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## Constitutional Law

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# Florida Constitutional Law: 1991 Survey of the State Bill of Rights\*

David C. Hawkins\*\*

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## I. INTRODUCTION

This work comprehensively surveys the cases of the Supreme Court of Florida that considered the bill of rights contained in article I of the state constitution during 1991.<sup>1</sup> It supplements the previous state constitutional surveys published by the Review,<sup>2</sup> and adheres to the same case selection criteria.<sup>3</sup>

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1. Specifically, the survey summarizes all cases that the court released in slip form during the period January 1 through August 15, 1991.

2. See David C. Hawkins, *Florida Constitutional Law: A Ten-year Retrospective on the State Bill of Rights*, 14 NOVA L. REV. 693 (1990) [hereinafter *Decade Survey*] (concluding that the court's decisions create a hierarchical order of rights in article I, with the order dependent solely upon the particular standard chosen to measure the justification for the state's encroachment; that article I rights are not absolute, despite rhetoric to the contrary; that article I rights eclipsed protections afforded by the federal analogues on five occasions during the decade; that litigants should exploit the textual differences between the state and federal constitutions, thereby advancing constitutional imperatives that are unique to Florida; and that the court has promoted the independence of the state constitution on several occasions when it eschewed relevant federal precedent); David C. Hawkins, *Florida Constitutional Law: 1990 Survey of the State Bill of Rights*, 15 NOVA L. REV. 1049 (1991) [hereinafter *1990 Survey*] (identifying a variety of doctrinal positions and principles of construction that drive the court's constitutional logic; concluding that the court has accepted major responsibility for protecting personal rights from governmental excess; and noting that article I rights on two occasions surpassed the protections of their federal counterparts).

3. This survey accepts the premise that each opinion citing to the state bill of rights, whether by principled analysis or passing reference, uniquely contributes to the development of the Florida Constitution. In profile, the opinion must confirm that the state constitution was relied upon by one or more members of the court, addressed by a lower court, or advanced by a litigant in support of a claim. Conversely, an opinion that generically refers to equal protection, double jeopardy, and the like, makes a less certain contribution to this body of law. Those cases are selectively included.

These case selection criteria allow one exception. Occasionally, the court simply cites to another case to dispose of a constitutional issue and fails to mention that its holding in the case under review has constitutional significance. See, e.g., *Blizzard v. W. H. Roof Co.*, 573 So. 2d 334 (Fla. 1991) (adopting opinion of district court that construed three sections of the Florida Constitution, yet failing to indicate that its hold-

No case more profoundly symbolizes the strength of article I than *Department of Law Enforcement v. Real Property*.<sup>4</sup> This featured opinion establishes an analytical model for state due process, which shields several article I rights from state encroachment by utilization of a heightened level of judicial scrutiny, and illustrates that Florida property rights are entitled to a level of protection that eclipses the protection afforded by federal analogues. Treatment of the decision appears throughout the following material.<sup>5</sup> Like *Real Property*, several other cases during this survey period granted relief for violations of personal rights entirely on the strength of state constitutional law. One message is clear—litigants should be encouraged to rely on article I with the same confidence that they place on other principled bases of relief.

## II. DECLARATION OF RIGHTS

### A. Basic Rights

Article I, section 2 makes three separate declarations of personal rights. The first declaration expresses the central constitutional concept that the state must deal with similar persons in a similar manner. The second provides that all natural persons have inalienable rights, and specifically enumerates several of those rights. The third expressly prohibits the deprivation of any right on account of race, religion,<sup>6</sup> or physical handicap.<sup>7</sup> During this survey period, the court construed

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ing has constitutional stature); *Broward County v. LaRosa*, 505 So. 2d 422 (Fla. 1987) (approving opinion of district court that construed article I, section 18, yet omitting reference to the prohibition of administrative penalties in its opinion); *State v. Castillo*, 486 So. 2d 565 (Fla. 1986) (clarifying *State v. Neil*, 457 So. 2d 481 (Fla. 1984), without signifying that it is necessarily deciding a constitutional question). Fortunately this practice is the exception, not the norm, for subtlety has no place when the court expounds the state's organic law. Cases of that ilk are included in this survey to the extent that research successfully identified them.

In all, the court released 49 cases that considered the state constitution during the seven-and-one-half-month survey period, and addressed 74 state constitutional issues. Of those, 38 cases and 53 issues directly pertain to article I.

4. 16 Fla. L. Weekly S497, (Aug. 15, 1991) (unanimous) (Barkett, J., author) (mandate issued Dec. 2, 1991).

5. See *infra* notes 20-24, 71-122, 282-88, 316-20 and accompanying text.

6. FLA. CONST. art. I, § 3 ("There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof . . .").

7. There is no express textual basis in the federal equal protection clause for treating race, religion, and physical handicap different from other classifications. Yet federal constitutional analysis regards race as a suspect classification, and subjects

rights guaranteed under each of these three clauses.

### 1. Equal Protection Clause

*All natural persons are equal before the law . . .* FLA. CONST.  
art. I, § 2.

Two opinions by Justice McDonald this survey period relied on the test of reasonableness to uphold various statutes that limited the exposure to liability of certain classes of defendants from negligence suits by injured plaintiffs. The plaintiffs in *Abdala v. World Omni Leasing, Inc.*<sup>8</sup> were injured in separate automobile accidents and sued the finance companies that leased the automobiles to the other drivers. The plaintiffs proceeded principally on the theory that the lessors were liable for damages under Florida's dangerous instrumentality doctrine, which holds that the owners of motor vehicles are liable for injury caused by the negligent operation of those vehicles by their agents.<sup>9</sup> The lessors argued that they were not accountable for the plaintiffs' injuries because they fell within an exception carved out by the legislature for long-term lessors of vehicles who maintained certain liability insurance limits.<sup>10</sup>

The court rejected the plaintiffs' common law argument. It explained that the legislature simply redefined the term "owner" of a motor vehicle, and excluded long-term lessors of automobiles. Moreover, the court wrote that the legislative history of the statutory exception showed that long-term leases were actually alternative methods of financing vehicle purchases, which offered tax advantages to the lessors.<sup>11</sup> It is unclear from the opinion why tax benefits of a long-term

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race-based restrictions to "the most rigid scrutiny." *Korematsu v. United States*, 323 U.S. 214, 216 (1944). Other classifications accorded special scrutiny under federal analysis are: gender, *Craig v. Boren*, 429 U.S. 190, 197-98 (1976); citizenship, *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971); and legitimacy, *Levy v. Louisiana*, 391 U.S. 68, 71-72 (1968). By expressly recognizing race, religion, and physical handicap, the adopters of the state constitution have conferred a unique constitutional status on those groups and have created an opportunity for Florida courts to extend protections beyond the federal counterpart. Reason argues that those classifications, unlike classifications not enumerated, are entitled to a heightened level of scrutiny.

8. 583 So. 2d 330 (Fla. 1991) (unanimous) (McDonald, J., author).

9. *Southern Cotton Oil Co. v. Anderson*, 86 So. 629 (Fla. 1920).

10. FLA. STAT. § 324.021(9)(b) (1989).

11. *Abdala*, 583 So. 2d at 334.

lease should render the financing company less culpable under the dangerous instrumentality doctrine than had it executed a short-term lease. A reasonable explanation for the holding is that long-term leases do not retain for the financing company the traditional indicia of ownership that would warrant holding it accountable under the doctrine for the negligence of lessees or third parties.<sup>12</sup>

Plaintiffs also advanced an equal protection challenge.<sup>13</sup> The court ruled that the statutory exception does not irrationally distinguish between the class of plaintiffs injured by vehicles leased for longer than one year, and the class of plaintiffs injured by vehicles leased for less than one year.<sup>14</sup> Nor does the statute discriminate against the most severely injured plaintiffs by eliminating long-term lessors as a source of recovery, for plaintiffs retained the "unlimited ability to recover from the lessee."<sup>15</sup>

The other case, *Blizzard v. W. H. Roof Co., Inc.*,<sup>16</sup> dealt with statutes of limitation that shortened the period for bringing negligence suits against an insured tortfeasor whose insurance carrier became insolvent, and against the association established by law to cover claims brought against insolvent carriers.<sup>17</sup> The statutes reduced the period for bringing suit from four years to one year, commencing at the deadline established in the order of liquidation. *Blizzard* argued that the statutes impermissibly created a subclass of insureds that was treated differently from members of the class as a whole.

A unanimous court adopted the opinion of the district court under review, which ruled that the legislative choice to treat an insured tortfeasor whose carrier became insolvent different from an insured whose carrier remained solvent, was reasonably related to the stated purpose of avoiding financial loss to claimants and policyholders alike.<sup>18</sup> The statutory scheme assures injured claimants a mechanism for prose-

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12. For instance, finance companies and long-term lessors may assume less control of the leased automobile than do short-term lessors. Moreover, finance companies may never see the automobile, or exercise a possessory interest over it during the term of the lease.

13. In addition, plaintiffs claimed that the statute violated due process and access to courts. See *infra* notes 136, 296 and accompanying text.

14. *Abdala*, 583 So. 2d at 333-34.

15. *Id.* at 334.

16. 573 So. 2d 334 (Fla. 1991) (unanimous) (McDonald, J., author).

17. FLA. STAT. §§ 95.11(5)(d), 631.68 (1987).

18. *Blizzard v. W.H. Roof Co.*, 556 So. 2d 1237, 1238 (Fla. 5th Dist. Ct. App. 1990).

cutting damage claims that would otherwise go unsatisfied due to the insolvency of the carrier. Moreover, it safeguards persons who sought to protect themselves from liability by purchasing insurance policies.<sup>19</sup>

## 2. Inalienable Rights and Deprivation Clauses

*All natural persons . . . have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion or physical handicap. FLA. CONST. art. I, § 2.*

Property, race, life and liberty were all considered this survey period. We begin with property. Article I accords high stature to substantive property rights. *Department of Law Enforcement v. Real Property*<sup>20</sup> declared that the rights "to acquire, possess and protect property" are among the most basic substantive rights protected by article I, section 2. A unanimous court found the procedures employed by the state to execute a property seizure and forfeiture under the Florida Contraband Forfeiture Act<sup>21</sup> were woefully inadequate to protect fundamental property rights safeguarded by this and other article I sections. Those rights are valued so highly that the initial restraint on property must be accomplished by the least intrusive means under the circumstances that are necessary to preserve potentially forfeitable assets.<sup>22</sup> Moreover, the state is entitled to forfeiture only when it shows by no less than clear and convincing evidence that the property was used in violation of the act.<sup>23</sup> The court imposed these and other "minimal" due process standards on the state without regard to the particular type of personal property or real property that the state sought to restrain. Because state due process is central to the protection of property rights in this context, *Real Property* is treated fully under article

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19. *Blizzard*, 573 So. 2d at 334.

20. 16 Fla. L. Weekly S497 (Aug. 15, 1991) (unanimous) (Barkett, J., author).

21. FLA. STAT. §§ 932.701-.704 (1989).

22. *Real Property*, 16 Fla. L. Weekly at S500.

23. *Id.* at S501.

I, section 9.<sup>24</sup>

The rights "to acquire, possess and protect property" are not entitled to such stalwart protection when subject to state regulation in contexts less onerous than forfeiture. In 1990, the court in *Shriners Hospitals v. Zrillic*<sup>25</sup> stated that the legislature is prohibited from restricting property rights unless the restriction is "reasonably necessary to secure the health, safety, good order, [and] general welfare."<sup>26</sup> This year, the court returned to that principle in *Harris v. Martin Regency, Ltd.*,<sup>27</sup> a case that asked whether the legislature could permissibly deny the owner of a mobile home park the right to evict the tenant mobile home owners where that owner had decided to allow the land comprising the park to become vacant. The mobile home park owner relied on section 723.061(1)(d), Florida Statutes (1985), which specifies limited circumstances when a park owner can evict tenant mobile home owners, including change in use of the park land.

Martin Regency, the park owner, notified the tenant mobile home owners of its intent to vacate its mobile home park. It provided the requisite notice, but omitted any explanation for the anticipated change. After the mobile home owners failed to timely vacate the park, Martin Regency initiated proceedings to evict them. The trial court granted summary judgment in favor of Martin Regency, finding that it complied with the notice requirements of section 723.061, and that it was not required to state its intended use of the park, provided that it did not continue to use the land as a mobile home park.<sup>28</sup> The district court affirmed.<sup>29</sup>

In a split decision, a bare majority of four justices agreed to quash the decision of the district court. The majority noted that mobile home

24. See *infra* notes 71-122 and accompanying text.

25. 563 So. 2d 64 (Fla. 1990).

26. *Id.* at 68 (citing, in part, *Palm Beach Mobile Homes, Inc. v. Strong*, 300 So. 2d 881 (Fla. 1974)). The court wrote in *Palm Beach Mobile Homes* that the extent of the personal right to use property must be determined in light of the prevailing social and economic conditions, rather than as the framers and adopters intended, for the legislature would otherwise become helpless to regulate and to extend that right to new conditions. 300 So. 2d at 884 (citation omitted).

27. 576 So. 2d 1294 (Fla. 1991) (Barkett, J., author; McDonald and Kogan, JJ., and Ehrlich, Senior Justice, concurring; Overton, J., dissented with an opinion; Grimes, J., dissented with an opinion in which Shaw, C.J., and Overton, J., concurred).

28. *Id.* at 1296.

29. *Harris v. Martin Regency, Ltd.*, 550 So. 2d 1160 (Fla. 4th Dist. Ct. App. 1989).



owners and mobile home park owners alike derive substantial property rights from article I, section 2 of the state constitution.<sup>30</sup> For instance, mobile home park owners enjoy a protected right to use the land comprising the park. Also, they need not accept tenancy of a mobile home owner indeterminately. However, the court held that mobile home park owners may offer the park for sale only if the sale is “‘consistent with the *total circumstances*’” and does not advance an evil sought to be remedied by state regulation of the sale.<sup>31</sup> The state regulates park sales by imposing on the park owner the obligation of good faith and fair dealing<sup>32</sup> and requires the park owner to give the home owner the right of first refusal.<sup>33</sup> Those regulations, the majority agreed, served a legitimate function by advancing the legislature’s aim of protecting mobile home owners from economic servitude and abuse by mobile home park owners.<sup>34</sup> The majority regarded the regulations as permissible only if “‘reasonably necessary’” to secure the public welfare.<sup>35</sup>

The court acknowledged that nothing in the legislative scheme required a mobile home park owner to specify the nature of the proposed change. It inferred from the statute a requirement that the change of use must be valid. Because the record was unclear whether Martin Regency intended to sell its land as vacant land (a permissible motive), or to avoid extending to the home owners the right of first refusal (an improper motive), the court determined that a genuine issue of material fact remained, and therefore the trial court’s grant of summary judgment for Harris Regency was inappropriate.

Three justices charged that the majority impermissibly created a restriction on the sale of a mobile home park out of “whole cloth.”<sup>36</sup> Justice Grimes wrote that section 723.061(d) does not forbid the owner from closing the park and selling the vacant land, and only guarantees the mobile home owner ample time to relocate should the park owner decide to change the use of the property. He claimed that the majority’s construction effectively provides that the owner may sell his or her

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30. *Harris*, 576 So. 2d at 1296 (citing *Stewart v. Green*, 300 So. 2d 889 (Fla. 1974)).

31. *Id.* at 1297-98 (emphasis in original) (quoting *Palm Beach Mobile Homes, Inc. v. Strong*, 300 So. 2d 881, 888 (Fla. 1974)).

32. FLA. STAT. § 723.021 (1985).

33. FLA. STAT. § 723.071 (1985).

34. *Harris*, 576 So. 2d at 1296.

35. *Id.* at 1297 (quoting *Shriners Hosps. v. Zrillic*, 563 So. 2d 64, 68 (Fla. 1990)).

36. *Id.* at 1300 (Grimes, J., dissenting; Shaw, C.J., and Overton, J., concurring.).

land *only* when it is a mobile home park. He argued that such a construction is itself an unconstitutional deprivation on the use of property.<sup>37</sup>

Other cases addressed the prohibition against deprivation on account of race. The deprivation issue in *Craig v. State*<sup>38</sup> concerned Palm Beach County's jury selection procedures, which provided that petit jurors were to be drawn from one of two districts that comprised discrete geographic areas of the county at large. In a 1989 decision, *Spencer v. State*,<sup>39</sup> the court struck the districting scheme on two grounds. First, it ruled that the administrative order creating the scheme "results in an unconstitutional systematic exclusion of a significant portion of the black population from the jury pool" of the district from which Spencer's venire was selected.<sup>40</sup> Second, it held that the procedure violates the equal protection clause of article I, section 2 of the Florida Constitution, and the Sixth and Fourteenth Amendments of the United States Constitution because a black defendant charged with a crime in the predominately white eastern district must be tried there, whereas a white defendant charged with a crime in the predominately black western district may choose to be tried in the eastern district.<sup>41</sup> At the time of Craig's trial, *Spencer* was pending appeal, and Craig filed a pre-trial motion to draw the jury from the entire county, rather than from the eastern district, the situs of his trial. The trial court denied the motion as untimely, proceeded with the trial, and the jury ultimately convicted Craig of numerous crimes, including first degree murder.

On direct appeal, the state argued that Craig could not rely on *Spencer*, for he failed to reassert the claim after the trial court denied his initial motion. The court rejected the state's procedural argument, ruled that *Spencer* was dispositive, and remanded for a new trial.

*Craig* reaffirmed the principle of standing expressed in *Kibler v. State*<sup>42</sup> that a white defendant may challenge a jury selection process

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37. *Id.* Justice Overton added that the majority risks that a federal court would overturn section 723.061(1)(d), Florida Statutes (1985), on Fifth and Fourteenth Amendment grounds, *id.* at 1299 (Overton, J., dissenting), although it is doubtful that a federal court would review *Harris* itself, for the decision is grounded exclusively on the Florida Constitution.

38. 583 So. 2d 1018 (Fla. 1991) (*per curiam*) (unanimous).

39. 545 So. 2d 1352 (Fla. 1989).

40. *Id.* at 1355.

41. *Id.*

42. 546 So. 2d 710 (Fla. 1989).

that discriminates against racial minorities.<sup>43</sup> Reliance on *Kibler* for this purpose is interesting, for the court there construed article I, section 16's guarantee of an impartial jury to persons accused of crimes. Thus, the constitutional right at stake was personal to Kibler. In *Craig*, however, the constitutional right at stake was the right of prospective jurors to be free of race-based discriminatory selection practices,<sup>44</sup> a right that they lacked standing to assert, and that only Craig could effectively vindicate on their behalf. The equal protection clause and impartial jury guarantee of article I protect congruent rights in this context so that Craig had as much at stake in assuring jury impartiality as the wrongfully-struck jurors. *Craig* reaffirms Florida's avowed commitment to rid the courtroom of racially discriminatory jury selection practices through application of the doctrine of vicarious standing.<sup>45</sup>

Palm Beach County's jury districting scheme was also assailed in *Moreland v. State*.<sup>46</sup> The opinion relies entirely on federal constitutional principles, however, it is included in this survey because its holding is equally germane to future state constitutional litigation. Moreland, like Craig, was tried and convicted by a Palm Beach County jury while *Spencer* was pending in the supreme court. Moreland argued at trial that the jury plan violated the sixth and fourteenth amendments to the federal constitution. The trial court rejected his claim, convicted him of first-degree murder, and imposed a life sentence of imprisonment.<sup>47</sup> The district court affirmed his conviction and sentence on direct appeal.<sup>48</sup>

Subsequently, the court released *Spencer* and Moreland relied on that decision to collaterally attack his conviction and sentence in a post-conviction relief motion. The trial court granted his motion, citing *Spencer*. The district court disagreed and reversed. Citing *Witt v.*

43. *Craig*, 583 So. 2d at 1020; see also *Powers v. Ohio*, 59 U.S.L.W. 4268, 4272 (U.S. Apr. 2, 1991).

44. *State v. Slappy*, 522 So. 2d 18, 22 (Fla. 1988).

45. *Id.*

46. 582 So. 2d 618 (Fla. 1991) (unanimous) (McDonald, J., author).

47. *Id.* at 619. Moreland also personally attacked the composition of the petit jury in a pretrial motion by asserting that the county's racially discriminatory bias against prospective black jurors violated the *state* constitution, *State v. Moreland*, No. 86-41-CF-A02 (15th Jud. Cir.) (Motion Relating to Composition of Petit Jury Panel and Memorandum of Law in Support), however, abandoned the state claim in his motion for post-conviction relief.

48. *Moreland v. State*, 525 So. 2d 896 (Fla. 4th Dist. Ct. App. 1988).

*State*,<sup>49</sup> which held that only major constitutional law changes warrant retroactive application in post-conviction proceedings,<sup>50</sup> the district court ruled that *Spencer* did not establish a new and different standard of procedural fairness that would entitle Moreland to raise it collaterally.<sup>51</sup>

A unanimous supreme court quashed the opinion of the district court and approved the trial judge's order granting Moreland a new trial. *Spencer* was neither new law nor a major constitutional change in the law, it said, but represented the first opportunity to apply existing sixth amendment law to a new situation.<sup>52</sup> Although *Witt* declared that the interests in decisional finality generally prohibit the retroactive application of decisions of this order, the justices stated that the district court erred by failing to acknowledge an exception to that principle. *Witt* also declared that "a more compelling objective . . . , such as ensuring fairness and uniformity in individual adjudications," would warrant abridging the doctrine of finality.<sup>53</sup> The court applied *Witt*'s "fundamental fairness" exception in *Moreland* because it had twice before granted relief to claimants who raised *Spencer* claims. Thus, the "fundamental fairness" exception enables the court to assure decisional consistency, and to avoid the patent miscarriage of justice that would result when one post-conviction litigant is entitled to rely on a favorable constitutional decision issued after the conclusion of direct appellate proceedings, while another court bars a claim by a similarly situated litigant.<sup>54</sup>

Reference to the Florida Constitution is conspicuously absent from *Moreland*. There is no doubt that Moreland enjoyed state constitutional rights that awaited vindication—*Craig* was issued only eight days earlier on state equal protection grounds, and *Spencer*, the dispositive case, was principally grounded on state equal protection. However, the court in *Moreland* cannot be faulted for failing to peg its decision on the state constitution. The explanation lies with Moreland's post-conviction motion, which sought relief assertedly because trial counsel was ineffective and because the jury violated the federal cross-section

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49. 387 So. 2d 922 (Fla. 1980).

50. *Id.* at 929-30 (footnote omitted).

51. *State v. Moreland*, 564 So. 2d 1164, 1166 (Fla. 4th Dist. Ct. App. 1990).

52. *Moreland*, 582 So. 2d at 619 (footnote omitted).

53. *Id.* at 620 (quoting *Witt*, 387 So. 2d at 925).

54. *Id.*

requirement.<sup>55</sup>

*Perkins v. State*<sup>56</sup> considered whether a state statute that made unavailable the defense of self defense by a person who attempts to commit a forcible felony violated due process and separation of powers.<sup>57</sup> The court held that the statute did not bar the defense under circumstances when the defendant and the decedent were engaged in attempted cocaine trafficking, and the decedent initiated the use of deadly force against the defendant. Justice Kogan added in his special concurring opinion that the right to fend off an unprovoked attack was equally grounded in article I, section 2, which assures the inalienable right to defend life and liberty. He wrote that “[t]he right to fend off an unprovoked and deadly attack is nothing less than the right to life itself,” which enables a person to mount a reasonable defense or to meet an unjustified use of force with force.<sup>58</sup>

## B. Freedom of Speech and Press

*Every person may speak, write and publish his sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions and civil actions for defamation the truth may be given in evidence. If the matter charged as defamatory is true and was published with good motives, the party shall be acquitted or exonerated.* FLA. CONST. art. I, § 4.

Two opinions this period bear on the speech and press provision. In *CBS, Inc. v. Jackson*<sup>59</sup> the court considered a subpoena issued by the defendant in a criminal proceeding that sought from CBS untelevised videotapes, or “outtakes,” of a law enforcement drug operation, which depicted physical evidence of the defendant’s arrest. CBS argued that the “outtakes” were protected under the qualified reporter’s privilege. The court held that there existed no impediment under the first amend-

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55. *State v. Moreland*, No. 86-41-CF-A02 (Fla. 15th Cir. Ct. June 22, 1989) (Motion for Post-Conviction Relief, filed Feb. 2, 1989; Amendment to Motion for Post-Conviction Relief and Memorandum of Law in Support).

56. 576 So. 2d 1310 (Fla. 1991) (per curiam). *Perkins* is addressed more fully under article I, section 9 (due process), *infra* notes 138-42 and accompanying text.

57. FLA. STAT. § 776.041(1) (1987).

58. *Perkins*, 576 So. 2d at 1314 (Kogan, J., specially concurring; Barkett, J., concurring).

59. 578 So. 2d 698 (Fla. 1991) (per curiam).

ment or the state constitution to the compelled discovery of those tapes.<sup>60</sup> It reasoned that the tapes do not risk drying up sources of information, and that certain information might eventually become unavailable to the public. Moreover, the disclosure of information contained in the "outtakes" would not otherwise threaten the newsgathering process.<sup>61</sup> The court's holding applies with equal force to unpublished film footage of an interview with a prison inmate and to photographs of an automobile accident.<sup>62</sup> The opinion demonstrates that Florida's speech and press guarantees are closely bound to first amendment precedent under the circumstances presented.

Without passing on the merits, the court in *In re Standard Jury Instructions (Civil Cases 89-1)*<sup>63</sup> approved standard jury instructions for use in defamation cases. The Supreme Court Committee on Standard Jury Instructions (Civil) recommended three alternative jury charges on liability issues in defamation cases. The court acknowledged that briefs submitted by media representatives perceived constitutional and common law deficiencies in the proposals.<sup>64</sup>

### C. *Rights to Assemble, Instruct, and Petition*

*The people shall have the right peaceably to assemble, to instruct their representatives, and to petition for redress of grievances. FLA. CONST. art. I, § 5.*

The defendant in *Larson v. State*<sup>65</sup> entered a nolo plea to felony witness tampering, and the trial court imposed probation, a condition of which prohibited the defendant from entering Tallahassee for five years. He argued on appeal that the condition violated his right to petition government under article I, section 5. Although the justices said that the claim was procedurally barred for Larson's failure to raise it

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60. *Id.* at 699.

61. *Id.* at 700.

62. *Id.* at 700 n.2 (disapproving *CBS, Inc. v. Cobb*, 536 So. 2d 1067 (Fla. 2d Dist. Ct. App. 1988), and *Johnson v. Bentley*, 457 So. 2d 507 (Fla. 2d Dist. Ct. App. 1984)).

63. 575 So. 2d 194 (Fla. 1991) (per curiam).

64. *Id.* at 195; *see also id.* at 202 (Barkett, J., dissenting) (cautioning that the standards do not have the force of law).

65. 572 So. 2d 1368 (Fla. 1991) (Kogan, J., author; Shaw, C.J., and Overton, McDonald, Barkett, and Grimes, JJ., concurring; Ehrlich, J., concurred in result only with an opinion).

initially in the trial court, they reached the merits and concluded that the condition of probation did not violate his constitutional right of petition, which assured him the opportunity to petition state government by telephone or mail, or by contacting state officers outside Tallahassee.<sup>66</sup> Moreover, Larson remained free to ask the trial court to modify the condition of probation should he need to personally appear before state officials in Tallahassee, and the trial court would be obliged to grant his request.<sup>67</sup>

The right to petition for redress of grievances assures electoral accountability—that persons will have the opportunity to make public officers and employees accountable for their acts. Writing for a unanimous court in *Reynolds v. State*,<sup>68</sup> Justice Kogan said in dictum that accountability of public officials forms the bedrock of our democracy, and partly explains the rationale for requiring the state to justify any impermissible exercise of peremptory challenges to strike racial minorities from petit jury venires.<sup>69</sup> This personal right turns on the right of the public, whether members of a minority or not, “to assurances that our courts are acting to eliminate past abuses.”<sup>70</sup>

#### D. *Due Process*

Florida’s due process section combines three categories of rights. The first category creates the substantive rights of life, liberty, and property that are safeguarded by procedural due process. The section also includes two other fundamental guarantees that protect defendants who are prosecuted criminally by the state. These categories are regarded generally as independent of due process—the protection against double jeopardy, and the protection against self-incrimination.

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66. *Id.* at 1371-72.

67. *Id.*

68. 576 So. 2d 1300 (Fla. 1991) (Kogan, J., author; Shaw, C.J., and Overton, McDonald, Barkett, and Grimes, JJ., concurring).

69. *Id.* at 1302; *see also* *Tillman v. State*, 522 So. 2d 14 (Fla. 1988) (holding that *Neil* has an equal protection component that derives from article I, section 2); *State v. Neil*, 457 So. 2d 481 (Fla. 1984) (holding that impermissible race-based strikes of prospective jurors violates a defendant’s right to an impartial jury guaranteed under article I, section 16).

70. *Reynolds*, 576 So. 2d at 1302.

## 1. Life, Liberty or Property

*No person shall be deprived of life, liberty or property without due process of law . . . .* FLA. CONST. art. I, § 9.

Four of the decisions that construed article I, section 9 this survey period were unanimous, and notably, each rested explicitly, and exclusively on Florida law. The first of those cases, *Department of Law Enforcement v. Real Property*,<sup>71</sup> is a case of singular importance for its contribution to state constitutional doctrine. Mindful of its role as a coordinate branch of state government,<sup>72</sup> the court, without dissent, upheld the Florida Contraband Forfeiture Act<sup>73</sup> against multiple constitutional challenges, but resorted to a canon of constitutional interpretation to impose “minimal” due process requirements on the exercise of the state’s powers of seizure and forfeiture. Without this textual interpolation, the Act suffered from defects that were potentially fatal to its continued existence. The opinion, written for the court by Justice Barkett, deserves careful review.

The Act permits the state to seize property that is used in violation of offenses enumerated in the Act, “or in, upon, or by means of which any violation . . . has taken or is taking place.”<sup>74</sup> After arresting the defendant on drug trafficking charges, the state initiated forfeiture proceedings against certain properties.<sup>75</sup> The trial judge issued warrants to seize the properties, based solely on an affidavit executed by a special agent. As required by the Act, the state petitioned for a rule to show cause why the properties should not be forfeited,<sup>76</sup> and also filed a notice of lis pendens, which was not required.

The defendant, joined by amicus, moved to dismiss the petition on constitutional grounds. The trial judge granted the motions, noting that the defendant had not yet been convicted of any offenses that were factual predicates for forfeiture, and holding that the Act facially vio-

71. 16 Fla. L. Weekly S497 (Aug. 15, 1991) (unanimous) (Barkett, J., author) (mandate issued Dec. 2, 1991).

72. FLA. CONST. art. II, § 3 (separation of powers).

73. FLA. STAT. §§ 932.701-.704 (1989).

74. FLA. STAT. § 932.703(1) (1989).

75. *Real Property*, 16 Fla. L. Weekly at S497. Defendant’s properties included a 60-acre tract of land with an airstrip extension, a 40-acre R/V mobile home subdivision with numerous full recreational vehicle hookups, entire 280 and 100-acre subdivisions platted into separate lots or parcels, and a personal residence and property. *Id.*

76. *Id.* at S502 n.2 (citing FLA. STAT. § 932.704(1) (1989)).



lated state and federal constitutions.<sup>77</sup> Deciding that the trial judge's order required immediate attention, a divided panel of the First District Court of Appeal certified the matter to the supreme court.<sup>78</sup> The justices reversed the trial judge, and upheld the Act as facially constitutional, provided, however, that it is applied in keeping with "minimal" due process principles articulated in the opinion.

The court began by describing the process that is due under article I, section 9. State due process includes a substantive and a procedural component. Substantive due process protects "the full panoply of individual rights from unwarranted encroachment by the government."<sup>79</sup> Procedural due process is a vehicle that protects substantive rights. It does so by ensuring fair treatment through an orderly procedure that includes notice, coupled with a real opportunity to be heard and to defend before any judgment is rendered.<sup>80</sup> The process that is due varies with the character of the rights implicated and the nature of the process challenged, and admits to no single, inflexible test.<sup>81</sup>

Turning to the act itself, the court noted several provisions that potentially affront due process. For instance, the act "can be read to mean" that a seizure immediately ousts owners and lienholders of their interest in seized property.<sup>82</sup> It requires the state to "'promptly proceed'" against the property, once seized, by a rule to show cause, and empowers the state to have the property forfeited "'upon producing due proof'" that the property was used in violation of the act, although it leaves those critical terms undefined.<sup>83</sup> The act bars suits to recover seized property for ninety days after seizure unless the state fails to initiate proceedings within that period.<sup>84</sup> It restrains owners and lienholders from defending until after seizure, and imposes on them the

77. *Id.* The trial judge struck down the act on grounds of substantive and procedural due process, and because it failed to adequately define the scope of the state's powers, thus rendering it void for vagueness and overbreadth. *In re Real Property Forfeiture Proceedings*, No. 90-250-CF (Fla. 8th Cir. Ct. Dec. 21, 1990) (order and opinion granting claimant's amended motion to dismiss petitions for forfeiture).

78. FLA. R. APP. P. 9.125.

79. *Real Property*, 16 Fla. L. Weekly at S497.

80. *Id.* at S498 (relying on *State ex rel. Gore v. Chillingworth*, 171 So. 649, 654 (1936)).

81. *Id.*

82. *Id.* at S501 n.7 (citing FLA. STAT. § 932.703(1) (1989)).

83. *Id.* at S498 (citing FLA. STAT. § 932.704(1) (1989)).

84. *Real Property*, 16 Fla. L. Weekly at S498 (citing FLA. STAT. § 932.703(1) (1989)).

burden of proving in a forfeiture proceeding that they lacked scienter.<sup>85</sup> In addition, the act fails to distinguish between real and personal property, to require preseizure notice and opportunity for the property owner or lienholder to be heard, and to prescribe procedures for the seizure itself.<sup>86</sup>

Several guiding principles direct the course of judicial analysis of forfeiture statutes. Forfeiture is a harsh exaction that courts generally disfavor.<sup>87</sup> Forfeiture statutes are strictly construed, but doubts are resolved in favor of upholding them against constitutional attack.<sup>88</sup> Attentive to its obligations to both establish rules that safeguard constitutional rights and to respect the province of a coordinate branch of state government,<sup>89</sup> the court sought to determine whether the forfeiture act "can reasonably be construed" to comport with "minimal" due process.<sup>90</sup> Unanimously, the court found that it could.

*Real Property* presented an issue untried in Florida. For guidance, the court turned to federal cases, said to be highly persuasive and expressing principles embodied in the Florida Constitution. Among them are the federal due process requirements of notice to the interested party and an opportunity to be heard at an adversarial proceeding *before* the government may seize property containing a residence, unless extraordinary circumstances justify postponing notice and hearing until after seizure.<sup>91</sup> Moreover, the "special significance" of residential property necessitates "special constitutional protection."<sup>92</sup> In that

85. *Id.* (citing FLA. STAT. §§ 932.703(2), (3) (1989)).

86. *Id.*

87. *Id.* (citations omitted).

88. *Id.* (citation omitted).

89. FLA. CONST. art. II, § 3.

90. This mode of statutory interpretation is not clearly dictated by precedent. For instance, the court is disinclined to rehabilitate laws that suffer from vital omissions or impermissible vagueness. *See Perkins v. State*, 576 So. 2d 1310, 1312-13 (Fla. 1991) (discussed *infra* note 138); *State ex rel Williams v. Coleman*, 180 So. 357, 360 (Fla. 1938) ("We are powerless to read into a statute . . . that which the Legislature in its wisdom omitted . . ."). Yet, the court believes that it should consider rehabilitative constructions of vague laws. *See State v. Wershow*, 343 So. 2d 605, 607 (Fla. 1977) (unwilling to abandon its position of judicial restraint to rewrite a statute proscribing "malpractice in office," when the statute is so vague and overbroad that it is *not amenable to a construction* that would permit the court to resolve all doubts in favor of its validity) (citing FLA. CONST. art. II, § 3).

91. *Real Property*, 16 Fla. W. Weekly at S499 (citing *United States v. Premises & Real Property* at 4492 S. Livonia Rd., 889 F.2d 1258 (2d Cir. 1989)).

92. *Id.* (quoting *Livonia Rd.*, 889 F.2d at 1264).

vein, due process requires preseizure notice and hearing to minimize the risk of erroneous deprivation. This respects the character of real property, which unlike personal property, makes it unlikely to produce exigencies that require means as restrictive as seizure.<sup>93</sup>

The state has at its disposal less restrictive means than seizure to preserve potentially forfeitable assets. They include notices of lis pendens, bonds, restraining orders, or some combination. The issuance of an ex parte restraining order before notice to the owner or lienholder, as example, is appropriate when a grand jury indictment has already established probable cause to believe that property is subject to forfeiture. The restraining order merely removes assets from control of the defendant temporarily, pending final judgment, and provides an opportunity for the state to establish a higher right to those assets.<sup>94</sup> However, seizure after indictment is no less serious an encroachment than seizure before indictment. Therefore, federal due process requires that the trial court reexamine probable cause at an adversarial hearing to determine de novo whether continued restraint on the property is necessary.<sup>95</sup>

Florida due process plays a central role in protecting property rights that are infringed when the state wields its powers of seizure and forfeiture. Traditionally, courts and legislatures have measured the degree of property protection from unjustified forfeiture based on the label attached to the forfeiture action itself. *Real Property* dispenses with this practice as too "simplistic," and rejects the notion that due process provides qualitatively different protection that depends on whether the forfeiture is classified as civil (remedial), criminal (punitive), or quasi-criminal. Instead, the court wrote, disputes over constitutional rights must be decided by evaluating those rights, and when necessary, by balancing the competing interests.<sup>96</sup>

Floridians have taken great care to make property rights secure under the state constitution. Property rights are expressly protected by article I, section 2, and they are numbered among the most basic sub-

93. *Id.* (citing *Livonia Rd.*, 889 F.2d at 1265).

94. *Id.* (citing *United States v. Monsanto*, 924 F.2d 1186, 1192 (2d Cir. 1991) (en banc)).

95. *Id.*; *Monsanto*, 924 F.2d at 1195.

96. *Real Property*, 16 Fla. L. Weekly at S502 n.15; see also *United States v. Halper*, 490 U.S. 435, 447-48 (1989) ("The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law, and for the purposes of assessing whether a given sanction constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads.").

stantive rights. For this reason, persons whose property the state restrains clearly have a compelling interest to be heard at the outset of forfeiture proceedings to assure that the state has probable cause to justify any restraint.<sup>97</sup> Moreover, property rights are “particularly sensitive” when the state seeks to forfeit residential property. This is directly attributed to several specific article I provisions that form a barrier between the state on the one hand, and the home and personal autonomy on the other.<sup>98</sup>

Next, due process requires a court to evaluate the justification for the state activity. The court said that the state advances “substantial” state interests when it seizes and forfeits property that is used to facilitate trafficking in illicit drugs. Those state interests include punishing criminal wrongdoers, seeking retribution for society, deterring the continued use of property to further criminal activity, remedying societal wrongs, and recovering the costs of law enforcement.<sup>99</sup> By characterizing the state’s interests as “substantial,” the court implies that the state has satisfied an intermediate level of justification for its activity, one less demanding than “compelling,”<sup>100</sup> but more demanding than merely “legitimate.”<sup>101</sup> As it turns out, however, the characterization is not particularly crucial in the forfeiture context. The defendant did not dispute the strength or importance of the state’s asserted aims, and the thirty-eight page slip opinion lays the matter to rest in a single sentence without citation.

More crucial to the outcome than the label attached to the state’s interests is the choice of standards by which the court measures the level of protection due individual rights when the state wields its power. Generally, when basic rights are at stake, article I, section 9 requires the state to narrowly tailor the means chosen to accomplish its goals by

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97. *Id.* at S499.

98. *Id.* (citing FLA. CONST. art. I, §§ 2 (inalienable rights), 12 (security in the home), and 23 (express right of privacy)). The seizure and forfeiture of property also implicate other provisions designed to limit the exercise of state power. *Id.* (citing FLA. CONST. art. I, §§ 17 (prohibition against excessive punishments), 21 (meaningful access to the courts)).

99. *Id.* at S499.

100. *See, e.g., In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990) (requiring the state to show a “compelling” state interest before it intrudes into a person’s right to self-determine his or her medical course).

101. *See, e.g., Stall v. State*, 570 So. 2d 257, 260 (Fla. 1990) (upholding anti-obscenity law, in part, because the state has a “legitimate interest ‘in stemming the tide of commercialized obscenity’”) (citation omitted).

using the least restrictive alternative. Because means less restrictive than seizure were available, the state failed to satisfy this burden. *Real Property* holds that Florida due process compels the state to employ means less restrictive than seizure, where feasible, if it intends to prevent the disposition of potentially forfeitable property before trial on the forfeiture.<sup>102</sup> The holding underscores the high regard Floridians have for the rights at stake, for very few article I rights receive greater protection from state encroachment.<sup>103</sup>

Because the act failed to adequately shield basic rights from unjustified ouster by the state, the court issued several rehabilitative procedural directives.<sup>104</sup> Before initially restraining real property (by means other than *lis pendens*), the state must provide notice and schedule an adversarial hearing on the issue of probable cause. The state must initiate proceedings by filing a petition for rule to show cause, and simultaneously recording a copy of the petition in the official records of

102. *Real Property*, 16 Fla. L. Weekly at S499. Due process also requires the state to provide notice to those with an interest in the property, and an opportunity to be heard throughout the forfeiture proceedings. *Id.*

103. The most stringent standard announced for protection of article I rights requires the state to show "overpowering public necessity" and "no alternative method" of meeting the necessity. *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973) (standard applied when the state abolishes a right of access to courts protected under article I, section 21, and fails to provide a reasonable alternative). A standard less rigorous, but one seldom satisfied, requires the state to show a compelling state interest that it advanced through the least intrusive means. *See, e.g., Hillsborough County Governmental Employees Ass'n, v. Hillsborough County Aviation Auth.*, 522 So. 2d 358, 362 (Fla. 1988) (article I, section 6, right to bargain collectively); *Palm Harbor Special Fire Control Dist. v. Kelly*, 516 So. 2d 249, 251 (Fla. 1987) (article I, section 2, inalienable rights (classification based on alienage)); *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544, 547 (Fla. 1985) (article I, section 23, express right of privacy). *See generally Decade Survey supra* note 2 at 856 (maintaining that the court has created a hierarchical order of article I rights that depends entirely on the standard used to measure the justification for the state's encroachment).

104. *Real Property*, 16 Fla. L. Weekly at S499-500. In other instances, the court has resorted to its rule making authority to craft procedural protection for substantive constitutional rights newly recognized in an opinion. *See, e.g., In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990) (prescribing procedures under article I, section 23 to safeguard the right of an incompetent patient to self-determine his or her medical course without prior judicial approval); *State v. Stanjeski*, 562 So. 2d 673 (Fla. 1990) (finding that statute, which authorized clerk to enter a final judgment by operation of law when obligor defaulted on support payments, "should be interpreted" to allow the obligor a hearing and the opportunity to present equitable defenses *before* entry of judgment).

the clerk. The recordation amounts to a seizure of real property.<sup>105</sup> The state must immediately schedule an adversarial preliminary hearing and notice all interested persons. In the event the state shows that it has probable cause to believe that the seized property is subject to forfeiture, the trial judge may protect the respective interests by order. The adversarial hearing should take place within ten days of filing of the petition for rule to show cause, and a decision on probable cause should be “expeditiously completed.”<sup>106</sup>

Due process does not require preseizure notice or hearing when the state initially restrains personal property,<sup>107</sup> however, it does require the state to send notice to interested persons after making an ex parte seizure, and to afford them an opportunity to be heard at a postseizure adversarial hearing. If requested, the adversarial hearing shall be held “as soon as possible after seizure.”<sup>108</sup> The trial judge must expeditiously determine de novo whether the state had probable cause to proceed with the forfeiture, and whether continued restraint of the seized property is warranted.<sup>109</sup>

The opinion makes several points regarding litigation of property claims under the act. Claimants are constitutionally entitled to a jury trial on the ultimate issue of forfeiture,<sup>110</sup> a right that is subsumed within state due process.<sup>111</sup> The state argued that it should be held to no more than a preponderance standard of proof at trial on the forfeiture claim. However, Florida law expects more. Construing the “due proof” requirement of the act, the court said that the state must show by “no less than clear and convincing evidence” that the seized prop-

105. The act makes no provision for seizure of real property, such as by warrant or writ, although seizure warrants were issued by the trial judge in this case.

106. *Real Property*, 16 Fla. L. Weekly at S500-501.

107. *Accord Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). Justice Brennan wrote that “seizure [of personal property] for the purposes of forfeiture is one of those ‘extraordinary situations’ that justify postponing notice and opportunity for a hearing.” *Id.* at 677 (quoting *Fuentes v. Shevin*, 407 U.S. 67, 90 (1972)).

108. *Real Property*, 16 Fla. L. Weekly at S500. The opinion is not entirely clear on this point. *See id.* (anticipating that the hearing would occur within ten days after seizure and “as soon as is reasonably possible”). The court also reaffirmed *Lamar v. Universal Supply Co.*, 479 So. 2d 109 (Fla. 1985), which held that due process requires “reasonably prompt” proceedings in forfeiture actions involving personal property. *Real Property*, 16 Fla. L. Weekly at S502 n.16. To the extent that there is disagreement between *Lamar* and *Real Property*, the latter prevails. *Id.*

109. *Id.* at S500.

110. *Id.* at S501 (citing FLA. CONST. art. I, § 21 (access to courts)).

111. *Id.*

erty was used in violation of the act before it is entitled to forfeiture.<sup>112</sup> The higher standard is justified, the court said, because forfeiture impinges on basic constitutional rights, often those of persons who are innocent of wrongdoing.<sup>113</sup>

This is a marked departure from the prevailing practice in Florida forfeiture cases. Formerly, the state was required to initially proceed by a mere showing of probable cause that the property was subject to forfeiture. Once established, the burden shifted to the claimant to rebut the showing of probable cause. Alternatively, the claimant was required to show by a preponderance of the evidence that no violation occurred, or that an affirmative defense entitles the claimant to repossess the seized property.<sup>114</sup>

In summary, there is no doubt that the court would have acted within its prerogatives had it performed last rites on the forfeiture act, affirming the trial judge and striking the act as sorely wanting protection for substantive rights.<sup>115</sup> While it may be argued that some justices would have voted to overturn the act in its entirety, it is doubtful that all would have concurred in the result. Thus seen, *Real Property* was likely the product of compromise, realized through strenuous effort.<sup>116</sup>

112. *Id.* Rather than imposing a fixed standard, the court allowed leeway for the legislature to establish a higher evidentiary burden, such as the standard that governs criminal prosecutions.

113. *Id. Contra Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974) (noting that innocence of the property owner has almost uniformly been rejected as a defense to a forfeiture).

114. *In re Forfeiture of Approximately Forty-Eight Thousand Dollars (\$48,900.00) in U.S. Currency*, 432 So. 2d 1382, 1385 (Fla. 4th Dist. Ct. App. 1983). Under *Real Property*, the claimant is still held to a preponderance burden to establish a defense that defeats a forfeiture action. *Real Property*, 16 Fla. L. Weekly at S501.

115. The district courts often complained about the procedural shortcomings in the predecessor versions of the 1989 act under review. *See id.* at S500 and cases cited therein.

116. Given an earlier opportunity to consider the act in light of federal double jeopardy, the court divided four to three. *See State v. Crenshaw*, 548 So. 2d 223, 227 (Fla. 1989). The majority never reached the constitutional issue. However, three justices advocated a minority position that the vehicle forfeiture authorized by the act violated the federal double jeopardy prohibition against multiple punishments, as applied, because the forfeiture penalty exceeded the compensation required to make the state whole. *Id.* at 229 (Kogan, J., dissenting, with whom Shaw and Barkett, JJ., concurred) (citing *Halper*, 109 S. Ct. at 1897). The rationale behind the double jeopardy concern strongly parallels the court's proportionality analysis in *Real Property*, which limits the state to the property or portion thereof that was used in connection with the crime. *Real Property*, 16 Fla. L. Weekly at S501. For a discussion of this aspect of the

On the one hand, allowing the act to stand served those justices who might have believed that it satisfied federal constitutional standards, and that Florida provided no greater protection. On the other hand, application of a judicial tourniquet of “minimal” due process requirements cured some of the potentially fatal defects that concerned those justices who would have struck the act, partially or entirely.

This remarkable unity has several virtues. The choice permitted the court to speak with clarity through one voice. Unanimity enhances the precedential value of a decision, for it reflects the joint wisdom of the court’s membership. This is particularly important because the opinion addresses constitutional rights of some magnitude. The decision respects Florida’s strong separation of powers doctrine by leaving intact a forfeiture law, said to advance several “substantial” state aims. Finally, the result is politically savvy and practically appropriate. The decision avoided piecemeal litigation that surely would have occurred had the court overturned the act, leaving to the legislature the task of enacting “minimal” protections of individual constitutional rights in the aftermath.<sup>117</sup>

*Real Property* establishes the analytical paradigm for article I, section 9 due process. The opinion distinguishes substantive and procedural due process as two discrete, functional components. The substantive due process component forms the core of the state bill of rights, shielding “the full panoply of individual rights” from unjustified interference by the state’s political branches. This is a statement of great amplitude.

It is beyond dispute that substantive due process protects expressly declared constitutional rights, such as the rights “to acquire, possess and protect property” under article I, section 2. Thus seen, personal rights declared throughout the constitution give substantive content to

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case, *see infra* notes 282-88 and accompanying text.

Another case decided this survey period suggests that the unanimity reached in *Real Property* is an example of collegial accommodation. The justices were irreconcilably split in *Smith v. Department of Health & Rehabilitative Servs.*, 573 So. 2d 320 (Fla. 1991), over a fundamental principle of due process—whether due process entitled indigents to a free transcript of an administrative hearing to perfect their appeal. *Smith* is discussed *infra* notes 304-10 and accompanying text.

117. The constant pressure from groups of constituents makes it unlikely that legislators, and the voters, will care enough about preserving “‘the balance of the Constitution’ to offset the votes of those whose interests will be disappointed.” Learned Hand, *The Bill of Rights 12 in THE OLIVER WENDELL HOLMES LECTURES* (1958) (citation omitted).



article 1, section 9 due process. More interesting is the implication that due process protects unspecified, unenumerated rights.<sup>118</sup> That the Florida Constitution should respect essential values that have no specific textual foundation is not surprising, for article I does not limit the scope of its protections to rights expressly declared.<sup>119</sup> In addition, courts have acknowledged that protected rights derive from non-constitutional sources. Among them are rights of individuals conferred by state grant or entitlement, such as statute, regulation, ordinance, and agreement.<sup>120</sup> Less clear is whether individual rights that derive from relationships, contracts, custom, course of conduct, and the like are similarly entitled to due process. The statement has the potential for far-reaching impact and its full import must await the perspective of later case development.

While a statement of general policy reserves important details for adjudication in later cases, precedent cautions against ascribing a meaning to the statement that exceeds the parameters of the decision. The court has recently refused to be bound by archetypical statements of constitutional principle outside the factual contexts in which they were announced.<sup>121</sup> With that caution *Real Property's* holding must be

118. See also *Real Property*, 16 Fla. L. Weekly at S499 (implying that privacy protections derive from the inalienable rights clause of article I, section 2).

119. Compare FLA. CONST. art. 1, § 1 with U.S. CONST. amend. IX.

120. See *Hewitt v. Helms*, 459 U.S. 460, 486, n.12 (1983) (Stevens, J., dissenting, joined by Brennan, Marshall, and Blackmun, JJ.) (specific rights attach "whether the State uses a particular form of words in its laws or regulations, or indeed whether it has adopted written rules at all"); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) (declaring that property interests "are created and their dimensions are defined by existing rules or understandings or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits").

121. Compare *In re Guardianship of Browning*, 568 So. 2d 4, 10 (Fla. 1990) (describing privacy as a "physical and psychological zone within which an individual has the right to be free from intrusion or coercion," and deciding that Florida's express right of privacy protects a person's right to self-determine his or her medical course, even if it means that death is certain to follow as a result of the choice) (citation omitted) and *In re T.W.*, 551 So. 2d 1186, 1191 (Fla. 1989) (stating that "'the right to be let alone [is] the most comprehensive of rights and the right most valued by civilized men,'" and declaring that it prohibits the state from requiring a minor female to obtain parental consent before electing to terminate her pregnancy in the first trimester) (citation omitted) with *State v. Stall*, 570 So. 2d 257 (Fla. 1990), *cert. denied*, 111 S. Ct. 2888 (1991) (relying on precedent predating the adoption of Florida's express right of privacy to declare that no privacy rights arise in the context of commercial sale or viewing of obscene material).

seen as grounded on textually enumerated rights in article I, not on peripheral rights or entitlements.

The procedural due process component requires fair treatment, which includes notice and a real opportunity to defend before judgment is rendered, whenever substantive rights are implicated. The application of due process is dependent on the character of the interests at stake, and the nature of the process involved. When fundamental property rights are implicated, the state must justify its action to divest those rights by showing that its action advances a substantial state interest. And the state must employ the least restrictive means to exercise an initial restraint on property, and show by no less than clear and convincing evidence that the property is subject to forfeiture.

*Real Property* is a fountainhead of state constitutional decision making. The decision illustrates the court's willingness to dispose of far-reaching constitutional questions entirely on the strength of the Florida Constitution. This is no phenomenon, but a result made more likely by the deliberate litigation of state constitutional claims at trial and on appeal, by the high regard that Floridians have shown for property rights in article I, and by an evolving line of precedent that urged state law development.<sup>122</sup> If the significance of an opinion is measured by the care that a state court takes to ground its holding firmly on state law logic, then *Real Property* has few equals in the opinions of the Supreme Court of Florida. The exclusive, explicit, and principled reliance on articulated state law values of property, fairness, notice, and meaningful hearing renders federal review improbable, and preserves for Floridians a measure of property security and due process that surpasses federal constitution standards.

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122. Although the opinion does not make the point, the court's case law suggests that the time was ripe when *Real Property* reached the court to confront the state constitutional claims attacking the forfeiture act. The historical progression begins with *Griffis v. State*, 356 So. 2d 297, 299 (Fla. 1978), where the court abided by express legislative intent, and wrote that the 1975 version of Florida's contraband forfeiture statute was to be construed "in uniformity" with its federal counterpart. Then, *Duckham v. State*, 478 So. 2d 347, 349 (Fla. 1985), suggested the onset of a new era. *Duckham* receded from *Griffis*, indicating that the extensive amendments to the act in 1980 required courts to look to state legislative intent, rather than federal precedent. Finally, three justices dissented in *State v. Crenshaw*, 548 So. 2d 223, 226 (Fla. 1989) (Kogan, J., dissenting, Shaw and Barkett, JJ., concurring), exposing the vulnerability of the act to constitutional attack. They argued that the forfeiture of the defendant's car under the act violated the double jeopardy prohibition against multiple punishment, because the forfeiture exceeded the compensation needed to make the state whole.

The second unanimous case this period, *State v. Rodriguez*,<sup>123</sup> like *Real Property*, dealt with the notice aspect of due process. The state charged Rodriguez by information with felony driving under the influence (DUI),<sup>124</sup> a crime that is punishable as a felony of the third degree provided the defendant has three or more prior DUI convictions. The information omitted any reference to Rodriguez's prior convictions. The court determined that proof of prior convictions is an essential element of the substantive offense of felony DUI.<sup>125</sup> Relying exclusively on the Florida Constitution, the court held that the fair notice aspect requires the state to specifically enumerate in the accusatory instrument the defendant's three specific prior convictions for driving under the influence.<sup>126</sup> The court overturned the felony DUI conviction because the state failed to provide Rodriguez with any notice of his prior convictions that it intended to rely on to establish felony DUI.<sup>127</sup>

The opinion adds that the record contained insufficient evidence to establish Rodriguez's prior DUI convictions,<sup>128</sup> and leaves for another day the question of whether a tender of proof alone might satisfy the constitution's fair notice requirement.

The justices further agreed that another due process aspect, the presumption of innocence, requires the trial court to withhold from the jury any allegations or facts about the defendant's prior DUI convictions.<sup>129</sup> Once the state proves the elements of the instant DUI offense, the trial court is then required conduct a separate, non-jury proceeding to determine the historical fact of the defendant's prior convictions.<sup>130</sup>

123. 575 So. 2d 1262 (Fla. 1991) (unanimous) (Barkett, J., author).

124. FLA. STAT. § 316.193(2)(b) (Supp. 1988).

125. *Rodriguez*, 575 So. 2d at 1266.

126. *Id.* (citing art. I, §§ 9 (due process) and 16 (right of accused in criminal prosecution to be informed of "the nature and cause of the accusation against him")); *see also* *M.F. v. State*, 583 So. 2d 1383 (Fla. 1991) (due process requires the state to provide the accused with notice of the allegations in juvenile as well as adult criminal proceedings, and does not prohibit the state from amending a petition of delinquency to correct a good faith typographical error before the adjudicatory hearing).

127. *Rodriguez*, 575 So. 2d at 1266-67.

128. *Id.* at 1266.

129. *Id.* at 1265-66.

130. *Id.* at 1266 (applying *State v. Harris*, 356 So. 2d 315 (Fla. 1978)). *Harris* explained the due process implications of failing to determine out of earshot of the jury the historical fact of convictions of similar crimes: "If the presumption of innocence is destroyed by proof of an unrelated offense, it is more easily destroyed by proof of a similar, related offense." 356 So. 2d at 317.

The third unanimous due process decision, *Burr v. State*,<sup>131</sup> vacated a death sentence and remanded for a new sentencing hearing because the defendant had been acquitted of collateral crimes that the trial court earlier relied on to establish three aggravating circumstances in overriding the jury's recommendation of a life sentence. Finding that two of the three aggravating circumstances rested "predominantly, if not entirely," on some of the collateral crimes evidence, the court was "forced to conclude" that the two circumstances are "reasonably suspect," and inadmissible under article I, section 9 at a resentencing hearing.<sup>132</sup> The court rejected a conclusion that the error could be considered harmless in the penalty phase of a capital trial.<sup>133</sup>

*Burr's* harmless error analysis warrants brief comment. The court wrote that the error was harmless in the guilt phase of *Burr's* trial, "in light of the overwhelming evidence of guilt discernible in our review of the entire record."<sup>134</sup> Without clarification, the statement risks its misapplication. *DiGuilio* posed the precise harmless error inquiry as whether there is a reasonable possibility that the error affected the verdict, and it expressly rejected the overwhelming evidence test as a basis for determining harmless error.<sup>135</sup> Despite appearances, *Burr* does not depart from *DiGuilio*, and its statement should not be read to imply that the court will find error to be harmless merely because the record contained overwhelming evidence of guilt.

In the fourth case, *Abdala v. World Omni Leasing, Inc.*,<sup>136</sup> the court rejected a due process attack against a statute that exempted long-term lessors of vehicles who maintained certain liability insurance

131. 576 So. 2d 278 (Fla. 1991) (per curiam).

132. *Id.* at 280; see also *Johnson v. Mississippi*, 486 U.S. 578 (1988) (vacating death sentence when the sole prior conviction relied on by the sentencer to establish an aggravating circumstance was later overturned).

133. *Burr*, 576 So. 2d at 280.

134. *Id.* (citation omitted). Compare *Bruno v. State*, 574 So. 2d 76, 80 (Fla. 1991) (finding error to be harmless, and stating that the record showed "overwhelming evidence of guilt"), cert. denied, No. 90-812 (U.S. Oct. 7, 1991) with *Dailey v. State*, No. 71,164, slip op. at 8 (Fla. Nov. 14, 1991) (finding error harmless in light of "other substantial evidence of guilt") and *Craig v. State*, 585 So. 2d 278, 280 (Fla. 1991) (same).

135. *DiGuilio*, 491 So. 2d at 1139; see also *Chapman v. California*, 386 U.S. 18, 23 (1967) (admonishing courts against overemphasizing a finding of overwhelming evidence of guilt as a basis for concluding that error could not have affected the outcome).

136. 583 So. 2d 330 (Fla. 1991) (unanimous) (McDonald, J., author). The case is treated more fully under equal protection, see *supra* notes 13-15 and accompanying text, and access to courts, see *infra* notes 296-99 and accompanying text.

limits. The court said that the exemption bore a reasonable relationship to a permissive legislative objective.<sup>137</sup>

In the following three cases, no opinion won majority approval, although the justices reached unanimous positions. In *Perkins v. State*,<sup>138</sup> the court overturned Perkins' conviction of murder in the first degree and attempted cocaine trafficking. Perkins and Guy agreed to buy cocaine through Lazier, their codefendant. Perkins and Lazier approached Kimble, the prospective seller. Instead of selling them cocaine, Kimble tried to rob Perkins and Lazier of their purchase money at gun point. In the ensuing struggle, Kimble shot Perkins, but Perkins succeeded in seizing Kimble's gun and shot him dead.<sup>139</sup>

The state conceded at trial that Perkins shot Kimble in self-defense, but argued that Perkins was barred from raising the legal claim of self-defense under the statute, which made the defense unavailable to a person who attempts to commit a forcible felony. The statute defines "forcible felony" under the catchall clause to be "any other felony which involves the use or threat of physical force or violence against any individual."<sup>140</sup> The trial judge granted Perkins's motion to dismiss the murder charges. However, the third district reversed, finding that the crime, trafficking in cocaine, qualifies as a "forcible felony" because it inherently involves a propensity to do violence.<sup>141</sup>

The state supreme court quashed the opinion of the district court. The court began with a fundamental principle of statutory construction, due process requires a court to strictly construe penal statutes according to their literal text, and in a manner most favorable to the accused. The court ruled that the term "involves" was vague and ambiguous, and failed to place narcotics trafficking within the conduct proscribed in the statute.<sup>142</sup>

Another case, *Anderson v. State*,<sup>143</sup> borrowed from established

137. *Id.* at 333-34.

138. 576 So. 2d 1310 (Fla. 1991) (per curiam). *Perkins* is also addressed under article I, section 2 (inalienable rights), *supra* notes 56-58 and accompanying text.

139. *Id.* at 1311.

140. FLA. STAT. § 776.041(1) (1987) (emphasis added).

141. *State v. Perkins*, 558 So. 2d 537, 538-39 (Fla. 3d Dist. Ct. App. 1990).

142. *Perkins*, 576 So. 2d at 1313-14. The court added that the rule of strict construction was a necessary rule of self-restraint, equally required by the doctrine of separation of powers embodied in article II, section 3 of the state constitution. Without the rule, courts could use "some minor vagueness" to extend the meaning of a statute beyond the text enacted by the legislature. *Id.* at 1312-13.

143. 574 So. 2d 87 (Fla. 1991) (per curiam) (Shaw, C.J., and Overton, McDon-

federal doctrine to declare that the state violates Florida's due process guarantee when it prosecutes a person on charges known to be based on perjured material evidence. However, the court rejected Anderson's claim that his indictment for first-degree murder was based on the perjured testimony before the grand jury of his accomplice woman-friend, turned accuser. The court wrote that her testimony was not materially false, and thus would not have affected the grand jury's decision to indict or the petit jury's truth-seeking function.<sup>144</sup>

At least three justices believed that state due process provided the dispositive principles in the following two plurality decisions. However, the fractured opinions make a less certain contribution to article I. The court in *Smith v. Department of Health and Rehabilitative Services*<sup>145</sup> accepted review of a claim by various petitioners, all of whom were indigent, that they had a statutory and a constitutional right to receive without charge transcripts of administrative hearings in order to perfect their judicial appeal from unfavorable administrative rulings. Six justices agreed that indigents were entitled under section 57.081(1), Florida Statutes (1985),<sup>146</sup> to receive transcripts of administrative proceedings at no cost.<sup>147</sup>

The petitioners also advanced a claim that they were entitled to receive transcripts under principles of state due process.<sup>148</sup> Justices, Overton, Grimes, and McDonald joined in the per curiam opinion and rejected the constitutional claim, while Chief Justice Shaw concurred in result. They relied on the United States Supreme Court's decision in

ald, and Grimes, JJ., concurring; Ehrlich, J., concurred with an opinion in which Shaw, C.J., and Kogan, J., joined; Barkett, J., concurred in part and dissented in part with an opinion; Kogan, J., concurred in result only).

144. *Id.* at 91-92.

145. 573 So. 2d 320 (Fla. 1991) (per curiam) (Overton and Grimes, JJ., concurred; Shaw, C.J., concurred in result; McDonald, J., concurred in part and dissented in part with an opinion; Ehrlich, J., concurred in part and dissented in part with an opinion in which Barkett and Kogan, JJ., joined).

146. The section provides that indigent parties to an administrative proceeding shall receive "the services of the courts, sheriffs, and clerks, with respect to such proceedings, without charge."

147. *Smith*, 573 So. 2d at 323 (Overton and Grimes, JJ., concurring); *id.* at 325 (Shaw, C.J., concurring in result); *id.* (Ehrlich, J., concurring in part; Barkett and Kogan, JJ., concurring); *see also* *Gretz v. Florida Unemployment Appeals Comm'n*, 572 So. 2d 1384 (Fla. 1991) (holding that agency rule requiring payment for a copy of hearing transcript and record violated statute prohibiting the charging of fees).

148. The petitioners advanced a second constitutional argument under the access to courts provision. *See infra* notes 304-10 and accompanying text.

*Ortwein v. Schwab*, which had considered a related issue.<sup>149</sup> *Ortwein* affirmed an Oregon court, construing Oregon law, which ruled that welfare recipients were not entitled to a waiver of an appellate court filing fee to seek judicial appeal of an administrative ruling, following an evidentiary hearing, that had affirmed an agency decision reducing their welfare benefits. Federal due process did not require the state of Oregon to waive costs that would permit an indigent to file an appeal, and that the existence of the alternative evidentiary hearing, which was not conditioned on the prepayment of a filing fee, sufficed under the circumstances.<sup>150</sup> It was “‘inconceivable,’” the per curiam opinion reads, that Florida’s statute requiring prepayment of transcript costs is any less rational.<sup>151</sup> “We see no compelling reason to construe Florida’s due process clause differently than its federal counterpart with respect to this issue. Since petitioners received an evidentiary hearing on their claims without cost, we do not believe that they would be constitutionally entitled to be furnished with a free transcript to assist in the prosecution of their appeals.”<sup>152</sup>

The per curiam position provoked a strong dissent, and exposed a deep-rooted division over the meaning of due process. Writing for three members of the court in dissent, Justice Ehrlich argued that a party could not be bound personally by an administrative decision until he or she had meaningful access to a judicial tribunal, which necessarily included a transcript of the administrative proceeding.<sup>153</sup> Moreover, the court had earlier declared in an equally applicable equal protection context that indigents were entitled to challenge their involuntary hospitalization in a manner commensurate with the appellate review available to nonindigents.<sup>154</sup>

149. 410 U.S. 656 (1973).

150. *Id.* at 658-59 (relying on *United States v. Kras*, 409 U.S. 434, 445-46 (1973) (upholding statutorily imposed bankruptcy filing fees, in part, because Kras’ resort to the bankruptcy court was not his sole path of relief); *see also* *Boddie v. Connecticut*, 401 U.S. 371, 382 (1971) (striking state statute requiring prepayment of filing fee by indigent seeking divorce because Connecticut courts provided the “exclusive precondition” for obtaining a divorce).

151. *Smith*, 573 So. 2d at 324 (quoting *Harrell v. Department of Health & Rehabilitative Servs.*, 361 So. 2d 715, 717 (Fla. 4th Dist. Ct. App. 1978)).

152. *Id.*

153. *Id.* at 325 (Ehrlich, J., concurring in part and dissenting in part; Barkett and Kogan, JJ., concurring) (relying on *Scholastic Sys. v. LeLoup*, 307 So. 2d 166 (Fla. 1974)).

154. *Id.* (relying on *Shuman v. State*, 358 So. 2d 1333 (Fla. 1978)).

*Smith* departs from the well-settled providential rule which states that the court should avoid deciding a constitutional question when it can dispose of the issue on nonconstitutional grounds.<sup>155</sup> Because six justices clearly agreed that indigents are statutorily entitled to a transcript free of charge, the court had no need to reach the constitutional claim.<sup>156</sup> Despite its dubious precedential importance as a constitutional decision, *Smith* adds a gratuitous measure of understanding to the field, and displays a willingness by the justices to share their views, however disparate. Both results are welcomed by those who follow carefully the court's labors.

*Walls v. State*<sup>157</sup> also produced a plurality decision and three opinions. The state prosecuted Walls for a double homicide. Suspecting that he was involved in other murders, the state asked a correctional officer to conduct a surveillance of Walls while he awaited trial in detention. The officer assured Walls that his comments to her would remain confidential, and discouraged Walls from telling his attorney. The officer took detailed notes of Walls' statements, which the state gave to its examining psychiatrists. Following evaluation, two of the state's psychi-

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155. See *Griffis v. State*, 356 So. 2d 297, 298 (Fla. 1978), *receded from on other grounds*, *Duckham v. State*, 478 So. 2d 347 (Fla. 1985); *Palm Beach Mobile Homes, Inc. v. Strong*, 300 So. 2d 881, 883 (Fla. 1974); *In re Estate of Sale*, 227 So. 2d 199, 201 (Fla. 1969).

156. It is not entirely clear why the court issued *Smith* in violation of the providential rule. The per curiam opinion, concurred in by Justices Overton and Grimes, indicates that the constitutional issue was reached because the matter had been "extensively argued." *Smith*, 573 So. 2d 323. Other recent cases suggest more appropriate rationale that guide the court to addressing a constitutional claim when other dispositional bases exist. See, e.g., *Davis v. State*, No. 76,640, slip op. at 3 n.\* (Fla. Oct. 31, 1991) (declining to impose procedural bar and reaching merits to emphasize that no error occurred); *Mac Ray Wright v. State*, 586 So. 2d 1024, 1029 (Fla. 1991) (reversing convictions on dispositive claim, and addressing other constitutional errors to instruct the trial court in the event of retrial); *Martinez v. Scanlan*, 582 So. 2d 1167 (Fla. 1991) (reaching the merits of the constitutional challenges on its own, "given the importance of th[e] case," and even though petitioners failed to show entitlement to relief, *id.* at 1171; addressing petitioners' separation of powers claim "for future guidance only." *Id.* at 1173). *But see id.* at 1176 (Kogan, J., specially concurring; Barkett, J., concurring); *id.* (Barkett, J., concurring in part and dissenting in part; Shaw, C.J., and Kogan, J., concurring) (arguing that the challenged act violated the single subject rule, thus disposing of the case, and that the majority inappropriately addressed additional constitutional claims).

157. 580 So. 2d 131 (Fla. 1991) (Kogan, J., author. Shaw, C.J., and Barkett, J., concurred. Grimes, J., concurred in result; McDonald, J., dissented with an opinion with which Overton, J., concurred).



atrists opined that Walls was competent to stand trial. The trial court accepted the opinions of the psychiatrists and proceeded to trial. The jury convicted Walls of murder, and recommended the death sentence, which the trial court imposed.<sup>158</sup>

On direct appeal, Walls argued that the correctional officer's activities violated his constitutional rights. A majority of the justices agreed, although two of the opinions chose different rationale. Justice Kogan wrote that the state engaged in illegal subterfuge, which required the court to conduct an "intensive scrutiny" of the particular method used by police to extract the statements from Walls.<sup>159</sup>

The state conceded at trial that the police conduct violated *Massiah v. United States*,<sup>160</sup> and further agreed that Walls' statements were properly excluded from the guilt phase and penalty phase of his trial. Relying exclusively on Florida due process, Justice Kogan wrote that the gross deception practiced by the state required the trial court to exclude the statements from *all* aspects of Walls' trial, thereby prohibiting the state from gaining advantage from the subterfuge on matters relating to Walls' competence to stand trial.<sup>161</sup> The practice violated the due process tenants of fairness and good faith, and degenerated from permissible accusation to impermissible inquisition.<sup>162</sup> The court ordered the case remanded for a new trial on all issues, and barred the use of psychiatric evaluations conducted by the original psychiatrists who received information derived from the Walls' detention statements.

Justice Grimes concurred in result only, and simply wrote that *Massiah* precluded the use of testimony by the mental health experts.<sup>163</sup> In dissent, Justice McDonald characterized the police activity as "inappropriate gathering of facts surrounding one's competency," which did not equate to a due process violation. Had the state's action led to a confession or been introduced as substantive evidence, he wrote, reversal would more likely be warranted.<sup>164</sup>

State due process arguments appeared in dictum and a minority

158. *Id.* at 132.

159. *Id.* at 133.

160. 377 U.S. 201 (1964).

161. *Walls*, 580 So. 2d at 134.

162. *Id.* at 133. The police conduct here also interfered with the attorney-client relationship, protected by article I, section 9. *Id.* at 134 (citing *Haliburton v. State*, 514 So. 2d 1088 (Fla. 1987)).

163. *Id.* at 135 (Grimes, J., concurring in result only).

164. *Id.* (McDonald, J., dissenting; Overton, J., concurring).

opinion in the two remaining cases. The court in *Clark v. State*<sup>165</sup> declined to consider a claim that separate sentences imposed on the same day and in the same court, but by different judges, resulted in sentences that combined to violate the recommended guidelines sentence. The court ruled that Clark was procedurally barred from raising the claim on appeal because he failed to ask the trial court to consolidate his sentencing proceedings. Recognizing that the underlying problem would persist in future cases, the court established a general rule that one sentencing score sheet must be used for each pending case. It further recognized an exception to that rule that allowed defendants to move to delay sentencing of pending cases to permit the use of a single score sheet.<sup>166</sup> In dictum, the court wrote that due process protects defendants against extreme delay occasioned by a rule that would postpone sentencing until all pending cases are ready for sentencing, such as where the delay results in an unreasonably long period of incarceration in anticipation of sentencing.<sup>167</sup>

A four-justice majority in *Espinosa v. State*<sup>168</sup> rejected Espinosa's claim that he was entitled to be tried separate from his co-defendant on multiple charges, including murder. The majority reasoned that Espinosa was not entitled to severance simply because he testified and was cross-examined by his co-defendant's counsel. Moreover, no evidence was introduced at his trial that could not have been introduced against either defendant, if each had been tried separately. Although Espinosa was unable to cross-examine his co-defendant during the guilt-innocence phase of his trial, because his co-defendant did not testify, Espinosa was able to cross-examine him during the penalty phase.<sup>169</sup>

Two justices in dissent relied on Florida's due process clause to argue that severance should generally be allowed in the guilt phase of a capital trial. Moreover, the requirement for an individualized punishment in death cases dictates that severance always be allowed in the penalty phase. This is particularly so when the co-defendants exhibit extreme animosity, and an elevated antagonism.<sup>170</sup> The inherent unfair-

165. 572 So. 2d 1387 (Fla. 1991) (per curiam) (Shaw, C.J., and Overton, McDonald, Ehrlich, Grimes, and Kogan, JJ., concurring; Barkett, J., specially concurring with opinion).

166. *Id.* at 1392.

167. *Id.* at 1390.

168. 16 Fla. L. Weekly S753 (Nov. 27, 1991) (per curiam).

169. *Id.* at S754; *see also* Beltran-Lopez v. State, 583 So. 2d 1030 (Fla. 1991) (per curiam).

170. *Espinosa*, 16 Fla. L. Weekly at S756 (Barkett, J., dissenting, Kogan, J.,

ness of jointly trying co-defendants under those circumstances is that “‘a substantial possibility exists [ ]that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty.’”<sup>171</sup>

## 2. Double Jeopardy

*No person shall . . . be twice put in jeopardy for the same offense*  
 . . . . FLA. CONST. art. I, § 9.

Federal case law provides a frequent source of precedent for resolving state double jeopardy claims. *Robinson v. State*<sup>172</sup> relied on *Oregon v. Kennedy*<sup>173</sup> and rejected a claim that double jeopardy barred retrial due to asserted prosecutorial overreaching where the record did not establish that the prosecutor deliberately intended to provoke Robinson into moving for a mistrial.<sup>174</sup> Robinson, a black man, was charged with first-degree murder of a white woman whom he kidnapped, robbed, and sexually battered. Robinson maintained that the prosecutor, during cross examination of a defense witness, insinuated that he habitually preyed on white women.

Unable to agree on which federal precedent suggested the better reasoned outcome, the justices in *Goene v. State*<sup>175</sup> predictably split their decision. Goene misrepresented his identity at sentencing and received a guideline sentence of four and one-half years' imprisonment following his conviction of various crimes. Afterward the state learned of Goene's true identity and that he had an extensive criminal history, which would have resulted in a guideline sentence of twelve-to-seventeen years' imprisonment had that fact been taken into account. The state moved to vacate Goene's sentence. After Goene began serving his sentence, the trial court granted the state's motion and resentenced Goene to seventeen years' imprisonment. He argued that a resentence

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concurring).

171. *Id.* (quoting *United States v. Berkowitz*, 662 F.2d 1127 (5th Cir. 1981)).

172. 574 So. 2d 108 (Fla. 1991) (Barkett, J., author. Shaw, C.J., and Overton, Grimes, and Kogan, JJ., and Ehrlich, Senior Justice, concurred. McDonald, J., concurred in result only), *cert. denied* No. 40-8277 (U.S. Oct. 7, 1991).

173. 456 U.S. 667 (1982).

174. *Robinson*, 574 So. 2d at 112-13 (relying on *Oregon v. Kennedy*, 456 U.S. 667 (1982)).

175. 577 So. 2d 1306 (Fla. 1991) (per curiam) (Shaw, C.J., and Overton, McDonald, and Grimes, JJ., concurred; Barkett, J., dissented with an opinion, in which Kogan, J., concurred).

to a greater term after he began serving the original sentence violated the state and federal double jeopardy clauses.<sup>176</sup>

Four of the six justices participating in the decision rejected Goene's claim of error. The majority acknowledged that the double jeopardy clause was intended, in part, to avoid subjecting a criminal defendant to repeated insecurity, which would occur were he or she not entitled to rely on the finality of the court's action.<sup>177</sup> The general rule, followed in Florida, prohibits a court from resentencing a defendant to an increased term of imprisonment once he or she has begun serving a sentence.<sup>178</sup> However, a defendant's fraudulent behavior in securing a sentence produces no "'legitimate expectations'" of constitutional finality.<sup>179</sup> Unlike a jury verdict of acquittal, a sentence imposed through the defendant's fraud may be assailed on appeal. This conclusion derives equally from the trial court's inherent power to assure the orderly function of the judicial process by rectifying "'at any time'" its orders and judgments that are the product of fraud.<sup>180</sup>

Two justices argued in dissent that the exception carved out by the majority ran afoul of the very purpose of the double jeopardy clause. Constitutional finality requires the state "to marshal all the evidence and present it at one time, not in a piecemeal fashion."<sup>181</sup> Here, the state failed to supply evidence of Goene's identity at the original sentencing hearing, or to seek a continuance and await a forthcoming fingerprint identification that would have established Goene's true identity.<sup>182</sup>

*Carawan v. State*<sup>183</sup> continues to have precedential importance in resolving claims that prosecution or sentencing of multiple charges arising out of a single act violates Florida law, even though the decision

176. *Id.* at 1306-07.

177. *Id.* at 1307 (relying on *Green v. United States*, 355 U.S. 184 (1957)).

178. *Id.* at 1308 (citations omitted).

179. *Id.* at 1307-08 (emphasis in original) (quoting *United States v. DiFrancesco*, 449 U.S. 117, 137 (1980)); *see also* *United States v. Jones*, 722 F.2d 632 (11th Cir. 1983).

180. *Goene*, 577 So. 2d at 1309 (emphasis in original) (quoting *State v. Burton*, 314 So. 2d 136, 138 (Fla. 1975)).

181. *Id.* at 1310 (Barkett, J., dissenting; Kogan, J., concurring).

182. *Id.* at 1311 (citing *Grady v. Corbin*, 110 S. Ct. 2084 (1990) (reasoning that double jeopardy barred a subsequent prosecution where the state was capable of prosecuting all charges in a single proceeding)).

183. 515 So. 2d 161 (Fla. 1987).

was overruled by the legislature effective July 1, 1988.<sup>184</sup> *Carawan* controls pipeline cases, that is, cases with direct appeals pending at the time the decision became final,<sup>185</sup> and cases alleging the occurrence of criminal activity before July 1, 1988.

The Second District Court of Appeal certified a question in a series of cases that asked whether double jeopardy barred prosecution and sentence for sale and possession (or possession with intent to sell) of the same quantum of cocaine. The lead decision, *State v. McCloud*,<sup>186</sup> dealt with prosecutions for those crimes allegedly occurring on June 9, 1988, and on August 1, 1988. Relying on the dictates of *Carawan*, the court said that the trial judge properly dismissed the June 9th possession charge.<sup>187</sup> However, section 775.021(4)(b), Florida Statutes (Supp. 1988), called for the opposite result concerning the August 1st offenses. That section authorized multiple convictions and sentences for offenses based on a single act, unless, for instance, it was a lesser-included offense. *McCloud* argued that the offense of possession was subsumed by the offense of sale, and fell within the exception. Rejecting that claim, the court ruled that an offense is a lesser-included offense under that section "only if the greater offense necessarily includes the lesser offense,"<sup>188</sup> and sale is not a lesser-included offense of possession because it can occur independent of possession. The court also ruled that the legislature prohibited it from examining either the pleading or proof to determine whether the defendant possessed and sold the same quantum of cocaine.<sup>189</sup>

The court ruled in *State v. Hollinger*<sup>190</sup> that *Carawan* did not prohibit the state from seeking to convict a defendant for the multiple offenses of first-degree premeditated murder and use of a firearm dur-

184. *State v. Smith*, 547 So. 2d 613, 617 (Fla. 1989) (construing FLA. STAT. § 775.021(4) (1987)).

185. Rehearing was denied in *Carawan* on December 10, 1987.

186. 577 So. 2d 939 (Fla. 1991) (per curiam) (Shaw, C.J., and Overton, McDonald, and Grimes, JJ., concurred; Barkett, J., dissented with an opinion in which Kogan, J., concurred); see also *State v. James*, 581 So. 2d 1305 (Fla. 1991); *State v. Oliver*, 581 So. 2d 1304 (Fla. 1991); *Davis v. State*, 581 So. 2d 893 (Fla. 1991); *State v. Robinson*, 581 So. 2d 158 (Fla. 1991) (per curiam); *State v. Robinson*, 581 So. 2d 157 (Fla. 1991) (per curiam); *State v. Gillette*, 580 So. 2d 614 (Fla. 1991) (per curiam); *State v. Dukes*, 579 So. 2d 736 (Fla. 1991) (per curiam); *State v. V.A.A.*, 577 So. 2d 941 (Fla. 1991) (per curiam); *State v. White*, 577 So. 2d 943 (Fla. 1991).

187. *McCloud*, 577 So. 2d at 940.

188. *Id.* at 941 (emphasis in original).

189. *Id.* (citing FLA. STAT. § 775.021(4)(a) (Supp. 1988)).

190. 581 So. 2d 153 (Fla. 1991) (unanimous) (Grimes, J., author).

ing the commission of a felony, allegedly occurring on October 1, 1987. *Carawan* specifically stated that those crimes did not violate double jeopardy, a conclusion which it attributed to "the legislature's manifest concern over the proliferation of violent crimes involving the use of firearms.'"<sup>191</sup> The court added that the intervening changes to section 775.021(4) since *Carawan* did not mandate a different result.<sup>192</sup>

Finally, Justice Grimes in *State v. Zanger*<sup>193</sup> reiterated that *Carawan* was limited to single act analysis, and rejected the defendant's claim that the decision prohibited multiple convictions of robbery and dealing in stolen property. He explained that Zanger robbed his victims and then sold their jewelry the following day, thus committing crimes based on separate acts.<sup>194</sup>

### E. Prohibited Laws

*No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed.* FLA. CONST. I, § 10.

Florida courts adhere to the standard announced in *Weaver v. Graham*<sup>195</sup> when deciding whether the application of a statute violates the prohibition against ex post facto laws under the state constitution. *Weaver* established that a statute impermissibly violates the federal ex post facto prohibition if it applies to events that occurred before its enactment, and operates to disadvantage the offender against whom it is applied.<sup>196</sup> For that reason, the court in *Hernandez v. State*<sup>197</sup> concluded that a law that requires the affirmance of a departure sentence comprised of a single valid reason for departure, even though other in-

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191. *Id.* at 154 (quoting *Carawan*, 515 So. 2d at 169). More likely, it meant to say that those crimes proscribed different conduct, which would permit the state to prosecute them both without violating double jeopardy.

192. *Id.*

193. 572 So. 2d 1379 (Fla. 1991) (Shaw, C.J., author; Overton, McDonald, Ehrlich, and Grimes, JJ., concurred; Barkett and Kogan, JJ., dissented).

194. *Id.* at 1380; *see also* *Henderson v. State*, 583 So. 2d 1030 (Fla. 1991) (unanimous, Barkett, J., author) (adopting rationale of *Henderson v. State*, 572 So. 2d 972 (Fla. 3d Dist. Ct. App. 1990), and holding that state could separately convict and sentence under *Carawan* for theft and uttering a forged instrument when both offenses arose from a single transaction and the defendant actually receives another's property).

195. 450 U.S. 24 (1981). *See* *State v. McGriff*, 537 So. 2d 107, 108 (Fla. 1989).

196. *Weaver*, 450 U.S. at 29.

197. 575 So. 2d 640 (Fla. 1991) (unanimous) (Kogan, J., author).

valid reasons are also relied on, could not be applied against a defendant whose crimes occurred before the enactment of the law.<sup>198</sup> The court vacated the sentence after finding one of two reasons given in support of a departure sentence was invalid. It left open the question whether a law that makes the burden of proof for departure reasons less burdensome similarly violates the ex post facto clause.<sup>199</sup>

#### F. *Searches and Seizures*

*The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.* FLA. CONST. art. I, § 12.

Only a single decision, *Department of Law Enforcement v. Real Property*,<sup>200</sup> relied on article I, section 12 this year. Together with several other state constitutional rights, this section prohibits the state from intruding into the sanctity of the home and the maintenance of one's personal life when it seeks to execute its seizure and forfeiture powers, unless it first complies with minimal due process requirements.<sup>201</sup> The court's authoritative reliance on the state search and seizure provision illustrates that the provision enjoys a vitality that has not been completely eviscerated by the conformity requirement.

The clearest opportunity to consider article I, section 12 as a source of protection, independent of the Fourth Amendment, presents

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198. *Id.* at 641 n.1 (relying on *McGriff*, 537 So. 2d at 109).

199. *Id.*

200. 16 Fla. L. Weekly at S497.

201. *Id.* at S499 (also citing FLA. CONST. art. I, §§ 2 (inalienable rights), and 23 (privacy)).

itself when the facts are outside Fourth Amendment precedent of the United States Supreme Court. Yet, even then, the section may prove to be unreliable. Until *Florida v. Bostick*,<sup>202</sup> the United States Supreme Court had not considered the specific Fourth Amendment implications when the government searches boarded passengers on commercial carriers. There, the Court reversed a decision of the Supreme Court of Florida that struck down a law enforcement drug interdiction practice, which consisted of plain-clothed narcotics officers, without a whisper of suspicion of wrongdoing, boarding scheduled busses, confronting passengers, and requesting consent to search their carry-on luggage for contraband.<sup>203</sup> In light of circumstances that the trial judge characterized as “very intimidating,”<sup>204</sup> a majority of the state court determined that Bostick was seized under article I, section 12 and the Fourth Amendment. Applying the standard announced in *United States v. Mendenhall*,<sup>205</sup> the majority concluded that Bostick was neither free to leave, nor to “disregard the [officers’] questions and walk away.”<sup>206</sup>

A six-member majority of the United States Supreme Court charged that the Florida court had misread *Mendenhall* by “focusing on whether Bostick was ‘free to leave’ rather than on the principle that those words were intended to capture.”<sup>207</sup> The correct formulation under the Fourth Amendment, Justice O’Connor wrote for the majority, “is whether a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter.”<sup>208</sup> Relying on *Immigration and Naturalization Service v. Delgado*,<sup>209</sup> where INS agents conducted a factory sweep in search of illegal aliens who might be found inside, she wrote that there is no seizure where persons have “no reason to believe that they would be detained if they gave truthful answers to the questions put to them or if they simply refused to answer.”<sup>210</sup> The opinion chastises the state court for focusing on a “sin-

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202. 111 S. Ct. 2382 (1991).

203. *Bostick v. State*, 554 So. 2d 1153 (Fla. 1989), *rev'd*, 111 S. Ct. 2382 (1991).

204. *Id.* at 1157.

205. 446 U.S. 544 (1980).

206. *Bostick*, 554 So. 2d at 1157 (quoting *Mendenhall*, 446 U.S. at 554).

207. *Bostick*, 111 S. Ct. at 2387.

208. *Id.* The dissent agreed that this formulation correctly expressed the *Mendenhall* standard, although it would have answered the question differently. *Id.* at 2389 (Marshall, J., dissenting; Blackmun and Stevens, JJ., concurring).

209. 466 U.S. 210 (1984).

210. *Bostick*, 111 S. Ct. at 2387 (quoting *Delgado*, 466 U.S. at 218).



gle fact—that the encounter took place on a bus,” to adopt a per se rule.<sup>211</sup> Declining to answer for the moment whether a seizure occurred when narcotics deputies confronted Bostick in the rearmost seat of his bus, the Court remanded for a decision on this issue by the Florida courts.

### G. *Pretrial Release and Detention*

*Unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great, every person charged with a crime or violation of municipal or county ordinance shall be entitled to pretrial release on reasonable conditions. If no conditions of release can reasonably protect the community from risk of harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process, the accused may be detained.* FLA. CONST. art. I, § 14.

No decision construed this section during the survey period, although a rules amendment has potential constitutional importance. Without ruling on the constitutional aspects of its decision, a divided court amended the rule establishing time standards for the state to charge pretrial detainees. Five justices in *In re Amendment to Florida Rules of Criminal Procedure—Rule 3.133(b)(6) (Pretrial Release)*<sup>212</sup> agreed to amend the Florida Rules of Criminal Procedure to require the state to file formal charges against defendants in custody within thirty days from the date of their arrest or service of *capias*. If the defendants remain uncharged on the thirtieth day, the rule requires the court to order the defendants automatically released on their own recognizance on the thirty-third day, unless the state files formal charges by that day; or if the state shows good cause, to order the defendants automatically released on their own recognizance on the fortieth day, unless the state files formal charges by that day.<sup>213</sup> The rule provides a benchmark for establishing a constitutional minimum when the stan-

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211. *Id.* at 2388. *But see id.* at 2392 (Marshall, J., dissenting, joined by Blackmun and Stevens, JJ.). Justice Marshall wrote that the state supreme court considered “all of the details of the encounter,” suggesting that the majority was unfaithful to the record. *Id.* (emphasis in original).

212. 573 So. 2d 826 (Fla. 1991) (per curiam).

213. FLA. R. CRIM. P. 3.134 (renumbering FLA. R. CRIM. P. 3.133(b)(6)).

dards are tested under the light of the adversarial process.

Of note, the majority rejected a rules committee proposal that would have authorized the state, with good cause, to detain a defendant beyond forty days without filing formal charges.<sup>214</sup> Proving that some court conferences must be uproarious, Justice Overton objected to the majority's forty day rule, charging that it was borne in the court's "bosom," rather than in the rules committee. He characterized the rule as "mandatory [and] inflexible,"<sup>215</sup> and added that the rule will now result in "games being played with the process" that thwart the desired effect of the mandatory cut-off period. For instance, he predicted that "most state attorneys will be filing informations based on hearsay evidence from investigating officers," rather than on sworn testimony of material witnesses, to avert the release of uncharged defendants.<sup>216</sup>

#### H. *Rights of Accused and of Victims*

*(a) In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation against him, and shall be furnished a copy of the charges, and shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses, to be heard in person, by counsel or both, and to have a speedy and public trial by impartial jury in the county where the crime was committed. If the county is not known, the indictment or information may charge venue in two or more counties conjunctively and proof that the crime was committed in that area shall be sufficient; but before pleading the accused may elect in which of those counties he will be tried. Venue for prosecution of crimes committed beyond the boundaries of the state shall be fixed by law.*

*(b) Victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to the right to be*

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214. The proposed rule provided, in part:

Unless the state can show good cause why the charging instrument has not been filed, the defendant shall be released from custody on his or her own recognizance. Any defendant who remains in custody after the 30th day [without formal charges] shall be brought before a magistrate at least every ten days thereafter, until the charging document is filed or defendant is released from custody.

*In re Amendment*, 573 So. 2d at 826 n.\*.

215. *Id.* at 828 (Overton, J., dissenting; McDonald, J., concurring.).

216. *Id.* at 829.

*informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused.* FLA. CONST. art. I, § 16.

Article I, section 16(a) creates a cluster of rights designed to serve persons who are subject to criminal prosecution. Second to article I, section 9 (due process), rights in this cluster are the most actively litigated article I rights. Half of those cases addressed the right to trial by an impartial jury.

### 1. Notice of Charges

The requirement that the state inform a defendant of “the nature and cause of the accusation against him” embodies the due process concept of fair notice. In *State v. Rodriguez*,<sup>217</sup> a unanimous court relied on the two companion provisions to overturn Rodriguez’s conviction for felony driving under the influence (DUI) because the state neglected to give him any notice of the particular prior DUI convictions it intended to rely in proving the enhanced felony DUI offense. Because the state ultimately was required to prove that Rodriguez had three or more DUI convictions, as an essential element of felony DUI, it was required to specifically allege the prior convictions in the charging instrument.<sup>218</sup>

### 2. Fair Trial

A juror’s use of unauthorized materials may implicate the right of a fair trial, in particular the rights of confrontation, cross examination, and assistance of counsel, guaranteed to the accused under article I, section 16 and the Sixth Amendment of the federal Constitution. In *State v. Hamilton*,<sup>219</sup> the state appealed a trial court ruling that ordered a new trial as to the penalty phase in the capital trial because one juror brought two unauthorized magazines into the jury room. Noting that no Florida case had yet formulated a test for measuring the error caused by a juror’s use of unauthorized documents, and stating that there could be no bright-line test, the court adopted a federal

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217. 575 So. 2d 1262 (Fla. 1991). This case was introduced above. *See supra* notes 123-30 and accompanying text.

218. *Id.* at 1266.

219. 574 So. 2d 124 (Fla. 1991) (unanimous) (Kogan, J., author).

test that attempts to balance the accused's constitutional right to a fair trial and the juror's privacy right to be shielded from needless prying and harassment.<sup>220</sup>

Under *Hamilton*, the moving party bears the initial burden of establishing the breach by stating a legally sufficient reason for conducting an interview of the jury. Defense counsel alleged that the unauthorized magazines distracted the jury because one included a single advertisement that depicted a blonde woman wearing a bathing suit.<sup>221</sup> The court said that the trial judge could have summarily denied defense counsel's motion for a new trial based on counsel's allegations, for the allegations expressed counsel's reaction to the advertisement and not the juror's reaction. The trial judge conducted a hearing, even though he harbored "serious doubt" about the existence of misconduct.<sup>222</sup> The court commended the trial judge, but hastened to add that a judge need not conduct an interview if the allegation of misconduct is "unreasonable."<sup>223</sup>

When the movant provides a legally sufficient reason for interviewing the juror, the misconduct raises a rebuttable presumption of prejudice. The burden then shifts to the state to show that the breach was harmless:<sup>224</sup> "[D]efendants are entitled to a new trial unless it can be said that there is no reasonable possibility that the [unauthorized materials] affected the verdict."<sup>225</sup> The inquiry must be "limited to objective demonstration of extrinsic factual matter disclosed in the jury room,"<sup>226</sup> and may not extend into matters relating to the juror's subjective thoughts, impressions, or mental processes.<sup>227</sup> In *Hamilton*, the justices agreed that the error was harmless, particularly because the unauthorized materials were irrelevant to the factual and

220. *Id.* at 128, 130; see also FLA. STAT. § 90.607(2)(b) (1987). The test may also be viewed as preserving the station of the jury itself by impermissibly delving into matters that inhere in the verdict, *Baptist Hosp. of Miami, Inc. v. Maler*, 579 So. 2d 97, 99 (Fla. 1991) (citation omitted), and averting improper second-guessing of verdicts. *Id.* at 102 (Kogan, J., concurring in part, dissenting in part).

221. *Hamilton*, 574 So. 2d at 130.

222. *Id.* at 130.

223. *Id.* (emphasis in original).

224. *Id.* (citing *United States v. Howard*, 506 F.2d 865, 869 (5th Cir. 1975)).

225. *Id.* at 129 (quoting *Paz v. United States*, 462 F.2d 740, 745 (5th Cir. 1972)).

226. *Id.* (quoting *Howard*, 506 F.2d at 869); see, e.g., *Trotter v. State*, 576 So. 2d 691 (Fla. 1991) (upholding trial court's finding that evidence failed to support allegations that law books and a telephone in jury room improperly influenced the jury).

227. *Hamilton*, 574 So. 2d at 129.

legal issues of the case.<sup>228</sup>

Because *Hamilton* may be read to authorize an inquiry, even though the trial judge harbored serious doubt about the merits of any alleged juror misconduct, a realigned court "clarified" its decision in a civil case, *Baptist Hospital of Miami, Inc. v. Maler*.<sup>229</sup> A four-justice majority held that "an inquiry is *never* permissible unless the moving party has made sworn factual allegations that, if true, would require a trial court to order a new trial using the standard adopted in *Hamilton*."<sup>230</sup> Thus, an inquiry is permissible if it will elicit information about overt prejudicial acts, and is impermissible if it will elicit information about a juror's subjective thoughts.<sup>231</sup> In *Baptist Hospital*, attorneys for the defendant hospital sought to interview jurors following the verdict for the brain-damaged infant plaintiff and against the hospital. They presented affidavits, alleging essentially that the verdict was an agreement borne out of sympathy for the plaintiff, and that the jury relied on nonrecord evidence of the hospital's insurability. The court ruled that the affidavits were legally insufficient, because they alleged facts that merely purported to be opinions of two jurors about the reason for the verdict, sought to delve into the jurors' subjective impressions, or were otherwise refuted by the record.<sup>232</sup>

Justice Kogan, who authored *Hamilton*, concurred in the court's continued adherence to the decision, but dissented for what he saw as an effective overruling of *Hamilton*'s threshold inquiry. He would authorize a "very limited" interview of jurors, to permit inquiry into objective acts that would establish whether jurors agreed to disregard their oaths and instructions, and whether nonrecord evidence was received.<sup>233</sup>

### 3. Right to Counsel

A majority of the court in *McKinney v. State*<sup>234</sup> affirmed the de-

228. *Id.* at 131.

229. 579 So. 2d 97 (Fla. 1991) (per curiam) (Shaw, C.J., and Overton, McDonald, Barkett, and Grimes, JJ., concurring. Kogan, J., concurred in part and dissented in part with an opinion in which Harding, J., concurred).

230. *Id.* at 100 (footnote omitted) (emphasis added).

231. *Id.* at 99.

232. *Id.* at 99-100.

233. *Id.* at 101 (Kogan, J., concurring in part, and dissenting in part; Harding, J., concurring) (emphasis in original).

234. 579 So. 2d 80 (Fla. 1991) (Barkett, J., author; Shaw, C.J., and Grimes and

fendant's convictions, but declined to hear a claim of ineffective assistance of trial counsel. *McKinney* reaffirms the court's practice of requiring defendants who claim that they received ineffective assistance, including those that assertedly impinge article I, section 16, to prosecute their claims in a motion for post conviction relief. Generally, direct appeal is an inappropriate time to initiate a claim of ineffective assistance of trial counsel because the trial judge has had no opportunity to consider and rule on the evidentiary basis of the claim.<sup>235</sup>

Unable to garner additional votes, Justice Overton dissented alone on this point, arguing that the holding sets bad precedent by encouraging multiple litigation. He would have declined for the moment to reach the merits of *McKinney's* other claims, preferring instead to remand for an evidentiary hearing and await the outcome on the ineffective assistance claim.<sup>236</sup>

The right to present mitigating evidence in capital cases is constitutionally guaranteed. The question posed in *Anderson v. State*<sup>237</sup> asked whether a defendant's waiver of that right amounts to a waiver of effective assistance of counsel, thereby implicating enhanced procedural protections. For reasons not clear from the record or opinion, *Anderson* instructed his attorney not to present evidence at the penalty phase of his capital trial. He argued on direct appeal that his decision effectively amounted to a waiver of effective assistance of counsel for which the trial court was required to ascertain that the waiver was knowing, intelligent, and voluntary. The trial colloquy reflected that defense counsel advised the court that his investigation identified numerous persons who could provide mitigating evidence, but that *Anderson* commanded him not to call any. *Anderson* declared on the record that he preferred not to have any witnesses testify on his behalf. The trial court's inquiry was limited to a solitary question—whether *Anderson* was on drugs or medication that would affect his understanding of the proceedings. *Anderson* replied that he was not.<sup>238</sup> Ultimately, the trial court accepted the jury's recommendation and imposed the death penalty.

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Kogan, JJ., concurring; McDonald, J., concurred in part, and dissented in part, without an opinion; Overton, J., dissented with an opinion).

235. *Id.* at 82.

236. *Id.* at 85 (Overton, J., dissenting) (citing unreported order in *Francis v. State*, No. 50,127 (Fla. June 20, 1978)).

237. 574 So. 2d 87 (Fla. 1991) (per curiam), *cert. denied*, 60 U.S.L.W. 3259 (U.S. Oct. 10, 1991).

238. *Id.* at 89-90, 94-95.

A majority affirmed the conviction and death sentence, holding that the trial court was not obliged to conduct further inquiry.<sup>239</sup> It specifically rejected Anderson's claim that the trial court was required to ascertain whether the waiver of his right to present mitigating evidence, which amounted to a waiver of his right to effective assistance of counsel, satisfied *Faretta v. California*.<sup>240</sup> The majority reasoned that *Faretta's* standard for protecting a defendant who seeks to exercise the right of self-representation did not apply because Anderson was represented by counsel.<sup>241</sup>

The decision to forego presenting mitigating evidence, Justice Barkett argued in dissent, raises the specter of "the most dire consequences possible under the law."<sup>242</sup> The right to present mitigating evidence is constitutionally guaranteed, and is no less important than the right to plead guilty to a capital crime. The latter requires an affirmative showing on the record that the defendant tendered his or her plea intelligently and voluntarily.<sup>243</sup> She wrote that Anderson was entitled to an equivalent degree of procedural protection, which should not be suspended " 'simply because the accused invites the possibility of a death sentence.' "<sup>244</sup> Moreover, a full inquiry into the effectiveness of a defendant's waiver, on the record, promotes finality of the judicial process, which is otherwise lost on collateral proceedings " 'that seek to probe murky memories.' "<sup>245</sup>

#### 4. Right to Appeal

Article I of the state constitution does not expressly create a right of appeal. And *State v. Gurican*<sup>246</sup> casts doubt on whether other consti-

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239. *Id.* at 95 (Shaw, C.J., and Overton, McDonald, and Grimes, JJ., concurred).

240. 422 U.S. 806 (1975).

241. *Anderson*, 574 So. 2d at 95. Justice Ehrlich concurred separately, stating that he would dissent on this point had the colloquy between the trial judge, defense counsel, and Anderson not occurred. He added that the colloquy was "sufficient to meet any constitutional requirement." *Id.* (Ehrlich, J., concurring; Shaw, C.J., and Kogan, J., concurred.).

242. *Id.* at 96 (Barkett, J., concurring in part, dissenting in part).

243. *Id.* (citing *Boykin v. Alabama*, 395 U.S. 238 (1969)).

244. *Id.* at 97 (quoting *Hamblen v. State*, 527 So. 2d 800, 804 (Fla. 1988)).

245. *Id.* (citation omitted).

246. 576 So. 2d 709 (Fla. 1991) (McDonald, J., author; Shaw, C.J., and Overton, Ehrlich, Barkett, and Grimes, JJ., concurring; Kogan, J., dissented without opinion.).

tutional sources may provide such a right.<sup>247</sup> There the court addressed for the first time whether a defendant who fled the jurisdiction of the trial court before sentencing and filing her notice of appeal is entitled to appeal her conviction if she returns to the jurisdiction before the state files a motion to dismiss the appeal. Justice McDonald, writing for a majority of six members, noted that but for Gurican's voluntary absence from the jurisdiction, the trial judge would have rendered a judgment sentencing her. Justice McDonald explained that Gurican forfeited whatever right to an appeal she possessed by fleeing the jurisdiction of the trial court, and showing overt disrespect for the judicial system, which she could no longer rely on for protection.<sup>248</sup>

Although *Gurican* does not foreclose the matter, it seems unlikely that future claimants will successfully argue that the state constitution provides a right of appeal to persons who comply with procedural rules. The majority distinguished its earlier decisions that found that a defendant had a constitutional right of appeal, explaining that those decisions construed jurisdictional provisions of former constitutions.<sup>249</sup> Moreover, the majority disagreed with a district court decision, which found a state constitutional right to appeal, and characterized its reasoning as "debatable."<sup>250</sup>

## 5. Impartial Jury

Florida adheres to a determined policy to rid its trial courts of race-based jury selection, and the appearance of impropriety that such a practice fosters. The focus of this effort has been on the entitlement of defendants in criminal cases to trial by an impartial jury guaranteed

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247. See *id.* at 711-12 n.2 (citing FLA. CONST. art. V, § 4(b)(1) ("[d]istrict courts of appeal shall have jurisdiction to hear appeals, that may be taken as a matter of right . . .")). The matter would seem to be foreclosed by *State v. Creighton*, 469 So. 2d 735, 740 (Fla. 1985), which construed the section as merely allocating jurisdiction, rather than conferring a right to appeal. See *In re Order on Prosecution of Criminal Appeals*, 561 So. 2d 1130 (Fla. 1990); see also *Abney v. United States*, 431 U.S. 651, 656 (1977) (noting that there is no federal constitutional right to an appeal, and that the right of appeal in criminal cases is purely a creature of statute); *Estelle v. Dorough*, 420 U.S. 534, 536 (1975) (noting that there is no federal constitutional right to state appellate review of state criminal convictions).

248. *Gurican*, 576 So. 2d at 711.

249. *Id.* at 712 (citations omitted).

250. *Id.* (citing *Marshall v. State*, 344 So. 2d 646, 648 (Fla. 2d Dist. Ct. App.) (Grimes, J., author) ("Our Florida Constitution guarantees convicted persons of the right of appeal . . ."), *cert. denied*, 353 So. 2d 679 (Fla. 1977)).



in article I section 16. It is noteworthy that other article I sections provide coordinate protection against racially discriminatory use of peremptory challenges,<sup>251</sup> and that the protection extends to litigants and jurors in civil proceedings.<sup>252</sup> Also, the court has declared in dicta that the state itself is entitled to a fair trial, free of discriminatory impediments.<sup>253</sup>

Florida's current standard for reviewing claims of racial bias in the jury selection process was announced in the 1984 decision *State v. Neil*.<sup>254</sup> The standard essentially provides that the moving party must first make a timely objection that the other party improperly exercised a peremptory challenge to strike a prospective juror on account of race. Then the movant must demonstrate a prima facie case on the record that the juror belongs to a distinct racial group, and that there is a "strong likelihood" that the peremptory was entirely racially motivated. Once the movant demonstrates the existence of a prima facie case, the burden shifts to the other party to show that it struck the prospective juror for a valid, non-racial reason.<sup>255</sup> The court considered six cases in the *Neil* case line this period, proving that its standard continues to demand the court's attention as the single-most litigated right in the cluster of article I, section 16 rights.

Defense counsel in *Williams v. State*<sup>256</sup> established a prima facie case of discrimination by objecting to the state's removal of two blacks

251. See *Reynolds v. State*, 576 So. 2d 1300 (Fla. 1991) (noting in dictum that article I, section 5's right to petition officials for redress of grievances assures accountability of public officials of the sort advanced by requiring the prosecutor to explain a race-based exercise of a peremptory challenge); *Tillman v. State*, 522 So. 2d 14 (Fla. 1988) (relying on state and federal equal protection clauses).

252. *Mazaheritehrani v. Brooks*, 573 So. 2d 925 (Fla. 4th Dist. Ct. App. 1990), *rev. granted*, No. 77,692 (Fla. July 11, 1991); see also *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991) (equal protection component of the Fifth Amendment's Due Process Clause prohibits discrimination on account of race in selecting a jury in a civil proceeding).

253. *State v. Neil*, 457 So. 2d 481, 487 (Fla. 1984). The *Neil* case line to date focused entirely on the rights of defendants and jurors in criminal trials to be free of race-based discriminatory practices in the selection of jurors. No case has yet reached the court asking it to apply *Neil* to remedy impermissible defense selection practices, although at least one district court considered the point. See *Cure v. State*, 564 So. 2d 1251, 1252 (Fla. 4th Dist. Ct. App. 1990).

254. *Neil*, 457 So. 2d at 481 (Fla. 1984), *clarified*, *State v. Slappy*, 522 So. 2d 18 (Fla.), *cert. denied*, 487 U.S. 1219 (1988); *State v. Castillo*, 486 So. 2d 565 (Fla. 1986).

255. *Neil*, 457 So. 2d at 486-87.

256. 574 So. 2d 136 (Fla. 1991) (*per curiam*) (unanimous).

from the jury. However, after the prosecutor explained the decision to remove the first black juror, the trial judge prevented the prosecutor from explaining the decision to excuse the second black juror. This was error, the court ruled, because the trial judge should have resolved all doubts in favor of the defense and conducted an inquiry. Relying on *State v. Slappy*<sup>257</sup> the court declared that “[i]f we are to err at all, it must be in the way least likely to allow discrimination.”<sup>258</sup> Therefore, “[w]henever a sufficient doubt has been raised as to the exclusion of any person on the venire because of race, the trial court must require the state to explain each one of the allegedly discriminatory challenges.”<sup>259</sup> That error here required remand for a new trial.

*Williams* is instructive for several reasons. The opinion illustrates circumstances when the defense may satisfy the “strong likelihood” requirement of establishing a prima facie case under *Neil* simply by creating “sufficient doubt” on the record that the state improperly struck even a single juror. It also shows the court’s intolerance of and the severe consequences to the state for its unjustified, race-based juror selection.<sup>260</sup>

Defense counsel failed to show a “strong likelihood” of improper discrimination in *Taylor v. State*,<sup>261</sup> where the prosecutor removed one of four black members of the venire. The trial judge rejected counsel’s assertion that the prosecutor was “systematically excluding” blacks, and refused to require the prosecutor to explain his peremptory.<sup>262</sup> The record failed to show a *Neil* violation, and the court held that the mere fact that the prosecutor challenged one of four black members does not show “substantial likelihood” of an improper peremptory, particularly when the prosecutor knew, under the procedure followed for jury selection, that another black juror would succeed the excused juror to the

257. 522 So. 2d 18 (Fla.), cert. denied, 487 U.S. 1219 (1988).

258. *Williams*, 574 So. 2d at 137 (quoting *Slappy*, 522 So. 2d at 22).

259. *Id.* at 137 (emphasis in original); see *Reynolds v. State*, 576 So. 2d 1300, 1301 (Fla. 1991) (unanimous) (Kogan, J., author) (“strong likelihood” of discrimination exists when the prosecutor removes the only black member of the venire); see also *Taylor v. State*, 583 So. 2d 323, 327-28 (Fla. 1991) (per curiam) (trial court need not look back to the prosecutor’s reasons for strike of second black venire member when defense accepts prosecutor’s withdrawal of the peremptory challenge).

260. The court expressly stated in another case that it has the highest regard for the integrity and skill of the state’s prosecutors, and does not ascribe to them a racist sentiment. *Reynolds*, 576 So. 2d at 1302 (Fla. 1991).

261. 583 So. 2d 323, 327 (Fla. 1991) (per curiam).

262. *Id.*

panel.<sup>263</sup>

Not infrequently the court addresses the standard of reviewing the trial judge's *Neil* rulings. *Neil* established a deferential standard of review, where it emphasized that "the trial court's decision as to whether or not an inquiry is needed is largely a matter of discretion."<sup>264</sup> Later the court said that the trial judge "necessarily is vested with broad discretion in determining whether peremptory challenges are racially intended . . . [and] we must necessarily rely on the inherent fairness and color blindness of our trial judges who are on the scene and who themselves get a 'feel' for what is going on in the jury selection process."<sup>265</sup>

With those principles in mind, four of six members of the court participating in *Green v. State*<sup>266</sup> sustained the decision of the trial judge to deny defense counsel's *Neil* claim, which was prompted when the prosecutor excused two black jurors. The majority wrote that the trial judge "sees and hears the prospective jurors, . . . has the ability to assess the candor and the credibility of the answers given to the questions presented. Clearly, the trial judge is in the best position to determine if peremptory challenges have been properly exercised."<sup>267</sup> Having reviewed the record, the justices declared: "we cannot say that the trial judge abused his discretion . . . ."<sup>268</sup>

The factual basis of the majority's decision in *Green* was seriously called into doubt in Justice Barkett's dissenting opinion.<sup>269</sup> Engaging in a careful review of the voir dire proceedings, she identified several instances where the majority had passed over voir dire testimony of caucasian jurors, who went unchallenged by the prosecutor, and yet possessed qualities that resulted in the dismissal of blacks.

The majority made no attempt to reconcile the dispute raised by Justice Barkett. The unexplained impasse allows room for speculation

263. *Id.* at 326 n.3, 327.

264. *Neil*, 457 So. 2d at 487 n.10; *see also Slappy*, 522 So. 2d at 24.

265. *Reed v. State*, 560 So. 2d 203, 206 (Fla. 1990).

266. 583 So. 2d 647 (Fla. 1991) (per curiam) (Shaw, C.J., and Overton, McDonald, and Grimes, JJ., concurring; Barkett, J., dissented with an opinion, with which Kogan, J., concurred.).

267. *Id.* at 652 (citation omitted).

268. *Id.* *But see* Files v. State, 586 So. 2d 352 (Fla. 1st Dist. Ct. App. 1991) (on motion for rehearing) (panel split on whether *Neil* rulings by trial judge should be resolved by abuse of discretion standard, or whether state's reasons must be supported by competent, substantial evidence).

269. *Green*, 583 So. 2d at 653 (Barkett, J., dissenting; Kogan, J., concurring.).

that the majority is unlikely to hold the state to exacting certainty.<sup>270</sup> *Green* also suggests that the majority tends to defer to the trial judge's factual findings in *Neil* rulings, even though a perusal of the record contains facts that suggest the findings were erroneous.<sup>271</sup> Moreover, the existence of record inconsistency will not necessarily convince the justices to find error after a *Neil* inquiry.

Deference to the station of the trial judge on the issue of discriminatory intent is clearly not warranted in all circumstances. For instance, the court refused to defer to the trial judge in *Reynolds v. State*<sup>272</sup> because she failed to conduct any sort of *Neil* inquiry. There, the state peremptorily struck the sole black juror on the venire. The trial judge agreed with the prosecutor that there was no "systematic exclusion," and summarily denied defense counsel's *Neil* objection.<sup>273</sup> Because the excusal of the entire black membership on a venire raises a "strong likelihood" of impropriety, the trial judge should have conducted a *Neil* inquiry to ascertain the prosecutor's motives, but erroneously never did.

Generally, the court will not reach the merits of a *Neil* claim that is procedurally barred. This period, the court declined to consider claims in two cases because trial counsel failed to preserve the issue for appeal. The first case, *Valle v. State*,<sup>274</sup> illustrates the importance to the movant of understanding the mechanics for asserting a *Neil* claim. At trial, defense counsel charged that the prosecutor's exercise of peremptory challenges to remove six blacks and two Hispanics from the jury created "an impropriety in the record."<sup>275</sup> The trial judge stated that he would allow the prosecutor to respond, but noted that "I've

270. See *Slappy*, 522 So. 2d at 22 (misuse of a preemptory is indicated by "a challenge based on reasons equally applicable to juror[s] who were not challenged"); see, e.g., *Gadson v. State*, 561 So. 2d 1316, 1318 (Fla. 4th Dist. Ct. App. 1990).

271. See *Bryant v. State*, 565 So. 2d 1298, 1303 (Fla. 1990) (McDonald, J., concurring in part, dissenting in part) (dissenting on decision to grant new trial for *Neil* violation, and arguing that "it is manifest from the record that the peremptory challenges were not racially motivated"); *Kibler v. State*, 546 So. 2d 710, 716 (Fla. 1989) (McDonald, J., dissenting, Ehrlich, C.J., concurring) (independently reviewing the record and concluding that there was no possibility of racial overtones that would warrant overturning the trial court ruling rejecting *Neil* claim); *Slappy*, 522 So. 2d at 24 (Fla. 1988) (McDonald, C.J., dissenting) (no showing that the trial judge abused his discretion).

272. 576 So. 2d 1300 (Fla. 1991) (unanimous) (Kogan, J., author).

273. *Id.* at 1300-01.

274. 581 So. 2d 40 (Fla. 1991) (per curiam) (unanimous).

275. *Id.* at 43.

been asked to make no findings and I am making no findings' " that the state acted improperly.<sup>276</sup> After the prosecutor volunteered reasons for striking the eight jurors, the defense objected only that the challenges were used to create a death-prone jury.

The record suffered from three defects, each of which could have been independently fatal. First, the record makes clear that defense counsel unartfully pled a *Neil* claim. Second, counsel should have asked the trial judge to expressly find that the defense had carried its initial burden of establishing a prima facie case of racial bias.<sup>277</sup> Finally, counsel failed to show that the reasons advanced by the prosecutor were racially motivated.<sup>278</sup>

The court also declined to consider a *Neil* claim raised collaterally in *Francis v. Barton*.<sup>279</sup> Although *Neil* was issued in 1984, after Francis appealed his conviction and sentence, Francis's failure to assert a *Neil* violation in his first collateral attack procedurally barred him from seeking to litigate the claim in his second collateral attack.<sup>280</sup> The majority denied all relief. Two justices specially concurred, but wrote to argue that the case should have been remanded for a review of the claim on its merits. They advanced a minority position that every constitutional claim in a death case should be reviewed on its merits. Moreover, they would have excused the procedural bar because Francis's direct appeal was in the *Neil* pipeline and the court issued its opinion on the direct appeal after it released *Neil*.<sup>281</sup>

## I. *Excessive Punishments*

*Excessive fines, cruel or unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden.* FLA. CONST. art. I, § 17.

Article I, section 17 prohibits, in part, "[e]xcessive fines, cruel or unusual punishment, . . . [and] forfeiture of estate." Seldom have

276. *Id.*

277. *Id.* at 44.

278. *Id.*

279. 581 So. 2d 583 (Fla. 1991) (per curiam) (Shaw, C.J., and Overton, McDonald, Grimes, and Harding, JJ., concurring. Barkett, J., concurred specially with an opinion with which Kogan, J., concurred.).

280. *Id.* at 584-85.

281. *Id.* at 585 (Barkett, J., specially concurring, Kogan, J., concurring).

courts construed this section. The two references to article I, section 17 in *Department of Law Enforcement v. Real Property*<sup>282</sup> are therefore exceptional, and for their brevity might go unnoticed. The court declared that Floridians have, under this section, a substantive right to be free from “excessive punishments.”<sup>283</sup> The phrase seems to borrow directly from the caption above the section, for it has no literal, textual derivation. This suggests that the phrase is only of general importance because the text of a constitutional section, and not its title, determines its construction.<sup>284</sup> In light of the facts and following discussion, however, the phrase “excessive punishments” effectively captures the spirit of the section, and establishes a principle akin to Eighth Amendment proportionality analysis.<sup>285</sup>

The court also declared that article I, section 17 limits the state to forfeiting property of a defendant that was used in the predicate crime, or alternatively, prohibits the state from forfeiting property that was not an instrument of criminal activity.<sup>286</sup> The state had alleged at trial that the defendant used portions of the properties, or improvements, to facilitate drug trafficking activity. It did not allege that the defendant used the entirety of the seized properties in that activity.<sup>287</sup> Under the ruling, the state may not forfeit property that was not related to further the predicate drug offense without violating the defendant’s right to be free from “excessive punishments.” This is a marked departure from federal Eighth Amendment case law, which permits forfeiture of the whole, even though the criminal activity pertained to a part.<sup>288</sup> The

282. 16 Fla. L. Weekly at S497. For an extended discussion of this case, see *supra* notes 71-122 and accompanying text, and *infra* notes 282-88, 316-20 and accompanying text.

283. *Id.* at S499. This right is protected by the notice and hearing requirements of article I, section 9. *Id.*

284. FLA. CONST. art. X, § 12(h).

285. See *Solem v. Helm*, 463 U.S. 277, 284 (1983) (Eighth Amendment proscribes punishment that is disproportionate to the crime committed).

286. *Real Property*, 16 Fla. L. Weekly at S501 (citing FLA. CONST. art. I, §§ 9 and 17).

287. *In re Real Property Forfeiture Proceedings*, No. 90-250 (Fla. 8th Cir. Ct. Dec. 21, 1990) (order and opinion granting claimant’s amended motion to dismiss petitions for forfeiture).

288. See *United States v. 141st St. Corp.*, 911 F.2d 870, 880-81 (2d Cir. 1990) (as applied, statute subjecting the whole of any tract of land used to facilitate narcotics distribution permits forfeiture of apartment building as a whole, rather than specific apartments, and does not violate eighth amendment proscription against disproportionate punishment), *cert. denied*, 111 S. Ct. 1017 (1991); *United States v. One 107.9*

decision illustrates an important principle of federalism—that the state may extend greater protection to persons from governmental excess than they are entitled to under the federal counterpart.

## J. Access to Courts

*The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.*  
FLA. CONST. art. I, § 21.

In its 1973 decision, *Kluger v. White*,<sup>289</sup> the court declared that article I, section 21 prohibits the legislature from abolishing a statutory right of access to the courts that predated the adoption of the Florida Constitution, or that became part of the state's common law. Despite its commitment to preserving an avenue of redress through Florida's courts, *Kluger* recognized that the demands of society and the "ever-changing character of the law" may on occasion justify the abolition of an enduring right of action. The court announced that the legislature is free to abolish a personal right of access if it provides a "reasonable alternative" to protect the right, or otherwise shows an "overpowering public necessity" for abolishing the right and that no alternative method exists to satisfy that necessity.<sup>290</sup> As the following two cases illustrate, *Kluger's* "exacting standard" continues to serve as the cornerstone of the court's article I, section 21 case law.

Various taxpayers, employers, employees, and others opposed recent comprehensive changes to Florida's workers' compensation law. They claimed in *Martinez v. Scanlan*,<sup>291</sup> in part, that the 1990<sup>292</sup>

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Acre Parcel of Land, 898 F.2d 396, 400 (3d Cir. 1990) (statute making all real property, or part, subject to forfeiture does not violate Eighth Amendment's protections against cruel, unusual, and disproportionate punishments). The identical conclusion would not necessarily withstand scrutiny under the double jeopardy clause. *See, e.g., United States v. Halper*, 109 S. Ct. 1892, 1902 (1989) (holding that the Double Jeopardy Clause may not subject a defendant who has already been punished in a criminal prosecution to an additional civil sanction to the extent that the second sanction does more than make the government whole); *State v. Crenshaw*, 548 So. 2d 223, 229 (Fla. 1989) (Kogan, J., dissenting; Shaw and Barkett, JJ., concurring) (arguing that the state's failure to establish a nexus between the forfeited property and the criminal conduct renders the forfeiture an impermissible second punishment).

289. 281 So. 2d 1 (1973).

290. *Id.* at 4.

291. 582 So. 2d 1167 (Fla. 1991) (McDonald, J., author; Overton, Grimes, and

amendments substantially reduced preexisting benefits to eligible workers, without providing countervailing advantages, and assertedly violated article I, section 21. A four-member majority found that the workers' compensation law remains a reasonable alternative to tort litigation. The majority explained that the law continued to provide injured workers with full medical care and wage-loss payments, regardless of fault and without the delay and uncertainty associated with common law tort remedies.<sup>293</sup> Three justices would not have addressed this claim, believing instead that the statute violated the single subject requirement<sup>294</sup> and made inappropriate the court's consideration of this and other constitutional claims.<sup>295</sup>

Petitioners in *Abdala v. World Omni Leasing, Inc.*<sup>296</sup> argued unsuccessfully that the legislature failed to provide a reasonable alternative or demonstrate overpowering necessity when it limited the liability of long-term lessors of automobiles from negligence of their lessees. The right to sue the lessors of motor vehicles was the product of recent common law,<sup>297</sup> not a long-established statute. Thus, the legislature was free to limit the vicarious liability of long-term lessors, without complying with the rigors of *Kluger*.<sup>298</sup> Justice McDonald wrote that such a limitation does not equate to denial of access to courts, and he added in passing, "particularly when the law is unsettled at the time of the enactment."<sup>299</sup>

Litigants frequently, yet unsuccessfully challenge statutes of limitations and repose on grounds that they deny access to courts. The

Harding, JJ., concurring; Kogan, J., concurred specially with an opinion, with which Barkett, J., concurred; Barkett, J., concurred in part and dissented in part with an opinion, with which Shaw, C.J., and Kogan, J., concurred).

292. Ch. 90-201, 1990 Fla. Laws 894.

293. *Scanlan*, 582 So. 2d at 1171-72.

294. FLA. CONST. art. III, § 6.

295. *Scanlan*, 582 So. 2d at 1176 (Kogan, J., specially concurring, joined by Barkett, J.); *id.* (Barkett, J., concurring in part, dissenting in part, joined by Shaw, C.J., and Kogan, J.).

296. 583 So. 2d 330 (Fla. 1991). The case was introduced above. *See supra* notes 8-15 and accompanying text.

297. *Id.* at 333 (citing *Susco Car Rental Sys. v. Leonard*, 112 So. 2d 832 (Fla. 1959)).

298. *Id.*; *see also* *Wright v. General Motors Acceptance Corp.*, 583 So. 2d 1033 (Fla. 1991) (per curiam) (unanimous); *Raynor v. De La Nuez*, 574 So. 2d 1091 (Fla. 1991) (Ehrlich, J., author; Shaw, C.J., and Overton, Barkett, Grimes, and Kogan, JJ., concurred; McDonald, J., concurred in part and dissented in part in an opinion.).

299. *Abdala*, 583 So. 2d at 333.



court in *Blizzard v. W. H. Roof Co., Inc.*<sup>300</sup> upheld the constitutionality of two statutes that shortened the period from four years to one year for bringing a negligence claim against insured tortfeasors whose insurance carrier became insolvent after the cause of action accrued. The justices adopted the opinion of the district court under review, which expressed the familiar principle that a statute of limitation does not deny constitutionally protected access to courts by merely shortening the period for bringing an action.<sup>301</sup> Without elaborating, the court declared that the legislative action was a “reasonable” restriction on the right of access assured under article I, section 21,<sup>302</sup> which was “necessary” to protect the rights of claimant and insured tortfeasor alike.<sup>303</sup>

Finally, the most divisive debate over article I, section 21 protections occurred in *Smith v. Department of Health and Rehabilitative Services*,<sup>304</sup> where three justices concurred in a plurality decision that article I, section 21 was “inapplicable” to cases brought by indigents who sought to receive free transcripts of administrative hearings.<sup>305</sup> They reasoned that the right of appeal to a judicial tribunal provided in the Administrative Procedure Act<sup>306</sup> afforded sufficient protection of

300. 573 So. 2d 334 (Fla. 1991). This case was introduced in article I, section 2 (equal protection). See *supra* notes 16-19 and accompanying text.

301. *Blizzard v. W.H. Roof Co.*, 556 So. 2d 1237, 1238 (Fla. 5th Dist. Ct. App. 1990); see also *University of Miami v. Bogorff*, 583 So. 2d 1000, 1004 (Fla. 1991) (statute of repose limiting period for medical malpractice claims does not violate article I, section 21, even when applied to claims accruing after the period had expired) (citation omitted) (McDonald, J., author; Overton and Grimes, JJ., and Ehrlich, Senior Justice, concurring; Shaw, C.J., and Barkett and Kogan, JJ., dissented without opinion.).

302. *Blizzard*, 556 So. 2d at 1238. The district court panel explained the reasonableness of the linkage between the statute of limitation and the purpose to be served in light of *Blizzard*'s equal protection argument, which we may assume applies equally to the access to courts argument.

303. *Blizzard*, 573 So. 2d at 334. This statement is potentially misleading. A showing of necessity itself is insufficient to sustain a legislative infringement of a right of access protected under article I, section 21. See *Kluger*, 281 So. 2d at 4. Moreover, statutory time bars on initiating claims need only be reasonable. See, e.g., *Pullum v. Cincinnati, Inc.*, 476 So. 2d 657, 659 (Fla. 1985), *appeal dismissed*, 475 U.S. 1114 (1986).

304. 573 So. 2d 320 (Fla. 1991) (per curiam). This case was introduced in article I, section 9 (due process). See *supra* notes 145-56 and accompanying text.

305. *Id.* at 323 (Overton and Grimes, JJ., concurring); *id.* at 325 (McDonald, J., concurring on point).

306. FLA. STAT. § 120.68 (1985).

their right of redress.<sup>307</sup> Chief Justice Shaw concurred in result only, which leaves in doubt his position regarding the outcome of the constitutional issues, for he may not have disputed the decision of Justices Overton, McDonald, and Grimes, to grant petitioners relief on the statutory claim.<sup>308</sup> Justice Ehrlich, with whom Justices Barkett and Kogan agreed, dissented on the constitutional issue, charging that the majority's "parsimonious" reading of the Act "facilely avoids the question of whether the right has any substance in the absence of a transcript."<sup>309</sup> Justice Ehrlich concluded that "[t]he plain language of article I, section 21 guarantees access to courts . . . [and that] meaningful judicial review by an article V court" of an administrative proceeding is essential to the fulfillment of that guarantee.<sup>310</sup>

### K. *Trial by Jury*

*The right of trial by jury shall be secure to all and remain inviolate. The qualifications and the number of jurors, not fewer than six, shall be fixed by law.* FLA. CONST. art. I, § 22.

This section preserves the right to a jury trial in cases that were triable before a jury when Florida adopted its first constitution in 1838.<sup>311</sup> Without elaboration, the court relied on this section as authority in *State v. Rodriguez*<sup>312</sup> for its conclusion that a defendant who the state has charged with the crime of felony driving under the influence has a right to be tried by a jury.<sup>313</sup> In addition, *Department of Law Enforcement v. Real Property*<sup>314</sup> reaffirmed the well-known principle that forfeiture proceedings are triable by a jury unless waived, and

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307. *Smith*, 573 So. 2d at 323.

308. *Id.* at 325 (Shaw, C.J., concurring in result only).

309. *Id.* at 326 (Ehrlich, J., concurring in part and dissenting in part; Barkett and Kogan, JJ., concurring).

310. *Id.* (emphasis in original). The notion that access to courts must be meaningful was echoed in the more recent and unanimous opinion of *Real Property*, 16 Fla. L. Weekly at S497, which declared that the right is entitled to all the safeguards of procedural due process. *Id.* at S499

311. *State v. Webb*, 335 So. 2d 826, 828 (Fla. 1976).

312. 575 So. 2d 1262 (Fla. 1991). This case is discussed more fully under the due process section above. See *supra* notes 123-130 and accompanying text.

313. *Id.* at 1266 n.6.

314. 16 Fla. L. Weekly at S497.

noted that state due process provides coordinate protection.<sup>315</sup>

## L. *Right of Privacy*

*Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.* FLA. CONST. art. I, § 23.

This survey period, only *Department of Law Enforcement v. Real Property*<sup>316</sup> relied on Florida's express right of privacy. Residential property rights derive special protection from article I that is directly attributed to several coordinate provisions, including the express right of privacy.<sup>317</sup> Because property rights subject to divestment under the Florida Contraband Forfeiture Act<sup>318</sup> are "particularly sensitive"<sup>319</sup> when residential property is at stake, the state is compelled to meet *at a minimum* a clear and convincing burden of proof, rather than the lesser preponderance standard, before it is entitled to forfeit property under the act.<sup>320</sup>

Last year, *In re Guardianship of Estelle M. Browning*<sup>321</sup> held that Florida's privacy amendment protects the right of a person to self-determine purely personal matters of medical health care, and rejected the interests traditionally relied on by the state to justify its regulation of a patient's choice to forego or withdraw life-saving procedures. Several laws enacted by the regular session of the 1991 Florida Legislature rode the crest of *Browning* and are worth noting. Those laws create statutory rights of privacy on behalf of patients who are subject to the state's health care system.

Chapter 91-98 creates rights for residents of continuing care facilities by providing, in part, that: "No resident of any facility shall be deprived of any civil or legal rights, benefits, or privileges guaranteed

315. *Id.* at S501.

316. *Id.* at S497

317. *Id.* at S499 (also relying on FLA. CONST. art. I, §§ 2 (inalienable rights), and 12 (search and seizure)).

318. FLA. STAT. §§ 932.701-.704 (1989).

319. *Real Property*, 16 Fla. L. Weekly at S499.

320. *Id.* at S500.

321. 568 So. 2d 4 (Fla. 1990).

by law, by the State Constitution, or by the United States Constitution solely by reason of status as a resident of a facility . . . ."<sup>322</sup> Among the enumerated rights is the "[f]reedom from governmental intrusion into the private life of the resident, as provided in s. 23, Art. I of the State Constitution."<sup>323</sup>

Another law, Chapter 91-127, creates the "Florida Patient's Bill of Rights and Responsibilities,"<sup>324</sup> which directs each health care facility or provider to observe specific standards. One standard requires respect for the patient's individual dignity, and acknowledges that patients retain certain "rights to privacy," which it declares to exist without regard to the patient's economic status.<sup>325</sup>

As patients and health care providers test the limits of these statutorily created rights in the future, they are certain to present the opportunity for courts to consider the constitutional dimension of their claims under article I, section 23.

### III. CONCLUSION

No case fosters the principles of article I of the state constitution more than *Department of Law Enforcement v. Real Property*. A unanimous Supreme Court of Florida let stand the Florida Contraband Forfeiture Act, despite the act's widespread disregard of substantive rights, and interpolated into the text "minimal" due process requirements on the state when it wields its powers to seize and forfeit private property.

The opinion by Justice Barkett is a fountainhead of state constitutional jurisprudence, and establishes an analytical paradigm of state due process. *Real Property* relies explicitly, and exclusively on article I, in which Floridians have declared for themselves a cluster of basic, fundamental property rights, deserving heightened protection from state encroachment. The opinion describes state due process as a broad concept that is central to the protection of all substantive rights. The decision provides a valuable precedent to guide courts in rehabilitating, rather than overturning constitutionally defective laws. The result respects the province of a coordinate branch of state government by leaving the law intact and promoting the implementation of legislative

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322. Ch. 91-98, 1991 FLA. LAWS 705.

323. Ch. 91-98, § 9, 1991 FLA. LAWS at 705, 708 (to be codified at FLA. STAT. § 651.083 (1991)).

324. Ch. 91-127, 1991 FLA. LAWS at 1298.

325. Ch. 91-127, § 1, 1991 Fla. Laws 1298, 1299.

policy.

*Real Property* is also noteworthy because it ventured beyond the perimeter of federal law, which historically established forfeiture policy involving property, due process, and punishment. This point demonstrates an important principle of federalism that should not be lost to a footnote.<sup>326</sup> Florida forfeiture law is now less vulnerable to shifts in federal forfeiture policy. The decision numbers among others of this court announcing a level of protection for article I rights that eclipse federal constitutional analogues.<sup>327</sup>

The court fulfills its most essential mission by deciding constitutional questions.<sup>328</sup> State constitutional scholarship is most apparent when the court grounds a decision explicitly, exclusively, and soundly on principles of state law. The court legitimizes its divergence from the federal constitutional base by articulating a well-reasoned decision, and by relying on policy choices of Floridians reflected, for instance, in textual distinctions between state and federal constitutions. The court also fulfills its unique interpretive role in those rare instances when it relies on its authority to craft rules of constitutional dimension to protect substantive rights newly-acknowledged in the opinion itself.<sup>329</sup> The uncommon occurrence of rule making in this context implies a decision of profound importance.

Occasionally, the court contributes to state constitutional policy under circumstances when it is not compelled to decide constitutional questions. This practice is commendable when the court disregards a procedural bar and reaches the merits of a constitutional claim due to "fundamental fairness,"<sup>330</sup> although traditionally, the court will not address the merits of a claim that is procedurally barred.<sup>331</sup> Express reliance on state procedural rules is today, more than before, likely to be accorded finality by federal courts.<sup>332</sup> Other practices equally should be encouraged, such as the reliance on dicta to offer insight into seldom-

326. See *Reynolds v. State*, 576 So. 2d 1300, 1303 (Fla. 1991) (taking the opportunity to correct an erroneous, "tacit assumption" that Florida's *Neil* decision provides less protection than *Batson v. Kentucky*, 476 U.S. 79 (1986)).

327. See *Decade Survey supra* note 2 at 857-58 (identifying five cases); *1990 Survey supra* note 2 at 1129-30 (identifying two cases).

328. FLA. CONST. art. V, §§ 1, 3(b)(1), (3).

329. See *supra* notes 104-14 and accompanying text.

330. See *supra* note 54 and accompanying text.

331. See *supra* notes 165, 274, 279 and accompanying text.

332. See *Coleman v. Thompson*, 59 U.S.L.W. 4789, 4796 (U.S. June 25, 1991).

litigated article I guarantees,<sup>333</sup> and the issuance of a special concurring opinion to express, clarify, or qualify a position on a fundamental matter.<sup>334</sup> This year, the court disregarded a providential rule of self-restraint and considered a constitutional question said to be particularly important, or extensively argued.<sup>335</sup> These cases add a welcome measure of understanding to the field, even though the rationale for disregarding the rule is inappropriate, or the holding affords only dubious precedential value.

As a group, race-based discrimination cases continue to demand attention. This year, as in the past, strong majority votes characterize the *Neil* line of cases, which is designed to rid Florida's courtrooms of racially discriminatory jury selection practices.<sup>336</sup> In these cases, the court fulfills its traditional role of protecting minorities.

A postscript: the 1991 Florida Legislature created a right of action to redress interferences by threats, intimidation, or coercion with rights secured by the state constitution or laws.<sup>337</sup> The enactment authorizes the Attorney General to sue for appropriate relief on behalf of injured persons, provides that damages shall accrue to those persons, and prescribes a civil penalty, which enures to the state. Because article I itself creates no affirmative remedy, the potential that this statutory sword will vindicate certain violations of article I can only enhance the importance of the state bill of rights.

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333. See *supra* notes 68-70 and accompanying text.

334. See, e.g., *supra* note 58 and accompanying text.

335. See *supra* note 156.

336. See *supra* notes 251-81 and accompanying text. For other racial discrimination cases cast in an equal protection context, see *supra* notes 38-55 and accompanying text.

337. Ch. 91-74, § 4, 1991 FLA. LAWS 567, 569 (to be codified at FLA. STAT. § 760.51 (1991)).