moving. Writing or sending a text message while the vehicle is stopped or at rest does not present a significant enough possibility of injury or death to justify the restriction on protected speech, particularly where, for example, a vehicle is parked in a roadway due to vehicle inoperability or a severe traffic jam where no cars are moving or have moved for a long time. Indeed, other state legislatures that have enacted legislation banning text messaging while driving have specifically exempted persons who are operating a vehicle that is lawfully parked or stopped. *E.g.*, Mo. Ann. Stat. § 304.820(10); R.I. Gen. Laws § 31-22-30(c)(3).

The State argues that we should not find section 316.90 to be overbroad because it restricts only one means of speech (a text message), and a driver can communicate via a

[4] Although Gardner's vehicle was in motion when he was allegedly writing a "text message," he still has standing to challenge the overbreadth of section 316.90. This is because the "overbreadth doctrine permits an individual whose own speech or conduct may be prohibited to challenge an enactment facially because it also threatens others not before the court – those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid. The doctrine contemplates the pragmatic judicial assumption that an overbroad statute will have a chilling effect on protected expression." *Wyche*, 619 So. 2d at 235 (quotations omitted).

telephone call while driving under circumstances where it is safe to do so. However, "the mere existence of an alternative means of expression . . . will not by itself justify a restraint on the particular means that the speaker finds more effective." *Daley v. City of Sarasota*, 752 So. 2d 124, 125 (Fla. 2d DCA 2000). We are thus not persuaded by the State's argument.

In sum, although section 316.90 "addresses a compelling government interest, it is not narrowly-tailored to ensure that there is no more infringement than is necessary to protect that interest." *Montas*, 993 So. 2d at 1132. If the Legislature wants to proscribe protected speech in the name of safety, then it must narrowly draft such legislation so as to not punish innocent conduct.

V. Conclusion

For the foregoing reasons, we find that section 316.90, Florida Statutes, violates due process, as it is both unconstitutionally vague and overbroad on its face. The ruling of the trial court is therefore reversed, and this proceeding is remanded for further proceedings consistent with this decision.

Reversed and remanded.

KAZNER and TATE, JJ., concur.

GARY, J. dissents.

I respectfully dissent because I find section 316.90, Florida Statutes, to be neither unconstitutionally vague nor overbroad.

I begin with the long-standing principle that "[a] statute cannot be declared unconstitutional unless it is determined to be invalid beyond a reasonable doubt." *Reaves v. State*, 979 So. 2d 1066, 1071 (Fla. 1st DCA 2008). "When reasonably possible and consistent with constitutional rights, all doubts concerning a statute should be resolved in favor of its validity." *Id.* "There is a strong presumption in the law that a state statute is constitutionally valid." *Gonzalez v. State*, 941 So. 2d 1226, 1228 (Fla. 5th DCA 2006) (quotations omitted).

I. Vagueness

Section 316.90, when read in context, is not so vague that an ordinary citizen is left in doubt regarding what is proscribed. "When engaging in statutory interpretation, related statutory provisions must be read together to achieve a consistent whole." *Reaves*, 979 So. 2d at 1072 (quotations omitted). Here, although the Legislature did not define the term "text message" in section 316.90, it did define the term "text messaging device" in the very same statute. That term is defined as "a hand held device used to send a text message or an electronic message via a short message service, wireless telephone service, or electronic communication network." § 316.90(a)(3). This broad definition leaves no doubt that the writing or sending of any messages on a cell phone – whether via SMS, a cellular network, or the internet – is prohibited while driving a motor vehicle.

If the Legislature intended for a "text message" to mean only a phone-to-phone message sent over a cellular network, then it would be unnecessary to define a "text messaging device" as

something that can send messages through other means. Instead, the Legislature would logically have defined a "text messaging device" as one that merely sends messages via a short message service or wireless telephone service.

Unlike the majority, I do not view the inclusion of the phrase "or an electronic message" in section 316.90(a)(3) as leading to an interpretation that a "text message" is something different from an "electronic message." The use of the word "or," when read in the context of the statute, indicates that "electronic message" is an alternative way of describing "text message." This is the only logical way to read the statute. Otherwise, if an "electronic message" is actually different from a "text message," and the writing or sending of an "electronic message" is thus not prohibited by the statute, then it would render the Legislature's inclusion of the phrase "or an electronic message" meaningless.

I note that, prior to today, the only government authority that has opined on the construction of section 316.90 is the Attorney General of Florida. His interpretation is at odds with the majority's opinion in this case. He concluded that, "based on the extremely broad definition of 'text messaging device,'" the statute prohibits not only phone-to-phone messages over a cellular network, but also e-mails, posts to social networking websites, and other "similar communications that do not fall within the literal definition of 'text message.'" Op. Atty. Gen. Fla. 2010-22-1 (2010). "Although an opinion of the Attorney General is not binding on a court, it is entitled to careful consideration and generally should be regarded as highly persuasive." *State v. Family Bank of Hallendale*, 623 So. 2d 474, 478 (Fla. 1993).

In sum, when all provisions of section 316.90 are read together, it is clear that the statute is prohibiting the writing or sending of any messages on a cell phone while driving a motor vehicle. The Legislature's failure to define "text message" is not fatal in light of the guidance provided by other provisions in the statute. *See Reaves*, 979 So. 2d at 1072 (even though definition of "racing" in Florida statute prohibiting racing on a highway did not include element of competition, other provisions of statute made it clear that "the statute cannot be applied unless vehicles are 'competing' with each other").

This conclusion is supported by the obvious purpose of the statute. There is no dispute that the intent behind section 316.90 is to prevent drivers from being distracted by taking their eyes off the road and hands off the wheel to type and send messages on their cell phones. *See Cesin v. State*, 288 So. 2d 473, 475 (Fla. 1974) (rejecting vagueness argument because, *inter alia*, "[t]here can be no misunderstanding the purpose for which the statute was enacted"). There is no ascertainable reason why the Legislature would proscribe the writing and sending of phone-to-phone messages sent over a cellular network and not likewise proscribe the use of a cell phone to write and send e-mails, posts on social networking website, instant messages in a "chat" session on Facebook, and the like. Although the majority believes the Legislature could have been more precise in drafting the statute, "[t]he fact that a legislative body may have chosen clearer language to achieve the desired statutory goal does not render the statute actually drafted unconstitutionally vague." *Barnes*, 686 So. 2d at 637.

Because the meaning of "text message" is "within the realm of reasonable inference from the language of the statute," *Cesin*, 288 So. 2d at 475, I agree with the trial court that section 316.90, Florida Statutes, is not unconstitutionally vague.

II. Overbreadth

I also do not find section 316.90 to be unconstitutionally overbroad. "[T]he overbreadth doctrine is an unusual doctrine that must be used sparingly, especially where the statute in question is primarily meant to regulate conduct and not merely pure speech." *Montas*, 993 So. 2d at 1129-30 (quotations omitted). The overbreadth of a statute must be not only real, but also substantial, when viewed in comparison to the statute's legitimate sweep. *State v. DuFresne*, 782 So. 2d 888, 891 (Fla. 4th DCA 2001).

As the majority points out, section 316.90 serves a very compelling public interest in seeking to prevent distracted driving and the serious injuries and death that result therefrom. What the majority fails to appreciate, however, is that this interest is substantially served by keeping drivers alert and paying attention even when their vehicles are at a rest in a roadway. When a vehicle is stopped at a red light or in traffic, it does not give the driver free reign to ignore the surroundings and traffic circumstances around him or her. Those situations present the possibility of countless circumstances where accidents can occur, both with other vehicles and pedestrians, if a driver is not paying attention. As but one example, a text-messaging driver stopped at a red light may not notice that another vehicle is speeding out of control and heading towards his or her vehicle, thereby preventing the text-messaging driver from moving (or honking a horn) to avoid the collision. As another example, a text-messaging driver with a radio turned on loud may not notice a police car or ambulance that is approaching and needing of the right-of-way. I could go on, but suffice it to say, the Legislature has a substantial interest in preventing distracted drivers on the roadway, whether their vehicle is moving at the moment or not.

I believe the majority places too much significance on the fact that section 316.90 can be read to apply to a person operating a motor vehicle that is parked due to vehicle inoperability and the like. These marginal or fringe applications of the statute, which are likely not in accord with the Legislature's intent, are best remedied through as-applied litigation. *See J.L.S. v. State*, 947 So. 2d 641, 645-46 (Fla. 3d DCA 2007). They do not render the statute substantially overbroad.

I find it particularly significant that section 316.90 is primarily meant to regulate conduct – *i.e.*, the act of typing on a small screen of a hand held device – rather than pure speech. Indeed, the statute does not prohibit a driver from all means of communicating with others outside of his or her vehicle; instead, it merely prohibits one means of doing so and only in a specific circumstance. A citizen may use a cell phone to make telephone calls while driving, and he or she may write and send text messages even when the vehicle is in motion, so long as it is not in the traveled portion of the roadway (*e.g.*, in driveways, parking lots, etc.). Being unable to write or send a text message while operating a vehicle on the traveled portion of a roadway is merely "a minimal inconvenience which affords effective protection against a significant possibility of grave or fatal injury." *State v. Eitel*, 227 So. 2d 489, 491 (Fla. 1969). "This limited inconvenience is no greater than requiring the use of seat belts or motorcycle helmets, or prohibiting cigarette smoking in public buildings." *People v. Neville*, 737 N.Y.S.2d 251, 255 (N.Y. Just. Ct. 2002) (upholding constitutionality of New York's statute banning any cell phone use while a vehicle is in motion).

For these reasons, I do not find that Gardner has met his "burden of demonstrating from both the text of the statute and from actual facts that substantial overbreadth exists." *J.L.S.*, 947 So. 2d at 645. The Legislature has narrowly tailored section 316.90 to serve the interests of public safety. Any applications of this statute that would implicate "innocent" conduct can be

addressed on a case-by-case basis, thereby making it inappropriate to employ the unusual doctrine of overbreadth to invalidate this statute. *Id.* at 646 ("since any application of [the statute] which violates the First Amendment can be remedied through as-applied litigation, we decline to use the 'strong medicine' of overbreadth to invalidate this entire statute").

III. Conclusion

Because I am not convinced that section 316.90, Florida Statutes, is unconstitutional beyond a reasonable doubt, I would affirm the trial court's ruling.

Supreme Court of Florida

Case No.: SC11-300
Lower Tribunal No.: 6D10-0427

STATE OF FLORIDA

Appellant,

vs.

RILEY GARDNER,

Appellee.

On consideration of the Notice of Appeal, jurisdiction of this Court being invoked by article V, section 3(b)(1) of the Florida Constitution, the above-styled case is hereby acknowledged. Upon direction from the justices of the Court, it is hereby ordered that the following issues will be briefed and argued to the Court by the parties:

1. Whether section 316.90, Florida Statutes, is unconstitutionally vague as to the meaning of the term "text message";

   and

2. Whether section 316.90, Florida Statutes, is unconstitutionally overbroad due to its application to persons operating motor vehicles that are parked or stopped in the travel portion of the roadway.

Dated: January 3, 2011.

Timothy Hall

Timothy Hall
Clerk, Supreme Court