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IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

HENRY LEE ROBINSON, Appellant, v. STATE OF FLORIDA, Appellee.	)	Case No. 2D17-3087

Opinion filed January 22, 2020.

Appeal from the Circuit Court for Pinellas County; Nancy Moate-Ley, Judge.

Howard L. Dimmig, II, Public Defender, and Matthew J. Salvia, Assistant Public Defender, Bartow, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Jonathan S. Tannen, Assistant Attorney General, Tampa, for Appellee.

EN BANC

LUCAS, Judge.

Henry Lee Robinson was found guilty by a jury of driving while his license was revoked as an habitual traffic offender (HTO) in violation of section 322.34(5),

Florida Statutes (2016). He raises two issues in his appeal of his judgment and sentence, both of which revolve around the same misapprehension of the elements of this criminal offense. Mr. Robinson contends that the State failed to provide sufficient evidence that the Department of Highway Safety and Motor Vehicles (DHSMV) had sent the required "notice" that his license had been revoked[1] and that, relatedly, the circuit court should have granted his request for a special jury instruction because the approved jury instruction, Fla. Std. Jury Instr. (Crim.) 28.11(a), fails to include or define notice as an element of this offense. Mr. Robinson gleans this element of notice not from the text of section 322.34(5) (which defines the offense), but from recitations within our case law that stated the DHSMV's notice to a driver of HTO revocation was an element of this crime.

Following supplemental briefing from the State and the defense on whether notice or knowledge is an element of section 322.34(5), this court voted on its own motion to proceed en banc pursuant to Florida Rule of Appellate Procedure 9.331(d). Our case law has inadvertently grafted an element onto a statutorily defined criminal offense that the legislature did not see fit to include. We believe it necessary to recede from those statements in our prior holdings that mistakenly included notice as a required element of a section 322.34(5) offense for the reasons that follow.

[1]As part of his first issue, Mr. Robinson also argues that the State failed to furnish sufficient evidence of his prior moving violation convictions under section 322.34(5). The State proffered a certified copy of Mr. Robinson's driving record as it was maintained by DHSMV; however, Mr. Robinson agreed to have the specific offenses within that report redacted. Furthermore, a witness from DHSMV testified (without any refutation) that Mr. Robinson had had his driver license revoked on four prior occasions, and that his license was never reinstated. Thus, this argument is without merit.

I.

Mr. Robinson has, to put it charitably, a somewhat checkered driving history. He has previously been convicted of driving with a suspended or revoked license on twenty-one prior occasions, eight of which were felonies. Four times, the DHSMV has designated Mr. Robinson as an HTO and, pursuant to the mandatory direction of section 322.27,[2] revoked his license accordingly. At no time did Mr. Robinson ever attempt to reinstate his driver license.

On October 22, 2016, Officers Tommy Nguyen and John Melton of the Tarpon Springs Police Department pulled Mr. Robinson over for a traffic violation. Mr. Robinson was later charged by information filed in the Pinellas County Circuit Court for the offense of driving while his license was revoked as an HTO under section 322.34(5). A jury trial was held on June 21 and 22, 2017.

While working through the jury charge conference, an issue arose concerning what the State was required to prove in its case against Mr. Robinson. The discourse between the circuit court and the attorneys uncovered a marked dissonance between what the text of the statute and the applicable approved jury instruction say about the elements of a section 322.34(5) offense versus what our case law has recited:

> Ms. Constantine [for the State]: [E]ven the notice requirement – that they [DHSMV] have to send the notice to the individual – is statutory. But if Your Honor notices, it's not in the instruction.
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> The Court: Right.

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[2] § 322.27(5)(a) ("The department shall revoke the license of any person designated a habitual offender, as set forth in s. 322.264, and such person is not eligible to be relicensed for a minimum of 5 years from the date of revocation, except as provided for in s. 322.271.").

Ms. Constantine: Which is very odd. And the same thing with the habitual traffic offender, the specific subjects, you know, I was telling the Court about regarding the priors, is also not in the jury instruction. Like it says, habitual traffic offender, but it doesn't address that in the standard.

The Court: Right. I'm not modifying the standard.

Ms. Constantine: Yes. I understand. It's just interesting. Well, I mean, obviously if there's going to be notice arguments, it's not going to be in the standard instructions. It's nowhere to be found.

The Court: I understand.

. . . .

Ms. Constantine: [I] understand that the Defense has provided case law from the Second DCA, that's a Motion to Dismiss case dealing with showing that notice has to have been provided to the Defendant; however, I would ask the Court that they not be permitted to argue that or ask DHSMV any questions about it because it would be misleading and confusing to the jury.

The Court: Well, they can proffer that.

Ms. Constantine: Proffering it, yes. I don't think that notice is a requirement under the law. I get that the Second DCA put that in there. I went through the statute, Your Honor. It is nowhere in the statute for HTO, 322.34(5). It is, however, in 322.34(2), which is what requires knowledge. . . . [W]e can go to the standard instruction that's been provided by the Florida Supreme Court, which also does not include notice in it. . . .

[I] can show Your Honor the statute where it references notice must be proven to establish knowledge for 322.34(2), and that's where they're getting that from, but that's not a requirement in the statute [section 322.34(5)].

It's not a requirement by the Florida Supreme Court. I don't know really how to reconcile that. The only thing that I can tell the Court, it's not in the statute, so the legislature is not requiring us to prove that. . . .

> The Court: Okay. Well, you can put on DHSMV, and we can proffer the parts related to this. Were you going to try to make knowledge an element of the crime, Ms. McNulty-Parker?
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> Ms. McNulty-Parker [for the defense]: Well, Your Honor, I think that there's a distinction between knowledge and notice. I agree with the State that it is not in the standard jury instructions, but I would point the Court to the case that I had given the Court yesterday, which is State v. Fields, Dinsdale, Stepp. That is 809 So. 2d 99. That's a Second DCA case. And I'm referring, if we go to page 2, it states – let's see, Your Honor.
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> Ms. Constantine: I agree with Ms. McNulty-Parker. It does say notice has to –
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> Ms. McNulty-Parker: Well, I do. I want to put that on the record. Okay. ["]The violation created by Section 322.34(5) does not involve[–]as an element of . . . finding that the motorist has been convicted on three separate occasions of DWLS [driving while license suspended].
>
> Instead, it involves driving a motor vehicle on the public highways of Florida at [the] time when [the] DMV has revoked the motorist's license and given notice of the revocation.["][3]
>
> So they're basically stating, Your Honor, that is a requirement. That is something that the State is required to prove and I do think that is fair game based on this case law. It's good law. It hasn't been overturned.

The circuit court ultimately denied the request for a special jury instruction that would have included a notice element because the defense would not agree to the inclusion of an inference instruction the State requested in the jury instruction (if the jury were to be instructed that notice was indeed an element of the offense). Specifically,

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[3]Although the quotation marks are not referenced in the transcript, it is clear that defense counsel was quoting directly from our court's State v. Fields opinion at 809 So. 2d 99, 101 (Fla. 2d DCA 2002), which, in turn, was quoting the Fourth District's decision in Rodgers v. State, 804 So. 2d 480, 483 (Fla. 4th DCA 2001).

the State maintained that if notice were an element of a section 322.34(5) offense, then, like a section 322.34(2) offense, the jury ought to be instructed that the DHSMV's mailing of notice would give rise to an inference that Mr. Robinson had knowledge that his license was canceled, suspended, or revoked as an HTO.[4] Ultimately, Mr. Robinson's driving record was submitted to the jury with redactions to remove all data that would have reflected notice from the DHSMV of his license's revocation or HTO status. The State also proffered the testimony of an employee of the DHSMV, who explained the manner in which the department sent HTO revocation notices. She further testified before the jury that Mr. Robinson's last five-year HTO revocation occurred on December 2, 2013, and that that revocation remained active.

Mr. Robinson was convicted as charged, adjudicated guilty, and sentenced to 365 days in county jail. He now brings the issue of notice under section 322.34(5) to the forefront for our consideration in this appeal.

II.

"Whether a jury instruction was legally adequate is a question of law subject to *de novo* review." Santiago v. State, 77 So. 3d 874, 876 (Fla. 4th DCA 2012) (citing State v. Glatzmayer, 789 So. 2d 297 (Fla. 2001)); see also State v. Floyd, 186 So. 3d 1013, 1019 (Fla. 2016) (holding that the certified question of whether a standard criminal jury instruction was "confusing, contradictory, or misleading" posed a pure

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[4]The State's argument here would seem to be a non sequitur since (a) Mr. Robinson was not charged with driving while knowing that his license had been canceled, suspended, or revoked under section 322.34(2) and (b) Mr. Robinson's attorney was not really arguing that "knowledge" was an element of a section 322.34(5) offense, but rather "notice" was, under our district's case law. We think this exchange further illustrates the confusion our prior holdings may have inadvertently created with respect to a section 322.34(5) offense.

question of law and was subject to de novo review). Moreover, the discrete issue in the jury instruction before us concerns how the elements of a criminal offense are defined. That is an issue of statutory interpretation. As the Florida Supreme Court explained in State v. Gray, 435 So. 2d 816, 820 (Fla. 1983), superceded by statute on other grounds, McCloud v. State, 260 So. 3d 911, 915 (Fla. 2018), "[t]he elements of a crime are derived from the statutory definition." See also Fla. House of Representatives v. Crist, 999 So. 2d 601, 615 (Fla. 2008) ("Enacting laws—and especially criminal laws—is quintessentially a legislative function."). For that reason, as well, a de novo review of the circuit court's ruling is appropriate in this case. See Acevedo v. State, 218 So. 3d 878, 879 (Fla. 2017) (interpretation of a criminal statute is reviewed de novo); Champagne v. State, 269 So. 3d 629, 632 (Fla. 2d DCA 2019) ("Questions of statutory interpretation are reviewed de novo . . . ." (quoting Eustache v. State, 248 So. 3d 1097, 1100 (Fla. 2018))).

A.

The text of section 322.34(5) is plain, clear, and unambiguous. Here is what the statute says about the elements of this crime:

> Any person whose driver license has been revoked pursuant to s. 322.264 (habitual offender) and who drives any motor vehicle upon the highways of this state while such license is revoked is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

The elements of this offense, then, are straight-forward. If a person has had his or her driver license revoked as an HTO and he or she drives a motor vehicle on the state's highways while such license is revoked, the offense has been committed. Quite obviously, the word "notice" is nowhere to be found in this section. If one turns to

the referential statute mentioned in section 322.34(5), section 322.264, one will not find the word "notice" there either.[5] No one contends there is any kind of ambiguity lurking within section 322.34(5). The meaning of the terms, "whose driver license has been revoked pursuant to s. 322.264" or "drives" or "motor vehicle" or "upon the highways of this state" are each sufficiently clear and definite to resolve this case; ordinarily, that would be the end of our court's interpretative work. See State v. Peraza, 259 So. 3d 728, 730 (Fla. 2018) (" '[W]hen the language of a statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.' . . . This Court is 'without power to construe an unambiguous statute in a way

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[5]In pertinent part, section 322.264 defines "habitual traffic offender" as follows:

> A "habitual traffic offender" is any person whose record, as maintained by the Department of Highway Safety and Motor Vehicles, shows that such person has accumulated the specified number of convictions for offenses described in subsection (1) or subsection (2) within a 5-year period:
> (1) Three or more convictions of any one or more of the following offenses arising out of separate acts:
> (a) Voluntary or involuntary manslaughter resulting from the operation of a motor vehicle;
> (b) Any violation of s. 316.193, former s. 316.1931, or former s. 860.01;
> (c) Any felony in the commission of which a motor vehicle is used;
> (d) Driving a motor vehicle while his or her license is suspended or revoked;
> (e) Failing to stop and render aid as required under the laws of this state in the event of a motor vehicle crash resulting in the death or personal injury of another; or
> (f) Driving a commercial motor vehicle while his or her privilege is disqualified.
> (2) Fifteen convictions for moving traffic offenses for which points may be assessed as set forth in s. 322.27, including those offenses in subsection (1).

which would extend, modify, or limit, its express terms or its reasonable and obvious implications.' " (alteration in original) (quoting Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984))).

If we were writing upon a clean slate, we would readily conclude that since the legislature did not see fit to include the DHSMV's prior mailing of notice of an HTO revocation as an element of section 322.34(5), notice is a not an element of this offense. We would simply acknowledge that the legislature appeared to create a status offense from this statute, in which a driver's status as an HTO, combined with his or her driving a motor vehicle on a state highway with a revoked license while so designated, are the only elements that comprise this crime. Because neither section 322.34(5) nor the referential statute that section cites mentions, much less purports to require, notice from the DHSMV as an element of the offense, a brief and uncomplicated analysis would have resolved the question Mr. Robinson raises.

B.

We are not, however, writing on a clean slate. In the early 2000s, the published decisions of Florida's district courts of appeal began stating that a DHSMV notice of revocation was a substantive element of a section 322.34(5) offense. It appears this novel intrusion can be traced back to the case of Rodgers v. State, 804 So. 2d 480, 481 (Fla. 4th DCA 2001), where the Fourth District was confronted with the question of whether the State was required to prove each of the prior substantive traffic convictions that led to the revocation of a defendant's driver license as an habitual traffic offender in order to sustain a conviction under section 322.34(5). The court in Rodgers answered that question in the negative and, we think, appropriately rejected the

defendant's attempt to liken a section 322.34(5) offense to "the entirely inapposite" offense of driving under the influence (DUI) with three prior DUI convictions under section 316.193(2)(b), Florida Statutes (2000). Id. at 483. The Rodgers court cogently explained the textual differences between those two criminal statutes:

> The DUI statute is so framed as to make the prior convictions an element of the DUI offense, i.e. driving while under the influence with three prior convictions for the same offense. In contrast, under section 322.34(5) the offense is driving when a DMV revocation of the motorist's license is in effect. The [l]egislature could have constructed section 322.34 so that the offense was defined as driving with three prior convictions for DWLS, but it did not do that.

Id. (footnote omitted).

Had that been the extent of Rodgers' pronouncement about the elements of a section 322.34(5) offense, we would have no qualm with the analysis (and, we suspect, the problem with which we are now faced would likely not have arisen). But the Rodgers opinion, while purportedly applying section 322.34(5)'s text, proceeded to add an extratextual gloss onto section 322.34(5):

> As the statutory text itself provides, to convict under section 322.34(5) the state was required to prove three elements: (1) DMV had revoked defendant's driver's license as a habitual offender under section 322.264; *(2) DMV gave defendant notice of the revocation of his license*; and (3) defendant operated a motor vehicle upon a highway of Florida while the license was revoked.

Id. at 482 (emphasis added).

Now, as we have already pointed out, giving notice is nowhere mentioned in "the statutory text itself" of either section 322.34(5) or section 322.264. How, then, did this new, independent element of a crime come into being? Where did the Rodgers

court discern it? Actually, it did not come from section 322.34(5)'s text at all, as is clear from the very next line of the opinion:

> As to the second element, the one requiring notice of the revocation, section 322.251(2) provides:
>
> "Proof of the giving of notice and an order of cancellation, suspension, revocation, or disqualification in either such manner shall be made by entry in the records of the department [DHSMV] that such notice was given. Such entry shall be admissible in the courts of this state and shall constitute sufficient proof that such notice was given."

Id.

The court did not explain why it saw fit to engraft what is a separate statutory direction to the DHSMV concerning how the department is supposed to maintain its recordation of HTO revocations into the text of section 322.34(5). Nor, for that matter, did the court articulate why it chose the particular feature of notice from among the numerous directions contained within section 322.251. The Rodgers court simply identified one part of one subsection of section 322.251 and, for whatever reason, declared that it was an element of section 322.34(5) so that, according to the court, the violation of section 322.34(5) "involves driving a motor vehicle on the public highways of Florida at a time when DMV has revoked the motorist's license *and given notice of the revocation*." Id. at 483 (emphasis added). This seemingly innocuous insertion, once planted in Florida's jurisprudence without the pruning influence of a ratio decidendi, soon began to spread.

Our court was one of the first to adopt it. In State v. Fields, 809 So. 2d 99, 100 (Fla. 2d DCA 2002), we were faced with the same issue that had precipitated the Rodgers decision—that is, whether proof of prior qualifying convictions was required to

establish an offense under section 322.34(5). We aligned ourselves with Rodgers and quoted its holding that "[t]he violation created by section 322.34(5) does not involve—as an element of the crime—a finding that the motorist has been convicted on three separate occasions of DWLS." Id. at 101. We also observed an important difference between section 322.34(2) and section 322.34(5) in the Fields opinion:

> Simply stated, there are two methods for establishing a third-degree felony with respect to one being charged for driving after license has been cancelled, suspended, or revoked under section 322.34. The first is section 322.34(2), which provides a straightforward procedure for matching increased punishment to additional driving offenses provided the accused knows of his former driver's license cancellations, suspensions, or revocations. The first two offenses under section 322.34(2) are misdemeanors, whereas a third or subsequent conviction is a third-degree felony. The second method is under section 322.34(5), which is an entirely dependent provision with respect to an accused's having been determined to be a habitual traffic offender pursuant to section 322.264. Both provisions achieve the same result by different methods of proof.

Id. at 100.

Unfortunately, despite the close attention we paid to parsing the textual distinctions in these statutes, our court proceeded to adopt the extratextual element of notice that Rodgers had added onto section 322.34(5). By further quotation from the Rodgers opinion, the Fields court also aligned our district with Rodgers' pronouncement about the elements of a section 322.34(5) offense, including the requirement of a DHSMV notice to the defendant:

> To sum up the requirements for a conviction under section 322.34, the statute as written by the [l]egislature merely makes it necessary for the state to prove by competent evidence that DMV maintains a record on the motorist, that its record shows the requisite three separate DWLS convictions within a 5[-]year period, and that DMV gave the

> motorist the statutory notice. These statutes permit the state to make this proof by presenting a certified copy of the motorist's driving record maintained by DMV. That is what the state did in its prosecution in this case. Hence the state made out a prima facie case, which allowed the trier of fact to find defendant guilty of the section 322.34(5) violation.

Id. at 101 (second alteration in original) (quoting Rodgers, 804 So. 2d at 483).

Fields did not attempt to trace this element of notice to any textual source (apart from the extensive quote from Rodgers). Nor did our Fields decision endeavor to supply what was conspicuously lacking in Rodgers: a justification for lifting one statute's directive to an agency to furnish motorists with notice and dropping it into another, separate criminal statute that does not mention that directive. Curiously, though, we may have hinted, obliquely, at a possible motive behind this judicially made element in one of the concluding lines of Fields: "We agree that when a driver has been deemed a habitual traffic offender pursuant to section 322.264 *and has received adequate administrative due process as provided by that section*, it is not necessary to produce certified records of the prior convictions under section 322.34(5)." Id. at 101. We never defined the parameters of the attendant "administrative due process" under section 322.264 or why we thought that, whatever it was, it was now a constituent element of section 322.34(5)'s text.[6] Regardless, notice was now an element the State would need to prove in order to sustain a conviction under section 322.34(5) in the Second District.

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[6]Arguably, Fields might have inadvertently expanded Rodgers' inadvertent expansion of the requisite elements required under section 322.34(5) even farther. If by "administrative due process," our court was referring to some sept of "due process," that, of course, would entail more than an agency merely giving notice of the agency's action. See Dep't of Highway Safety & Motor Vehicles v. Hofer, 5 So. 3d 766, 771 (Fla. 2d DCA 2009) ("Procedural due process requires both fair notice and a real opportunity to be heard . . . 'at a meaningful time and in a meaningful manner'. . . . Accordingly, the amount of process due varies based on the particular factual context surrounding an

Since then, our court has repeated (and, on one occasion, inexplicably altered) this formulation of a section 322.34(5) offense. See, e.g., Patterson v. State, 938 So. 2d 625, 630 (Fla. 2d DCA 2006) ("A conviction under section 322.34(5) simply requires competent evidence showing that the DHSMV maintained a record on the motorist, that the record reflected three prior moving violation convictions, *and that the motorist received notice* of his designation as a habitual traffic offender and the resulting suspension of his license." (emphasis added)); State v. James, 928 So. 2d 1269, 1271 (Fla. 2d DCA 2006) ("For a conviction, the statute requires the State to prove that (1) DMV maintains a record on the motorist, (2) DMV's records show the requisite three separate convictions within a five-year period, and (3) DMV notified the motorist."); Kirschner v. State, 915 So. 2d 624, 625 (Fla. 2d DCA 2005) ("To sustain a conviction under section 322.34(5), the State is required to prove that Kirschner's license was suspended or revoked under the habitual traffic offender statute and that she drove a vehicle on the highways of the State of Florida at a time when the Department of Highway Safety and Motor Vehicles had revoked her license and given notice of the revocation."). None of these opinions have ever addressed, much less explained, why it was necessary to engraft a separate administrative direction to the DHSMV into the text

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administrative proceeding." (first alteration in original) (citations omitted) (quoting Keys Citizens for Responsible Gov't, Inc. v. Fla. Keys Aqueduct Auth., 795 So. 2d 940, 948 (Fla. 2001))); Deel Motors, Inc. v. Dep't of Commerce, 252 So. 2d 389, 394 (Fla. 1st DCA 1971) ("[A]ll proceedings conducted by any state agency, board, commission, or department for the purpose of adjudicating any party's legal rights, duties, privileges, or immunities, must be conducted in a quasi-judicial manner in which the basic requirements of due process are accorded and preserved. Such proceeding contemplates that the party to be affected by the outcome of the proceeding will be given reasonable notice of the hearing and an opportunity to appear in person or by attorney and to be heard on the issues presented for determination.").

of section 322.34(5). Other than Fields' brief, enigmatic mention of "administrative due process," there is no stated rationale underlying the addition of a notice element, no exegesis of the statute from which it has been derived, not even an anecdotal circumstance or hypothetical concern expressed that might justify this repeated recitation in these holdings. "Notice" simply appeared as ipse dixit in the Rodgers decision, drifted over into our district where we colored it with the words "administrative due process," and now it remains a cited fixture of our common law, with the occasional vacillation between whether the notice must be "given" or "received." The element of notice does not derive from the statute's text. And, as counsel below pointed out, it conflicts with the approved standard jury instruction for this offense (which tracks the statute's text). See Fla. Std. Jury Instr. (Crim.) 28.11(a) ("To prove the crime of Driving While License Revoked as a Habitual Traffic Offender, the State must prove the following two elements beyond a reasonable doubt: 1. (Defendant) drove a motor vehicle upon a highway in this state. 2. At the time, (defendant's) license was revoked as a habitual traffic offender."). The dissonance between what our case law and what the statute regard as the elements of this criminal offense is impossible to reconcile.

C.

To all of this, an objection might be raised that, if notice is not explicitly required under section 322.34(5), it surely *ought to be* an element of (or perhaps an affirmative defense to) this felony offense. After all, there is a separate statute that requires the DHSMV to mail notices to drivers when it revokes their licenses for an HTO designation, and the DHSMV, like any governmental agency, might have made a mistake. Furnishing proof of the DHSMV's notice would ensure that a defendant's

license was properly revoked, and it would only impose a very slight burden on the State, while perhaps preventing conviction of a felony offense based upon a mistaken or improper HTO revocation.

We find this objection unpersuasive for the following six reasons.

First and foremost, we are a court of law, not a legislature. Subject to the strictures of our state and federal constitutions, it is for the legislature to declare the public policy of what acts constitute a criminal traffic offense in the State of Florida, what elements must be proven to establish the commission of those offenses, and what may constitute an affirmative defense to criminal liability. See State v. Burris, 875 So. 2d 408, 413-14 (Fla. 2004) ("To construe the statute in a way that would extend or modify its express terms would be an inappropriate abrogation of legislative power." (citing Auld, 450 So. 2d at 219)); Armstrong v. City of Edgewater, 157 So. 2d 422, 425 (Fla. 1963); Cambell v. State, 37 So. 3d 948, 950 (Fla. 5th DCA 2010) ("Courts generally do not have the authority to add elements to a crime that has been put in place statutorily by the legislature.").

Second, the inclusion of a notice element into this criminal offense (even if we were at liberty to amend it) inescapably constructs new language onto legislation that is clear and unambiguous on its face. We cannot do that, even under the guise of statutory interpretation. See Auld, 450 So. 2d at 219 ("[W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction . . . ." (quoting A.R. Douglass, Inc. v. McRainey, 137 So. 157, 159 (Fla. 1931))); Bryson v. State, 42 So. 3d 852, 854 (Fla. 1st DCA 2010) ("If statutory language is clear,

unambiguous, and conveys a definite meaning, there is no reason to resort to the rules of statutory interpretation." (citing Knowles v. Beverly Enters.-Fla., 898 So. 2d 1, 5 (Fla. 2004))). And for the same reason, the selected provision of notice that was plucked from section 322.251 cannot be machinated into the text of section 322.34(5) under the guise of reading those statutes in pari materia. See Brown v. State, 848 So. 2d 361, 364 (Fla. 4th DCA 2003) ("In the first place, the '*in pari materia*' canon of statutory construction would be appropriate only if we found the statute ambiguous, and we do not." (citing McLaughlin v. State, 721 So. 2d 1170 (Fla. 1998))); United States v. Warren, 820 F.3d 406, 408 (11th Cir. 2016) ("[C]ourts generally apply *in pari materia* only when a legal text is ambiguous."). To the extent it was necessary to recite the substantive elements of a section 322.34(5) offense in our prior holdings, our court should have simply stated the plain text of the unambiguous statute.

Third, requiring notice effectively makes the elements of an offense under section 322.34(5) no different than an offense under section 322.34(2); the actual text of the latter requires "knowledge" by the driver that his or her license was canceled, suspended, or revoked as an element—knowledge that can be proven through (this will come as no surprise) the DHSMV furnishing a notice.[7] See § 322.34(2) ("The element of knowledge is satisfied if the person has been previously cited as provided in subsection (1); or the person admits to knowledge of the cancellation, suspension, or revocation; or the person received notice as provided in subsection (4). There shall be

[7]If a DHSMV notice is an element of an offense under section 322.34(5), and the same notice satisfies the "knowledge" required under section 322.34(2), the internal logic that both Rodgers and Fields proceeded under to resolve the issue before those courts begins to collapse. Because both courts made clear that section 322.34(2) and section 322.34(5) offenses, though related, are not to be conflated.

a rebuttable presumption that the knowledge requirement is satisfied if a judgment or order as provided in subsection (4) appears in the department's records for any case except for one involving a suspension by the department for failure to pay a traffic fine or for a financial responsibility violation."); see also § 322.251(2) ("Proof of the giving of notice and an order of cancellation, suspension, revocation, or disqualification in either manner shall be made by entry in the records of the department that such notice was given. The entry is admissible in the courts of this state and constitutes sufficient proof that such notice was given."); State v. Miller, 830 So. 2d 214, 215 (Fla. 2d DCA 2002) ("[N]otation of the giving of the notice in the DMV's records is sufficient proof that the notice was given."); Fla. Std. Jury Instr. (Crim.) 28.11. Confusing these two, separate statutory offenses would also run afoul of the Florida Supreme Court's clarification that they are, in fact, distinct: "[S]ubsections 322.34(2) and 322.34(5) each contains an element that the other does not. The DWLS provision requires that the driver *know* his or her license is suspended, cancelled, or revoked, whereas the HTO provision, subsection (5), contains no knowledge component." Gil v. State, 118 So. 3d 787, 792-93 (Fla. 2013).

Fourth, as we have already observed (and as Rodgers acknowledged), section 322.34(5) is a status offense. Requiring the State to prove whether an administrative procedure for imposing that status was dutifully followed (absent an explicit requirement in the criminal statute) seems to invite a "trial within a trial" of what is supposed to be a discrete, criminal proceeding. Cf. State v. Page, 449 So. 2d 813, 816 (Fla. 1984) ("An added reason for our ruling is our concern with the fact that acceptance of the narrow interpretation of subsection 90.610(1) advanced by the first

district in Hall [v. Oakley, 409 So. 2d 93 (Fla. 1st DCA 1982),] would result in the cumbersome procedure of conducting a 'trial within a trial' to determine whether some form of affirmative misstatement or misrepresentation of fact was involved in the commission of the crime."). That said, we are not without sympathy to the plight of those who may find that the DHSMV has made a mistaken recordation on their driving record. But there are means (that do not require judicial rewriting of a criminal statute) for individuals to challenge the DHSMV's improper revocation of their driver license; in the event that were ever to become an issue in a prosecution under this statute, we see no reason why such defendants could not request a continuance or a stay of their criminal proceedings in order to avail themselves of the right to make an appropriate challenge in a separate proceeding, if they have a sufficient basis to do so.

Fifth, to the extent the element of notice could be derived from an inchoate (and unexamined) notion that "administrative due process" plays some part in the interpretation of this criminal offense's statutorily defined elements, that is simply the wrong analysis being applied to the wrong issue. All the prior decisions we have discussed purported to lay down, *as a matter of statutory interpretation*, what is contained within section 322.34(5). That is the knot that Mr. Robinson's counsel, the assistant state attorney, and the presiding judge in this case found themselves in: our case law says something is in a statute that isn't in the statute. But there was never any need for our cases to engage in the exercise of interpretation when the statute is clear on its face. If "administrative due process," or any kind of due process, require some refinement to the legislative elements of this offense, that is a question to be raised,

argued, considered, and decided within the rubric of a constitutional challenge—which is not before us.

Finally, sixth, with the element of notice absent from both the statute and the standard jury instruction, the cases requiring notice as an element of a section 322.34(5) offense provide no direction whatsoever as to how the State can prove that notice was provided, whether it must be received or simply given (our court has said both), how the defense can disprove it, or what presumptions or inferences, if any, might apply.[8] Again, those legislative considerations were included as part of section 322.34(2)'s text, where the offense requires proof of knowledge. It is hardly surprising that section 322.34(5) does not include similar guidance because neither notice nor knowledge is an element the legislature included within that offense.

In sum, there is no reason to prolong this error, nor will we leave it to the trial bench and bar to untangle a common law pronouncement that has inaccurately recited the elements of a criminal statute's unambiguous text.

III.

Today we acknowledge an inadvertent mistake and rectify it. Although adherence to our precedent would seem to compel a reversal of Mr. Robinson's conviction (because Mr. Robinson's jury was not instructed about an element our common law invented), we will not lengthen any further the string citation of case law that includes an extraneous and erroneous element of a section 322.34(5) conviction.

[8]This is not a hypothetical concern; it shaped a considerable aspect of the conflict over jury instructions during Mr. Robinson's trial.

Instead, we proceed en banc to correct this small, but significant misstatement that has intruded into our law.

We hold that the DHSMV's provision of a notice that a driver's license was revoked under section 322.251 is neither an element of nor an affirmative defense to the criminal offense set forth under section 322.34(5). We recede from the portion of our opinions in Patterson, 938 So. 2d at 630, James, 928 So. 2d at 1271, Kirschner, 915 So. 2d at 625, and Fields, 809 So. 2d at 101, which held that notice was an element of a section 322.34(5) offense. We clarify that the statutory elements of a section 322.34(5) offense are just what the statute states they are. Under the version of the statute applicable to Mr. Robinson's offense,[9] "[t]o prove the crime of Driving While License Revoked as a Habitual Traffic Offender, the State must prove the following two elements beyond a reasonable doubt: 1. (Defendant) drove a motor vehicle upon a highway in this state[;] 2. At the time, (defendant's) license was revoked as a habitual traffic offender." Fla. Std. Jury Instr. (Crim.) 28.11(a). With that clarification made, we affirm the judgment and sentence of the circuit court. We certify conflict with the Fourth District's decision in Rodgers, 804 So. 2d at 482-83, and those cases citing Rodgers for the proposition that notice is a required element of a section 322.34(5) offense.[10]

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[9]Effective October 1, 2019, section 322.34(5) was amended to reflect:

> Any person who has been designated a habitual traffic offender as defined by s. 322.264 and who drives any motor vehicle upon the highways of this state while designated a habitual traffic offender is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

See ch. 2019-167, § 12, Laws of Fla. (2019).

[10]We also certify conflict with Neary v. State, 63 So. 3d 897, 898 (Fla. 5th DCA 2011), and Arthur v. State, 818 So. 2d 589, 591 (Fla. 5th DCA 2002), to the extent

Affirmed.

KHOUZAM, C.J., and NORTHCUTT, MORRIS, BLACK, SLEET, SALARIO, BADALAMENTI, ROTHSTEIN-YOUAKIM, and SMITH, JJ., Concur.

CASANUEVA, SILBERMAN, KELLY, LaROSE, and ATKINSON, JJ., Concur in result only.

VILLANTI, Judge, Dissenting.

While I agree with the majority's legal discussion regarding statutory construction, I disagree with how the majority applies it here. Because of this, I do not believe that en banc consideration is needed in this case as there is no need to recede from the existing case law which was properly decided.

At issue is the proper interpretation of section 322.34(5), Florida Statutes (2016). As the majority properly notes, that section makes it a felony for "[a]ny person whose driver license has been revoked pursuant to s. 322.264 (habitual offender)" to drive "any motor vehicle upon the highways of this state while such license is revoked." The majority notes—correctly, I might add—that the plain language of this statute does not mention that the defendant must have been given notice of his or her status as a habitual traffic offender. Therefore, according to the majority, the State should not be required to prove that any notice was provided. However, this interpretation ignores the text of the remainder of the statute, which compels us to read some additional statutory provisions within the same chapter.

To begin with, section 322.34(5) itself provides no authority to actually revoke a driver's license. That section refers to a driver's license that "has been

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that those cases stand for the proposition that notice is a required element of a section 322.34(5) offense.

revoked pursuant to s. 322.264." However, section 322.264 is a definitional statute only. It provides, in toto:

> A "habitual traffic offender" is any person whose record, as maintained by the Department of Highway Safety and Motor Vehicles, shows that such person has accumulated the specified number of convictions for offenses described in subsection (1) or subsection (2) within a 5-year period:
>
> (1) Three or more convictions of any one or more of the following offenses arising out of separate acts:
>
> (a) Voluntary or involuntary manslaughter resulting from the operation of a motor vehicle;
>
> (b) Any violation of s. 316.193, former s. 316.1931, or former s. 860.01;
>
> (c) Any felony in the commission of which a motor vehicle is used;
>
> (d) Driving a motor vehicle while his or her license is suspended or revoked;
>
> (e) Failing to stop and render aid as required under the laws of this state in the event of a motor vehicle crash resulting in the death or personal injury of another; or
>
> (f) Driving a commercial motor vehicle while his or her privilege is disqualified.
>
> (2) Fifteen convictions for moving traffic offenses for which points may be assessed as set forth in s. 322.27, including those offenses in subsection (1).
>
> Any violation of any federal law, any law of another state or country, or any valid ordinance of a municipality or county of another state similar to a statutory prohibition specified in subsection (1) or subsection (2) shall be counted as a violation of such prohibition. In computing the number of convictions, all convictions during the 5 years previous to July 1, 1972, will be used, provided at least one conviction occurs after that date. The fact that previous convictions may have resulted in suspension, revocation, or disqualification under another section does not exempt them

> from being used for suspension or revocation under this section as a habitual offender.

As is clear from the plain language of this statute, nothing in section 322.264 provides for revocation of a driver's license. Accordingly, the language in section 322.34(5) referring to a driver license that has been revoked "pursuant to s. 322.264" is necessarily a non sequitur as that statute simply does not provide for revocation.

Instead, the only authority of the Department of Highway Safety and Motor Vehicles to revoke the driver's license comes from section 322.27(5)(a), which provides that "[t]he department shall revoke the license of any person designated a habitual offender, as set forth in s. 322.264, and such person is not eligible to be relicensed for a minimum of 5 years from the date of revocation." When the Department revokes a license under that statute, however, it must provide the affected driver with notice:

> (1) All orders of cancellation, suspension, revocation, or disqualification issued under the provisions of this chapter, chapter 318, chapter 324, or ss. 627.732-627.734 shall be given either by personal delivery thereof to the licensee whose license is being canceled, suspended, revoked, or disqualified or by deposit in the United States mail in an envelope, first class, postage prepaid, addressed to the licensee at his or her last known mailing address furnished to the department. Such mailing by the department constitutes notification, and any failure by the person to receive the mailed order will not affect or stay the effective date or term of the cancellation, suspension, revocation, or disqualification of the licensee's driving privilege.
>
> (2) The giving of notice and an order of cancellation, suspension, revocation, or disqualification by mail is complete upon expiration of 20 days after deposit in the United States mail for all notices except those issued under chapter 324 or ss. 627.732-627.734, which are complete 15 days after deposit in the United States mail. Proof of the giving of notice and an order of cancellation, suspension, revocation, or disqualification in either manner shall be made by entry in the records of the department that such notice

was given. The entry is admissible in the courts of this state and constitutes sufficient proof that such notice was given.

§ 322.251 (emphasis added). These statutes, when considered in pari materia, are the source of the language in the cases referenced by the majority that require the State to prove that notice of the revocation was provided to the defendant in order to prove a violation of section 322.34(5).

Accordingly, the majority's focus solely on the language of section 322.34(5) in this case is simply too narrow. It is true that the intent of the legislature, as expressed by the plain language of the statutes it has enacted, is the polestar of statutory construction. See, e.g., E.A.R. v. State, 4 So. 3d 614, 629 (Fla. 2009); Borden v. East–European Ins. Co., 921 So. 2d 587, 595 (Fla. 2006). It is also true that "[t]o discern this intent, the Court looks 'primarily' to the plain text of the relevant statute, and when the text is unambiguous, our inquiry is at an end." E.A.R., 4 So. 3d at 629. However, when "a *part* of a statute appears to have a clear meaning if considered alone but when given that meaning is inconsistent with other parts of the *same statute* or others in pari materia, the Court will examine the entire act and those in *pari materia* in order to ascertain the overall legislative intent." Fla. Dep't of Envtl. Prot. v. ContractPoint Fla. Parks, LLC, 986 So. 2d 1260, 1265-66 (Fla. 2008) (quoting Fla. State Racing Comm'n v. McLaughlin, 102 So. 2d 574, 575-76 (Fla. 1958)). Moreover, when the legislature has enacted a comprehensive statutory scheme, the task of the courts is to attempt to follow all of the requirements it has set forth. See E.A.R., 4 So. 3d at 629.

A straightforward review of the statutory scheme shows that section 322.34(5) contains a latent ambiguity because the statutory section it references as authority for revoking a driver's license—section 322.264—provides no such authority.

The presence of this statutory non sequitur requires this court to consider the entire statutory scheme and follow all of the requirements the legislature has set forth. That scheme requires the Department to provide notice to a driver whose license has been revoked as a habitual traffic offender. And to prove that a defendant drove after his or her license had been revoked based on his or her status as a habitual traffic offender, the State must prove that the license at issue was, in fact, validly revoked. To do so requires proof that the required notice was provided in accordance with section 322.251.

Here, the cases from which the majority wants to recede require simply that the State prove, as part of its proof, that the defendant drove despite the revocation of his or her license as a habitual traffic offender, and that the Department completed the required steps to actually revoke the defendant's license as a habitual traffic offender. One of those required steps is providing statutory notice. Neither the notice statute nor the case law at issue require any proof of knowledge by the defendant, and notice and knowledge are not the same thing. Hence, en banc consideration of this case, a drastic course of last resort, simply does not apply here as the prior cases were not incorrectly decided, they do not contain incorrect statements of the law, and they do not run afoul of legislative intent. Therefore, I must respectfully dissent from the majority's decision to go en banc as being wholly unnecessary.