

Is the “Fairly Debatable” Standard for Bond Pending Appeal Being Applied Unfairly?



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“[T]he unjust deprivation for a single hour of one man’s liberty, creates a debt that can never be repaid.”¹

INTRODUCTION

Rule 3.691, Florida Rules of Criminal Procedure, provides, inter alia, that “no person may be admitted to bail on appeal from a conviction of a felony unless the defendant establishes that the appeal is taken in good faith, on grounds *fairly* debatable, and not frivolous....” (emphasis supplied). What that standard means, and how it should be determined, is critical to our clients seeking bond pending appeal.

Post-trial release for eligible defendants is discretionary, but the decision is guided by the factors set forth in *Younghans v. State*,² the provisions of section 903.132(1), Florida Statutes, and Rule 3.691. Even for convicted persons who appear to meet the criteria, post-trial release is often denied.³ This case study illustrates why the denial of bond pending appeal, if based primarily on the trial court’s confidence in its own legal rulings, may well be difficult to remedy on review, because of the deferential abuse of discretion standard

of review and because appellate courts may be unwilling to pre-judge the legal issues presented on less than a full record. This article proposes an alternative approach, taking this factor out of the courts’ domain and crediting counsel’s professional assessment that “fairly debatable” issues will be raised on appeal. Trial courts should confine their analysis to whether a convicted person, if released pending appeal, would be a danger to the community or a flight risk. Trial courts should not be permitted to discount the legal potential of issues to be raised simply because they question the court’s legal analysis and judgment.

In Florida’s first prosecution under section 1006.63, Fla. Stat. (2005), which criminalized hazing and makes it a felony offense where the hazing results in “serious bodily injury” or death, co-defendants Michael Morton and Jason Harris were convicted after a high-profile Tallahassee trial in which five Florida A&M University (FAMU) fraternity-brother defendants were charged with felony hazing of a candidate for admission to the fraternity.⁴ Both defendants were sentenced to two years imprisonment followed by probation. Harris sought bond pending appeal.⁵

Jason Harris was the poster child for release pending appeal: an academically successful college student with no criminal history, convicted as a “principal,” not as a person who personally inflicted any bodily injury; an exemplary record of leadership at the

university; and numerous potential issues on appeal. Those issues included a constitutional vagueness challenge to the never-before-construed statute, a non-standard jury instruction given over objection, voir dire proceedings conducted, in part, outside the presence of counsel and the defendant, insufficiency of the evidence of “serious bodily injury,” and the implicit judicial bias and fair trial concerns presented by the fact that Harris’s defense counsel was arrested and jailed for criminal contempt moments after his client was sentenced. Nonetheless, after a hearing, the trial court denied bond (in a 34-page order), on the ground that the issues were not even “fairly debatable” under the applicable standard.⁶

The court acknowledged that a defendant’s burden on this factor is “slight,” but refused to attribute any legitimacy to any of the issues proposed to be raised on appeal, even questioning appellate counsel’s good faith in bringing the appeal.⁷ On review of the 34-page order denying bond, the First District Court of Appeal’s swift overnight ruling said only that the motion for review was “denied on the merits.” Thus, Harris and Morton served 19 months of their two-year prison sentence before the First District reversed the convictions due to the erroneous and prejudicial jury instruction on the definition of “serious bodily injury,” and the appellants were then released.⁸

This article illustrates that Harris’s motion for release pending appeal was unreasonably denied, and concludes that for a defendant who is otherwise eligible for release pending appeal, in light of counsel’s duty of candor to the court and duty to advocate only non-frivolous issues, judges should generally accept that counsel’s articulated “fairly debatable” issues meet the test of good faith. Because frivolous direct criminal appeals brought by counsel are virtually non-existent, this factor—whether a defendant has a “fairly debatable” issue on appeal—should rarely, if ever, preclude bond pending appeal.

THE FELONY HAZING PROSECUTION

In the spring of 2006, it was reported that Marcus Jones, a candidate for admission to the Kappa Alpha Psi fraternity at FAMU, had been repeatedly hit on the buttocks with a cane, over several days, in an alleged off-campus hazing incident. Almost 30 candidates had been driven to another location, inside a dark building illuminated with a red light, where members of the fraternity instructed them to get in the “cut” position (bent over, pointing one hand, using the other to protect the testicles), where they were repeatedly struck with canes for several hours. Jones developed redness, swelling, and a large painful hematoma (fluid-filled bruise) from the beatings, which was drained and treated surgically to remove pooled blood and damaged tissue. He suffered no permanent impairment or serious disfigurement, other than a small surgical scar.

The fraternity investigated the hazing allegations, and eventually five fraternity members were arrested and charged with felony hazing, in violation of section 1006.63(2), Florida Statutes. The co-defendants were student leaders in the fraternity and within the university community. Among other things, Harris was College and Pharmacy Student of the Year in 2005, and a member of Golden Key National Honor Society. It is undisputed that Harris, who was prosecuted as a “principal,” did not strike the victim.⁹ Witnesses said he was present and offered aid and encouragement to the candidates, saying “stay strong.”

The disputed factual issues for trial were who struck Marcus Jones, and whether he had “serious bodily injury,” as required by statute. The defendants also challenged the constitutionality

of the new anti-hazing statute from the outset of the case, arguing that it was unconstitutionally vague because the essential element of “serious bodily injury”—which transforms the offense to a felony—was undefined.¹⁰ The trial court denied the motion to dismiss the charge on vagueness grounds, and delivered a non-standard jury instruction defining the term, over defense objections.¹¹ After trial, the jury could not come to a unanimous verdict, expressing difficulty with the element of “serious bodily injury.” The court declared a mistrial, and the defendants were tried a second time.

At the retrial, the court fashioned and delivered a different, more complex instruction defining the term, again over a vigorous defense objection. The second jury found defendants Morton and Harris guilty as charged.¹² The court rejected a recommendation of probation and sentenced them to two years in prison followed by probation. Both defendants were taken into custody. Almost three months after sentencing, the court denied the defendants’ timely post-trial motions, including Harris’s motion for bond pending appeal.¹³ Both defendants appealed the convictions, and Harris separately sought expedited review of the order denying bond.¹⁴ Ironically and unfortunately, his application to the appellate court for release pending appeal was summarily denied, although ultimately, almost two years later, the conviction was reversed.

THE LEGAL STANDARDS FOR POST-TRIAL RELEASE

Over a half-century ago, in *Younghans v. State*,¹⁵ the Florida Supreme Court acknowledged that post-trial release pending appeal is a matter of discretion, not right, announcing guidelines for the lower courts to use in the exercise

of their discretion. Adopting a standard from federal courts, Younghans advised Florida judges to consider, as a threshold issue, whether an appeal is taken in good faith, on grounds not frivolous but fairly debatable, “in deciding whether the ends of justice require that a person be imprisoned during the pendency of an appeal.”¹⁶ That test derived from *Herzog v. United States*,¹⁷ in which Justice Douglas explained:

[T]he first consideration is the soundness of the errors alleged. Are they, or any of them, likely to command the respect of the appellate judges? It is not enough that I am unimpressed. I must decide whether there is a school of thought, a philosophical view, a technical argument, an analogy, an appeal to precedent or to reason commanding respect that might possibly prevail.

In other words, might reasonable lawyers and judges disagree?

Additionally, *Younghans* instructed courts to determine whether a defendant presents a danger to the community or a risk of flight should bond pending appeal be granted, by considering these factors:

- 1) the habits of the individual as to respect for the law, 2) his local attachments to the community, by way of family ties, business, or investments, 3) the severity of the punishment imposed for the offense, and any other circumstances relevant to the question of whether the person would be tempted to remove himself from the jurisdiction of the court. In a case where the term of imprisonment imposed is short, the trial court might also consider whether the denial of bail would render nugatory the right to appeal from the judgment of conviction.

Younghans is still the leading case in this area of the law.¹⁸ Rule 3.691,

Whether a defendant has a “fairly debatable” issue on appeal should rarely, if ever, preclude bond pending appeal.

Florida Rules of Criminal Procedure, governing post-trial release, incorporates the Younghans factors, and also provides that “no person may be admitted to bail on appeal from a conviction of a felony unless the defendant establishes that the appeal is taken in good faith, on grounds fairly debatable, and not frivolous...” Thus, post-trial, when institutional interests in carrying out the judgment of the court must be balanced against a defendant’s interests in staying at liberty pending appeal, a defendant is required to articulate honestly arguable legal issues to be presented on appeal in order to justify post-trial release.²⁰ If bond pending appeal is denied, the trial court must enter a written order with specific findings supporting that result.²⁰

COUNSEL’S ADVOCACY OF AN ISSUE SHOULD BE SUFFICIENT PROOF THAT AN APPEAL IS TAKEN IN GOOD FAITH, ON GROUNDS FAIRLY DEBATABLE, AND NOT FRIVOLOUS

Rule 3.691’s requirement that the appeal be taken on “grounds fairly debatable” should not be difficult to satisfy. Recently, in *Childers v. State*,²¹ the First District Court of Appeal explained the rather lenient “good faith” / “fairly debatable” standard: “[g]ood faith does not mean there is probable cause to believe the judgment will be reversed, but simply that the appeal is not vexatious and the defendant has assigned errors that are open to debate and about which reasonable questions exist.”²² Were the rule otherwise, requiring a trial judge to acknowledge having committed reversible trial error prior to granting post-trial release, it would virtually never be granted.²³ But *Childers* makes clear that the bar is not set that high; articulating a good faith fairly debatable issue on appeal—one that is “open to debate”—is all that the rule requires.²⁴ Judges should not demand any greater standard.

With rare exceptions not applicable to ethical and responsible appellate counsel,²⁵ no criminal appeal prosecuted by counsel should ever be deemed frivo-

lous, i.e., “devoid of merit,” even if its chance of success is slim.²⁶ Preserved issues have arguments and counterarguments of record, and even if counsel, faced with adverse precedent, had advocated unsuccessfully for a change in the law, that discussion alone illustrates that the issue is debatable.²⁷ Even unpreserved error may result in reversal, if an appellate court finds that the error undermined the fundamental fairness of a proceeding.²⁸ Thus, unpreserved error can easily present a “fairly debatable” issue, if it meets the “fundamental error” test.

In fact, the only reported decisions in Florida finding a criminal appeal to be frivolous involve pro se litigants, often in post-conviction matters. Since the majority of criminal appeals are done by public defenders, cases with no non-frivolous issues result in Anders proceedings, not frivolous appeals.²⁹ It is unlikely that bond would ever be sought in those cases. But where private counsel or a public defender elects to brief and advocate an issue, because of a lawyer’s ethical obligation to the court, that decision necessarily reflects a professional assessment of the issue and a conclusion that it is, at the least, “fairly debatable.”³⁰

Jason Harris raised four issues on appeal:

- ▶ whether section 1006.63(2) was unconstitutionally vague (an issue of first impression in the state);
- ▶ if the statute was valid, whether the court-drafted non-standard jury instruction on “serious bodily injury” was erroneous and prejudicial;
- ▶ whether the evidence was insufficient to convict Harris as a principal, and to prove the element of “serious bodily injury;” and
- ▶ whether the criminal contempt charge against trial counsel was evidence that judicial bias against Harris’s counsel infected the proceedings and denied Harris a fair trial.

In addition, in his motion for bond pending appeal, Harris had listed other alleged trial errors as potential appellate issues. For example, he argued that the

court conducted voir dire for over an hour while Harris and his counsel were tardy to the first day of trial, contrary to the requirements of Rule 3.180(a)(4).³¹ Other proposed issues included whether the court abused its discretion in refusing to grant the Defendant’s request for an additional peremptory challenge when three alternate jurors were selected,³² and whether the court erred in permitting the State to back-strike two African-American jurors after the jury was sworn, without good cause and in violation of Harris’s Sixth Amendment right to a trial by jury of his peers. Given the low hurdle of the “fairly debatable” standard, and the *Childers* court’s discussion of a defendant’s minimal burden in making that showing (“The standard is whether the issues raised are open to debate and involve reasonable questions”),³³ one wonders how the trial court could find that *none* of these issues was “fairly debatable,” and that therefore bond should be denied.³⁴

The answer is revealed in the unusually lengthy 34-page order denying bond, described by the trial court as the product of “more research and scrutiny than was necessary” to test the court’s initial impression that all of its prior rulings had been correct. In setting forth its painstaking analysis of the court’s prior rulings, the court utilized the wrong test, stating that while “conceptually, a defendant can always establish a mere possibility of success on appeal ... this alone is insufficient to meet the ‘fairly debatable’ test.”³⁵ In fact, the question does not turn on the likelihood of appellate success; the question is whether a reasonable jurist could debate both sides of the arguments sought to be raised on appeal. “Success on appeal” may turn on myriad factors tangential to the merits of a legal position—including legal trends and hot topics, individual appellate judges’ predilections, and the effectiveness of an attorney’s presentation, to name only a few. And even on the law itself, reasonable judicial minds may disagree, evidenced by the dearth of unanimous decisions coming from the state and federal supreme courts.

Therefore, although one might readily predict that a case is “fairly debatable” or honestly arguable, predicting success at the outset of a case is a very long shot indeed, and should not be the measure of whether bond pending appeal is granted.³⁶

A leading case, *Boles v. State*, established that a trial court abuses its discretion and applies the wrong legal analysis if denial of bond is based “on the sole ground that he believed the appeal would not succeed.”³⁷ And in *Jackson v. State*,³⁸ in an opinion reversing a conviction, the Third District expressed its “total disapproval of the trial court’s at best presumptuous ruling denying Jackson bond pending appeal because, in part, there were no ‘fairly debatable’ grounds for reversal,” noting that the ruling denying bond had been earlier reversed on review. Similarly, in this felony hazing case, the trial court simply appeared determined that its sentence would be served (and that it would “hurt”), and turned a blind eye to the notion that reasonable minds might differ about at least one of the appellate issues. And the overnight denial of Harris’s motion seeking review of the order denying bond ensured that he would remain in custody, even though, as it turned out, after full briefing and oral argument the appellate court found the challenged jury instruction to be reversible error.³⁹

The course of this case, and Jason Harris’s inability to gain post-trial release despite his clean record and despite his having proposed numerous good faith “fairly debatable” issues on appeal (including a constitutional challenge to a new statute, an issue of first impression in the entire state), was inconsistent with the standards of Rule 3.691, as discussed in *Childers*. It is suggested that, particularly in a high-profile case, a trial judge may be loathe to grant a perceived benefit to a convicted defendant who was just sentenced, providing apparent closure to the case. Thus, leaving the “fairly debatable” inquiry to the sentencing judge at that sensitive point in time unfairly reduces that defendant’s opportunity for release pending appeal, even though he

or she may meet all the criteria for post-trial release. A better solution would be for courts to respect counsel’s representations that an issue is “fairly debatable,” since that representation must comport with counsel’s duty of candor to the court. If necessary, the procedure could include a specific certification by counsel that he or she has considered the applicable standards for bond pending appeal before identifying the proposed appellate issues, which would at least cause counsel to stop and think about the seriousness of the representation to the court.

Such certifications by counsel are familiar in Florida appellate courts. For example, an attorney requesting a written opinion after a per curiam affirmance must certify, based on professional judgment, that “a written opinion will provide a legitimate basis for supreme court review because....”⁴⁰ Similarly, an attorney seeking en banc review in a district court of appeal must certify that, in his or her professional judgment, the case meets the defined criteria of exceptional importance or intra-district conflict.⁴¹ And, every appellate brief must also contain a certification that counsel has complied with the font requirements of the appellate rules.⁴² Thus, a certification that proposed appellate issues are “fairly debatable” and consistent with counsel’s ethical obligations to advocate only non-frivolous issues or good faith arguments for a change in the law could be incorporated into the rule governing post-trial release and accepted by courts, just as the other certifications are accepted as evidence that counsel has discharged his or her ethical obligation to analyze the law.

Placing the responsibility on counsel to make the “fairly debatable” assessment, subject to counsel’s ethical duty of candor to the court, would also obviate the appellate court’s dilemma: whether deference should be afforded to a trial court’s discretionary determination of bond, even though the “fairly debatable” inquiry is a purely legal issue, and even though a preliminary review of the issues, without full briefing, might prejudice the court against the appellant’s position in

later proceedings. The more determinative aspects of *Younghans* and the rule governing post-trial release ought to be whether, *assuming no statutory barriers to bond exist, and assuming that counsel has represented that fairly debatable issues are presented in the appeal*, the defendant presents any danger to the community or risk of flight. Those types of issues are those that the trial court is well-positioned to determine, and if bond is denied based on those factors meaningful review could then be obtained based on the trial court’s factual findings.⁴³ The present practice, allowing the trial court to evaluate the merit of its own rulings, is too likely to result in the unwarranted denial of post-trial release.

CONCLUSION

If the requirement that a convicted person demonstrate “fairly debatable” appellate issues is to be an element of the showing in order to be granted post-trial release pending appeal, leaving that determination to the trial court is like letting the fox guard the henhouse. The fairness of the inquiry would be improved if trial counsel’s representation to the court that such issues exist were to be credited, being based on counsel’s ethical duty of candor to the tribunal. The court should focus on the other requirements for bond, including statutory eligibility requirements and *Younghans* factors involving a defendant’s respect for the law and obligation to appear. The trial court should not be charged with re-evaluating its own prior rulings with an eye to their ultimate appellate success. As the hazing case well illustrates, a trial judge’s temptation to provide post hoc re-affirmance of its own trial rulings, to the detriment of a defendant’s liberty interests, is too great, and appellate review on a limited record may be inadequate.

In the *Morton/Harris* felony hazing case, trial counsel perfectly preserved a challenge to the trial court’s jury instruction, and the District Court ultimately agreed that the instruction was misleading and unfair: “Appellant makes the persuasive argument that the

instruction as given effectively allowed jurors to convict if they found that the victim's injuries were anything more than slight.⁴⁵ Harris's request for bond pending appeal, challenging the jury instruction and raising numerous other "fairly debatable" issues, was legally sufficient and should have been granted. His unnecessary and unwarranted incarceration for nineteen months cannot be remedied, but the procedure leading to that unfortunate result can be.

Unless and until trial courts are removed from evaluating their own rulings in determining post-trial release, counsel should consider bolstering their arguments for bond pending appeal with a self-imposed "certification," reminding trial courts that counsel's assessment of the issues proposed to be raised on appeal is being made with a recognition of the ethical duty of candor to the court. Rule 3.691 does not contemplate that trial courts will serve as an "advance" appellate judge, assessing the likelihood of reversal, but the risk of that happening, and of self-serving conclusions predicting affirmative, is demonstrably real. To avoid that result in the future, revisions to the rule consistent with the ideas proposed herein should be considered. ♀

¹ *Johnson v. United States*, 218 F.2d 578, 580 (9th Cir. 1954) (Stephens, J., concurring).

² 90 So. 2d 308 (Fla. 1956).

³ Most district court orders on review of orders denying bail are unpublished summary affirmances without analysis. But see *McGlade v. State*, 941 So. 2d 1185 (Fla. 2d DCA 2006) (reversing "recalcitrant" trial judge's repeated refusal to grant release pending appeal, where defendants convicted of practicing midwifery without a license met all the criteria for release).

⁴ Previously, the anti-hazing statute only required postsecondary institutions to have an anti-hazing policy. In 2005, the statute was amended to create criminal penalties for hazing, enacted in response to several hazing incidents around the state. See Fla. H.R. Comm. on Crim. Just. HB 193 CS (2005) Staff Analysis Feb. 17, 2005. The statute, named after Chad Meredith, a Florida university student who died in a hazing incident, provides for a first-degree misdemeanor offense, and a third-degree felony offense. See §1006.63, Fla. Stat. (2008). While the offense of hazing is similar to battery and aggravated battery, the consent of the victim is no defense to criminal hazing. See §1006.63(5)(a).

⁵ The jury could not reach a verdict as to three other defendants. They later pled to misdemeanor

hazing and adjudication was withheld. Of the two defendants convicted of the felony offense, only Harris sought bond pending appeal.

⁶ See March 23, 2007 Order Denying Defendants' [sic] Bond Pending Appeal (*State v. Morton et al.*, Fla. 2d Jud. Cir. (Leon Co.) Case No. 2006-CF-1397).

⁷ *Id.*, pp. 33-34.

⁸ See *Morton v. State*, 988 So. 2d 698 (Fla. 1st DCA 2008); *Harris v. State*, 987 So. 2d 807 (Fla. 1st DCA 2008).

⁹ See §777.011, Fla. Stat. (aiding and abetting).

¹⁰ Compare, *Sult v. State*, 906 So. 2d 1013, 1020 (Fla. 2005) ("A statute ... is void for vagueness when, because of its imprecision, it fails to give adequate notice of what conduct is prohibited"); *Brown v. State*, 629 So. 2d 841, 842 (Fla. 1994) (same); with *State v. Fuchs*, 769 So. 2d 1006, 1009 (Fla. 2000) (holding that the absence of any definition does not necessarily render a statute unconstitutional).

¹¹ Several Florida criminal statutes use the term "serious bodily injury," and the definition of the term is not uniform. See e.g., §316.1933(1)(b) (blood test for impairment or intoxication in cases of death or serious bodily injury) (driving); §316.192(3)(c)(2) (reckless driving); §318.19(2) (traffic infractions requiring a mandatory hearing); §327.353 (blood test for impairment or intoxication in cases of death or serious bodily injury) (boating); §790.155(1)(b) (blood test for impairment or intoxication in cases of death or serious bodily injury) (use of weapons); §828.41(3) (definitions relating to Florida Animal Enterprise Protection Act); compare §456.065(2)(d)(2) (unlicensed practice of health care profession).

¹² By agreement, no instruction was given as to the misdemeanor hazing lesser included offense.

¹³ The court stated that it imposed a two-year sentence because the court wanted to "make it hurt." The court's final act at the sentencing hearing was to charge Harris's trial counsel with criminal contempt, and order him taken into custody with his client. The alleged contemptuous conduct occurred on the first day of trial, and during trial, but the court permitted the entire proceeding to go forward without revealing that an order to show cause would be issued following trial. Ultimately, counsel was convicted, *State v. Alan*, Fla. 2d Jud. Cir. No. 2007 MM 741A1, and the contempt judgment is on appeal, see *Alan v. State*, Fla. 1st DCA Case No. 1D08-3012. Trial counsel also challenged the contempt prosecution collaterally in federal court, but that case was dismissed as frivolous. See *Alan v. Dekker*, N.D. Fla. No. 4:07-cv-00485, appeal docketed 11th Cir. No. 09-10117. The question of whether the court's handling of the contempt matter denied Harris a fair trial was one of the issues raised in Harris's motion for bond pending appeal and on appeal. In reversing the conviction, the First District did not reach that issue. See n. 9, supra.

¹⁴ See Fla.R.App.P. 9.140(h)(4), and Fla. R.Crim.P. 3.691(c), providing for expedited review.

¹⁵ 90 So. 2d at 310.

¹⁶ *Id.*

¹⁷ 75 S. Ct. 349, 351 (1955) (Douglas, Circuit Justice).

¹⁸ We note that recently the First District, applying *Youngmans*, reversed the denial of bond

pending appeal, which had been based on the intended victim of the offense (solicitation of murder) expressing fear, should the defendant remain in the community. See *Lundy v. State*, 32 Fla. L. Weekly D2651, 2007 WL 3284020 (Fla. 1st DCA 2007). Despite the nature of the offense and the victim's concerns, the court found that reasonable conditions of bond could be fashioned to provide "a reasonable measure of security to the victim and his wife." *Id.*

¹⁹ "Assignments of error" have been abolished under the appellate rules. See Fla.R.App.P. 9.040(e). Thus, in describing the "fairly debatable" issues to be presented on appeal, counsel seeking bond pending appeal should work closely with trial counsel to identify the issues, and a thorough briefing for the trial court will help to create a record that will be helpful, should it be necessary to seek review of an order denying release pending appeal.

²⁰ See Fla.R.App.P. 9.140(h)(3) ("All orders denying post-trial release shall set forth the factual basis on which the decision was made and the reasons therefore"); *Coolley v. State*, 720 So. 2d 598 (Fla. 2d DCA 1998) (neither the use of a firearm nor the imposition of a minimum mandatory sentence provides a per se reason to deny bond pending appeal; specific facts informing the court's discretion are required to comply with the rule); *Lynn v. State*, 696 So. 2d 542 (Fla. 5th DCA 1997) (oral ruling insufficient to satisfy rule).

²¹ 847 So. 2d 1120 (Fla. 1st DCA 2003).

²² *Id.* (quoting *Baker v. State*, 213 So.2d 285, 287 (Fla. 4th DCA 1968)).

²³ This principle has also been recognized by federal courts in their assessment of requests for post-trial release. See generally *United States v. Miller*, 753 F.2d 19, 24 (3d Cir. 1985); *United States v. Giancola*, 754 F.2d 898, 901 (11th Cir. 1985), cert. denied, 479 U.S. 1018 (1986) (adopting *Miller*); see also *United States v. Eaken*, 995 F.2d 740, 743 (7th Cir. 1993) (Easterbrook, J., dissenting).

Even district judges who perceive a "substantial question" lurking do not believe that the question is "likely" to produce reversal—if they believed this, they would have acquitted the defendant. The self-critical role in which §3143(b)(1)(B) casts a district judge justifies non-deferential appellate review and the conclusion that "likely" means a middling probability. See e.g., *United States v. Bilanzich*, 771 F.2d 292 (7th Cir. 1985); *United States v. Greenberg*, 772 F.2d 340 (7th Cir. 1985).

Federal courts have not been uniform in interpreting the standards for bond pending appeal, with many courts imposing a more rigorous standard than the Florida "fairly debatable" standard for proposed appellate issues. See Doug Keller, Resolving a "Substantial Question": Just Who is Entitled to Bail Pending Appeal Under the Bail Reform Act of 1984?, 60 *Fla.L.Rev.* 825 (Sept. 2008) (presenting a thorough review of the history of bail in the federal system, and urging a more lenient test than currently applied in the Eleventh Circuit Court of Appeals).

²⁴ In another context—the availability of the judgmental immunity defense to a legal malpractice claim—the term "fairly debatable" has been equated with an area of the law that is "unsettled." See *Haisfeld v. Fleming, Haile & Shaw, P.A.*, 819 So. 2d 182 (Fla. 4th DCA 2002). Haisfeld noted that "[a]n 'unsettled' issue of law is one that has not yet been

determined by the state's court of last resort and on which reasonable doubt may be entertained by well-reasoned lawyers." *Id.* at 182 (citation omitted).

²⁵ See *Florida Bar v. Orr*, 504 So. 2d 753 (Fla. 1987) (attorney disciplinary proceeding issuing public reprimand, where attorney affirmatively misrepresented that the defendant, who had pled guilty, was eligible for bond pending appeal while believing that no grounds for such appeal existed and without further prosecuting the appeal).

²⁶ In *Treat v. State ex rel. Mitton*, 163 So. 883, 883-84 (Fla. 1935), the Florida Supreme Court provided this definition of "frivolous appeal":

A frivolous appeal is not merely one that is likely to be unsuccessful. It is one that is so readily recognizable as devoid of merit on the face of the record that there is little, if any, prospect whatsoever that it can ever succeed. See *Hopkinson v. Kennedy*, 225 Mass. 231, 114 N.E. 204 [1916]. It must be one so clearly untenable, or the insufficiency of which is so manifest on a bare inspection of the record and assignments of error [or briefs, in keeping with modern practice], that its character may be determined without argument or research. An appeal is not frivolous where a substantial justiciable question can be spelled out of it, or from any part of it, *even though such question is unlikely to be decided other than as the lower court decided it, i.e., against appellant or plaintiff in error.* (emphasis supplied) (footnote omitted). Thus, it has long been established that a defendant seeking bond pending appeal does not have the burden to convince the trial court that the appeal will result in reversal. "Frivolous appeal" has also been defined similarly in a civil case. See *Kerzner v. Lerman*, 849 So. 2d 1185, 1187 (Fla. 4th DCA 2003), quoting *Visoly v. Sec. Pac. Credit Corp.*, 768 So. 2d 482 (Fla. 3d DCA 2000) ("[A] 'frivolous' appeal is one which raises arguments a reasonable lawyer would either know are not well grounded in fact, or would know are not warranted either by existing law or by a reasonable argument for the extension, modification, or reversal of existing law.").

²⁷ Advocating that the law should be changed is not always futile. See e.g., *United States v. Gaudin*, 515 U.S. 506 (1995), holding that in a false statement prosecution, the element of "materiality" must be decided by a jury. The Court's decision overruled prior precedent, *Sinclair v. United States*, 279 U.S. 263 (1929) (holding that "materiality" was to be determined by the court), which for decades had been applied uniformly by all federal courts in a host of federal false statement statutes.

²⁸ See *Petrucelli v. State*, 855 So.2d 150, 153 (Fla. 2d DCA 2003) ("A fundamental error is one that undermines the confidence in the trial outcome and goes to the very foundation of a case. Often, it is the equivalent of a denial of due process." *Jassan v. State*, 749 So.2d 511, 512 (Fla. 2d DCA 1999)) (citations omitted). "[F]undamental error is not subject to harmless error review. By its very nature, fundamental error has to be considered harmful. If the error was not harmful, it would not meet our requirement for being fundamental." *Reed v. State*, 837 So.2d 366, 369-370 (Fla. 2002). For example, one very astute appellate lawyer challenged the constitutionality of the Act containing the sentencing guidelines, raising the argument for the first time on appeal, resulting in a decision invalidating the guidelines and permitting the resentencing of hundreds of inmates sentenced under the invalid guidelines.



See *Heggs v. State*, 759 So. 2d 620 (Fla. 2000), deciding case on pass-through jurisdiction from *Heggs v. State*, 718 So. 2d 263, 264 (Fla. 2d DCA 1998) ("Heggs did not challenge the constitutionality of the sentencing guidelines in the circuit court. Even so, his increased sentence under the 1995 guidelines implicates a fundamental due process liberty interest.").

²⁹ See *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L.Ed.2d 493 (1967); In re Appellate Court Response to Anders Briefs, 581 So. 2d 149 (Fla. 1991).

³⁰ See R. Regulating Fla. Bar 4-3.3 (candor toward the tribunal).

³¹ See Fla.R.Crim.P. 3.600(b)(1) (requiring new trial on this ground if prejudice is shown); *Israel v. State*, 837 So. 2d 381 (Fla. 2002); and *Muhammad v. State*, 782 So. 2d 343 (Fla. 2001).

³² See Fla.R.Crim.P. 3.350(d) and (e).

³³ *Childers*, 847 So. 2d at 1121.

³⁴ In denying bond, the court found no statutory prohibition, no danger to the community should Harris be released, and no risk of flight. The denial of bond was based largely on the conclusion that the issues to be raised were not "fairly debatable," and perhaps on the court's implicit and explicit displeasure with counsel. See March 23, 2007 Order denying bond, p. 33 ("The Court questions whether the high public profile of this case has turned this case into a career media opportunity, rather than it being just another felony appeal deserving only of an Anders brief.").

³⁵ *Id.* at p. 2.

³⁶ A recent Supreme Court case, *Herring v.*

United States, 555 U.S. ___ (Jan. 14, 2009), is a prime example of the fact that jurists' differing judicial philosophies may frame the law. In *Herring* the Court affirmed the Eleventh Circuit Court of Appeals but split 5-to-4 on the issue of whether the exclusionary rule applied when a negligent bookkeeping error led a police officer to believe, mistakenly, that an outstanding arrest warrant justified an arrest. The four dissenters wrote extensively, in two separate opinions, on why that outcome was the wrong result. Like so many cases litigated to the highest level, the law growing out of the case was determined by the vote of one justice. Thus, not surprisingly, in many cases defendants and their attorneys simply lack the prescience to make a meaningful and accurate assessment of the likelihood of success on appeal at the stage when bond is requested, prior to a review of the complete record and preparation of the brief. But they are equipped to say when an issue is "fairly debatable."

³⁷ 388 So. 2d 581, 583 (Fla. 5th DCA 1980).

³⁸ 416 So. 2d 10, n. 1 (Fla. 3d DCA 1982).

³⁹ See n. 9, supra.

⁴⁰ See Fla.R.App.P. 9.330(a).

⁴¹ See Fla.R.App.P. 9.331(d)(2).

⁴² See Fla.R.App.P. 9.210(a)(2).

⁴³ See Fla.R.Crim.P. 3.691(b); *Dumas v. State*, 889 So. 2d 139 (Fla. 4th DCA 2004) (citing *Cooley v. State*, 720 So. 2d 598 (Fla. 2d DCA 1998)).

⁴⁴ *Morton*, 988 So. 2d at 704 (concluding that the jury instruction, which failed to provide that "moderate" injury must result in an acquittal, was harmful error).

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