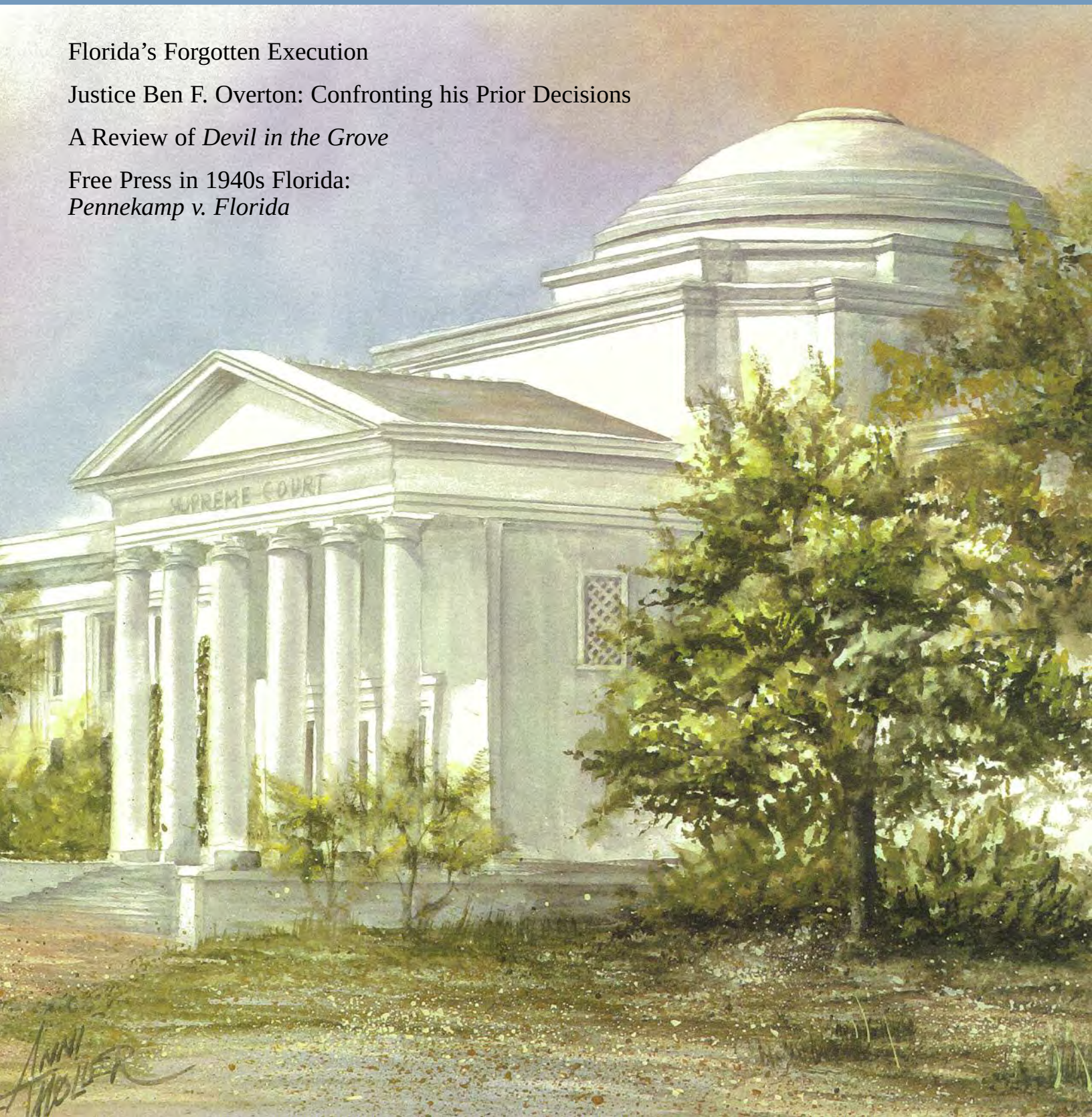
Florida Supreme Court Historical Society

SPRING/SUMMER 2014



Florida's Forgotten Execution

Justice Ben F. Overton: Confronting his Prior Decisions

A Review of *Devil in the Grove*

Free Press in 1940s Florida:
Pennekamp v. Florida

FROM THE EDITOR

Welcome aboard the third annual addition of the Florida Supreme Court Historical Society's Magazine. Our excellent articles include a detailed examination of the first female execution in Florida, a look into Justice Ben Overton's decisions during his time on the Supreme Court, a review of the Pulitzer Prize winning novel, *Devil in the Grove,* and an article chronicling the development of free press in Florida during the 1940s. Many thanks to our excellent authors in providing us with such wonderful works. Enjoy!

Jonathan F. Claussen

Postcard rendering of the Florida Supreme Court

Florida Supreme Court Historical Society

Editor
Jonathan F. Claussen, Esq.

Editorial Assistance
Sylvia Walbolt, Esq.
Susan Rosenblatt, Esq.
Mark Miller

Designer
Lili Picou

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Florida Supreme Court Historical Society

The Florida Supreme Court Historical Society works to save and maintain for future generations the records of the people and events that have shaped the evolution of Florida's court system from the early 1800s, through the 20th Century, and beyond. The Society is committed to making sure people understand the importance of a strong, independent judiciary in our governmental balance of power. The Society's two-fold mission is to (1) educate the public about the critically important work of the courts in protecting personal rights and freedoms, as well as in resolving the myriad of disputes that arise within the state, and (2) preserve the rich history of Florida's judicial system.

This publication has been sponsored by the members of the Florida Supreme Court Historical Society.

Florida Supreme Court Historical Society
PO Box 11344, Tallahassee Florida, FL 32302

Florida Supreme Court Historical Society Spring/Summer 2014

From left to right: **Thurgood Marshall, Jack Greenberg, Franklin Williams, Mr. and Mrs. Alex Akerman, James Nabrit Jr., and Robert Carter, on the steps of the U.S. Supreme Court following the March 9, 1951, argument of the Groveland Boys case.** ***(Courtesy of* The Crisis *magazine)***

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FROM THE PRESIDENT

Dear Members and Friends of the Florida Supreme Court Historical Society,

This past year has been one of focusing our attention to housekeeping and financial matters for the Society, and to further developing our organization consistent with its mission. I would like to thank my many fellow Members who have provided valuable assistance with these matters in the past year. However tedious this work may at times seem, we are all in agreement that it requires our attention to help ensure the long term health of our Society. We are particularly grateful to our Interim Administrator, Kelly Layman, for all that she has done to make sure that the Society is on proper footing and has all of its records in order.

We are also proud to announce that the Society has stepped forward to commission official oil portraits for the four sitting Justices who have remained without that customary honor. As part of the Society's mission to preserve for posterity the activities of the Court and its Justices, the Society's Board elected to underwrite those four portraits. The Board designated Hank Coxe, my immediate predecessor, to oversee this effort. Our hope is to have the portraits ready for unveiling in late spring 2014.

I hope you enjoy this third annual addition of our magazine, which includes a survey of the history of *Pennekamp v. Florida*, by Judge Scott Makar of the First District Court of Appeal; a review of Gilbert King's *Devil in the Grove* by Bruce Rogow; a piece by H. Franklin Robbins, Jr. and Steven G. Mason, who share the story of "Celia", the first recorded female execution in Florida; and an analysis by Joseph H. Lang, Jr. of instances in which the late Justice Ben Overton had occasion to revisit decisions during his long career.

I look forward to seeing the membership at our Annual Dinner, scheduled for Thursday, January 30 in Tallahassee. We are sure to have many distinguished members of the Bar in attendance for the presentation of the Society's Lifetime Achievement Award to former Chief Justice Rosemary Barkett. We excitedly expect Judge Barkett – the first woman Justice on the Florida Supreme Court and something of a Florida legal legend – to cross the ocean from her current position in The Hague to accept the award and attend the Society's dinner. I am sure many of her friends, colleagues and admirers will be eager to honor Judge Barkett's many accomplishments that evening.

I hope you enjoy the magazine, and I thank Jonathan Claussen, Kelly O'Keefe, Susan Rosenblatt and Sylvia Walbolt for their diligent efforts to prepare such an interesting publication.

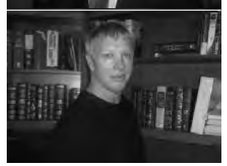
Today's a great day to be a Florida lawyer. I'm proud to be one. You should be too.

Miles A. McGrane, III
President

CONTRIBUTORS

Joseph H. Lang, Jr. is a shareholder in the Appellate Practice Group of Carlton Fields, P.A. He is Board Certified by The Florida Bar in Appellate Practice. He served as a law clerk to Justice Overton from 1995 to 1997.

Judge Scott Makar has served on the First District Court of Appeal since 2012, appointed by Governor Rick Scott. He served as Florida's Solicitor General from 2007-2012, arguing five cases in the United States Supreme Court, including four in the 2009 Term – a record for state solicitors general. He headed the City of Jacksonville's appellate division for five years, was a partner at Holland & Knight where he worked for 12 years, and clerked for Thomas A. Clark of the 11th Circuit Court of Appeals. He received his Ph.D. (economics), J.D., M.A., and M.B.A. from the University of Florida and his B.S. (mathematics/economics) from Mercer University. He has taught 40 courses on 15 different topics at three law schools (Florida, Florida State, and Florida Coastal) and three undergraduate schools (Florida, University of North Florida, and Jacksonville University). He has written many law review and law journal articles and is working on two books: *Florida, the Constitution & the United States Supreme Court* and *Famous Florida Trials*.



H. Franklin Robbins, Jr. is semi-retired. He has practiced law in Florida as a sole practitioner for over forty years, and has focused primarily on criminal and First Amendment law.

Steven G. Mason is a sole practitioner who is board certified by the Florida Bar as a criminal trial and criminal appellate specialist. He limits his practice to criminal, First Amendment and civil rights litigation.

Bruce Rogow is a Professor of Law at Nova Southeastern University Law Center. He has argued hundreds of cases in state and federal courts including numerous cases in the Supreme Court of the United States. He began his legal career in 1964-1966 with the Lawyers Constitutional Defense Committee representing civil rights workers in Mississippi, Alabama and Louisiana. He has been named in Best Lawyers in America for 27 years, this year in 6 separate categories.

CHIEF JUSTICE POLSTON'S FAMILY'S COMMITMENT TO CHILDREN

BY DAN HOFFMAN

It is, of course, already well known among Florida Supreme Court watchers and many others in the Florida legal community that Chief Justice Polston's family has opened their home and their hearts to children in need. Chief Justice Ricky Polston and his wife, Deborah Ehler Polston, are the proud parents of not only their four grown biological daughters, but also of a sibling group of six foster children.

The Polston family story unfolded with a leap of generosity, followed by more unexpected steps along the way. Initially, at a time when they had four teenage daughters of their own, the Polstons became licensed foster parents and later adopted three brothers who had been in and out of foster homes.

The Polstons had not planned to take on three boys, but their desire to keep the three united prevailed. Mrs. Polston recalls that "one week before we met the boys for the first time, the oldest boy, age 10, said to his caseworker, 'Go ahead and adopt out my baby brothers, no one will ever want me, I'm too old. People always want the babies anyway, and I don't want them to suffer because of me.' It was that sweet spirit, I fell in love with, and within the month we brought the three boys home."

The initial three brothers were joined in succession by three more brothers. In less than six years, the Polstons had adopted all six of the brothers.

Turning around the lives of six brothers is a truly remarkable act of goodness, but the Polston's dedication to underserved children in Florida did not end there.

The Polstons have dedicated themselves to Florida's at-risk children in numerous ways. Deborah was the one who initially took the initiative to become foster parents, and so it should not be surprising that she has devoted an enormous amount of time and effort to the cause. Through her experiences, she became a voice of change in the foster system and her efforts as a child advocate have only increased. Deborah is the author of *Victor's Dream* and the Eagle Child Series, which are aimed at and made available to children in foster care. She has served on several government boards and task forces to improve the foster care system and received the 2008 "Point of Light" award for her service to Florida's children.

The Polston's initial efforts may have been in the sphere of Florida's foster care and adoption systems, but they have since become involved in addressing among the most troubling issues in our State affecting at-risk children, an underreported issue known as human trafficking.

Human trafficking is the face of modern day slavery – and it is practiced today through forced labor and commercial sexual exploitation. In the United States alone, it is estimated that 2.5 million people are being trafficked, and that about half are under 18 years old. The trafficking of children, particularly when it is of a sexual nature, is perhaps the ugliest element of human trafficking.

Deborah now volunteers as Florida's Human Trafficking Advocate, a position to which she was appointed by Governor Scott in November, 2012. Her goal as the Advocate for Human Trafficking is to work with community organizations to enhance the state's effort to bring about a coordinated effort to address the needs related to human trafficking. The position was created as part of the Governor's Office of Adoption and Child Protection, which is within the Executive Office of the Governor.

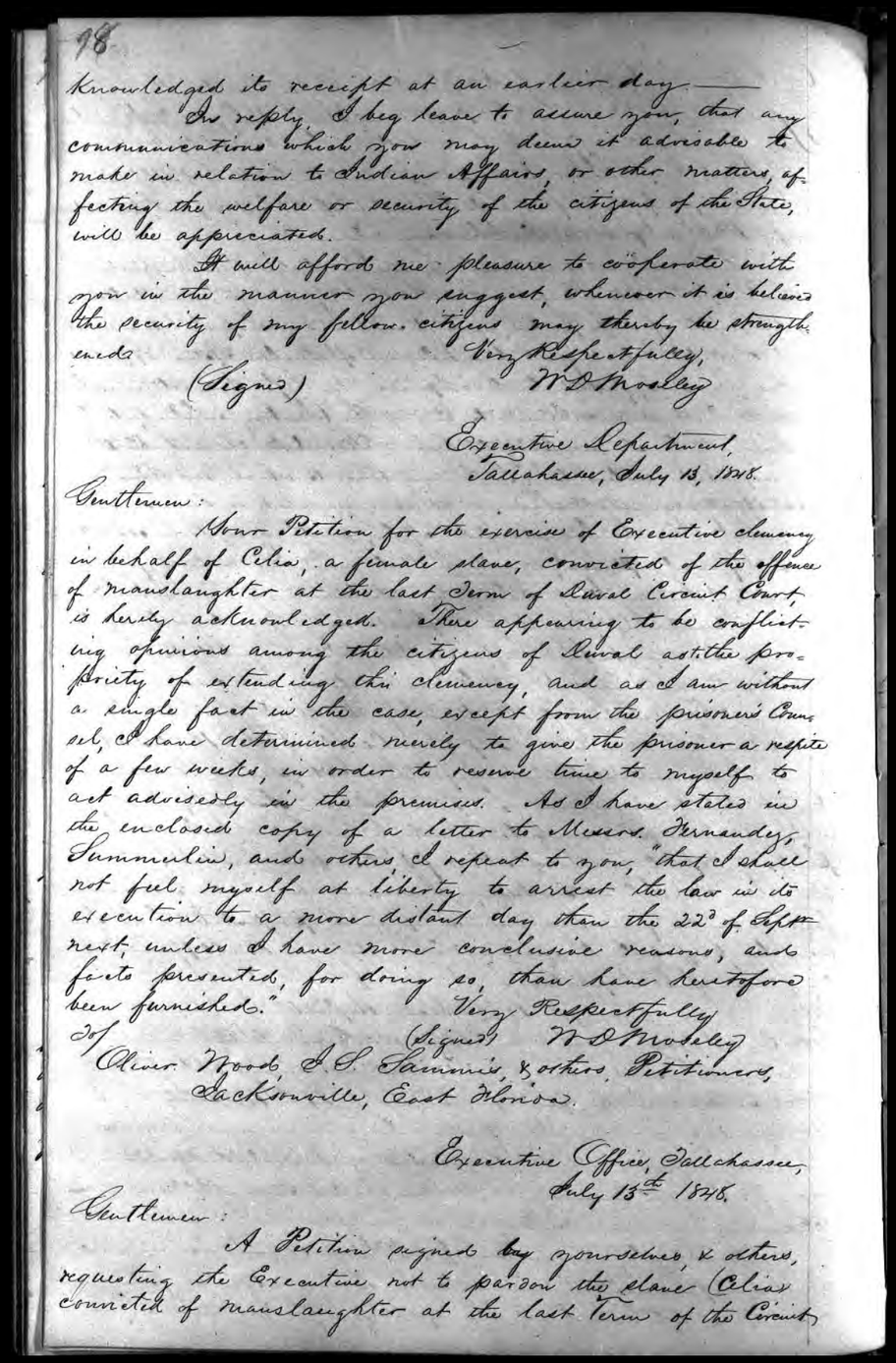
While Mrs. Polston is able to devote the greater amount of time to acting as a child advocate, the Chief Justice is also vocal about the issue of human trafficking in Florida. Chief Justice Polston used the occasion of an address to a local bar association as an opportunity to shine a light on the horrible practice, and to remind Florida attorneys that this is not simply a crime of another place or time.

The Chief Justice reminded members of the bar that notwithstanding the passage of the Thirteenth Amendment in 1865, there remain a variety of offending practices in Florida – from practices surrounding migrant seasonal farm workers to domestic servants to child trafficking – which persist to this day. Chief Justice Polston alerted his audience to Florida's status as a national destination for child runways who get caught in a web of human trafficking involving commercial sexual activity.

Florida is believed to be the third most common trafficking destination in the country. Approximately half of all trafficking victims are children under 18, a disproportionate percentage of whom are foster children. Across America, almost 300,000 youth are at risk of becoming victims of commercial sexual exploitation. Many are being trafficked in our own communities.

Fortunately, the Polstons are not alone in working to combat the scourge of human trafficking in our state. Florida's laws on human trafficking have been enhanced several times recently, including the removal of the requirement for a child to establish that force, fraud, or coercion was used to pressure them into sexually exploitative behavior, as well as the addition of a "safe harbor" provision which aims to treat the children as victims of crime and abuse instead of as criminals. ■

Daniel Hoffman is an attorney in the law firm of Stanley M. Rosenblatt, PA, where he practices with his wife, Miriam, and her parents, Stanley and Susan Rosenblatt.



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Knowledged its receipt at an earlier day——

In reply, I beg leave to assure you, that any communications which you may deem it advisable to make in relation to Indian Affairs, or other matters, affecting the welfare or security of the citizens of the State, will be appreciated.

It will afford me pleasure to cooperate with you in the manner you suggest, whenever it is believed the security of my fellow citizens may thereby be strengthened.

Very Respectfully,
(Signed) W D Moseley

Executive Department,
Tallahassee, July 13, 1848.

Gentlemen:

Your Petition for the exercise of Executive clemency in behalf of Celia, a female slave, convicted of the offence of manslaughter at the last Term of Duval Circuit Court, is hereby acknowledged. There appearing to be conflicting opinions among the citizens of Duval as to the propriety of extending this clemency, and as I am without a single fact in the case, except from the prisoner's Counsel, I have determined merely to give the prisoner a respite of a few weeks, in order to reserve time to myself to act advisedly in the premises. As I have stated in the enclosed copy of a letter to Messrs. Hernandez, Summerlin, and others I repeat to you, "that I shall not feel myself at liberty to arrest the law in its execution to a more distant day than the 22d of September next, unless I have more conclusive reasons, and facts presented, for doing so, than have heretofore been furnished."

Very Respectfully
(Signed) W D Moseley

To
Oliver Wood, J. S. Fairnie, & others, Petitioners,
Jacksonville, East Florida.

Executive Office, Tallahassee,
July 13th 1848.

Gentlemen:

A Petition signed by yourselves & others, requesting the Executive not to pardon the slave Celia convicted of manslaughter at the last Term of the Circuit

Letter from Governor William D. Moseley to petitioners seeking clemency and asking for stay of execution for Celia.

FLORIDA'S FORGOTTEN EXECUTION

THE STRANGE CASE OF CELIA

BY H. FRANKLIN ROBBINS, JR. AND STEVEN G. MASON

The first woman executed in Florida was named Celia. She had no last name. She was a "mulatto" slave and her crime was the murder of her white master, who was also her father. She was executed by public hanging on September 22, 1848, and then forgotten. The eleven remaining members of her family suffered a terrible ordeal after her death.

The existing records allow us to begin this story in January of 1830, when Jacob Bryan and his common law wife, a forty-two-year-old slave named Susan, arrived in Florida and settled somewhere near "Goodby Lake," less than ten miles from Jacksonville. They had emigrated from Georgia, bringing with them their four small "mulatto" daughters, Celia (age 12 years), Ann (5 yrs.), Zany (2 yrs.), and Sarah (less than 1 year). Three years later, Susan gave birth to a son, Dennis. Two years later, a second son, Jerry, was born. By December of 1847, their oldest daughter, Celia, had four children of her own: Mary Jane (age 12 yrs.), William (9 yrs.), Damius (7 yrs.) and Francis (4 yrs.). Celia's younger sister, Ann, gave birth to a son, John, in 1839.

On November 25, 1842, apparently content with their circumstances, Jacob Bryan executed a "deed of manumission" whereby he freed all the slaves who comprised his family. Celia's child, Francis, was born the following year and would not have been included among the slaves freed by their master.

The Crime

Five years after Jacob Bryan freed his slaves, his oldest daughter Celia split his head open with a drawing knife. The newspaper reported that a jury found her "*Guilty of manslaughter, with a recommendation of clemency to the Executive.*" The trial judge ignored the jury's recommendation and, on May 26, 1848, sentenced Celia to death.

It is impossible to determine whether Celia was tried as a slave or a free "mulatto", but in either case, the judge probably had no other choice but the death sentence. An 1840 territorial statute provided that "*[I]f any slave, free Negro or mulatto, shall be guilty of man-slaughter of any white person … they shall suffer death.*" There is no record of an appeal from her conviction.

Less than two weeks before her scheduled hanging, Florida's governor, William D. Moseley, set a new execution date of September 22, 1848, in order to consider the matter of clemency recommended by the jury. Governor Moseley took no further action, however, and, at noon on September 22, 1848, she was hanged. In reporting her execution, THE NEWS said "[t]he Slave Celia . . . : *met her fate without the least remorse for the crime she had committed, and, up to the last moment, denounced her mother as the cause of her death.*"

Celia's Family

The tragic case of Celia does not end with her death on the gallows. A terrible fate awaited the eleven remaining members

Pictured above: Depiction of drawing knife like the one used by Celia to kill Jacob Bryan.

of her family. The three most important participants in the events that unfolded during the first two years after Jacob Bryan's death were William F. Crabtree, the probate judge, Thomas Ledwith, the sheriff of Duval County and curator of the Bryan estate, and Isaiah D. Hart, the administrator of the estate. The record reflects that they genuinely tried to help the surviving members of Celia's family, to no avail.

The day after Bryan's death, Probate Judge William F. Crabtree issued "Letters Curatorship" to Duval County Sheriff Thomas Ledwith, commanding him to take into his custody all of Jacob Bryan's *"personal Estate, goods chattels and effects"* until further order of the court. As early as 1828, Florida had enacted, while still a territory, a statute that formally designated slaves as "personal property." Section 6 of "An Act Regulating Conveyances of Real and Personal Property and the Recording Thereof" provided: *"That from and after the passage of this act, slaves shall be deemed, held and taken, as personal property for every purpose whatever."*

As personal property, the members of Jacob Bryan's family were all taken into custody by Sheriff Ledwith, pursuant to Judge Crabtree's order. Sheriff Ledwith filed his inventory of the Bryan estate on December 10, 1847:

An inventory of personal property found on the Estate of Jacob Bryan this 7th day of Dec. 1847.

Thomas Ledwith Sheriff & Curator on [sic] of the Estate of Jacob Bryan.

Negroes-Names}

Susan	*Aged*	*60*	*Value $*	*100.00*
Cely	*-*	*30*		*500.00*
Mary Jane		*12 }*		*300.00*
William	*} Children of Cely*		*9 }*	*200.00*
Damius	*}*		*7 }*	*150.00*
Francis	*}*		*4 }*	*100.00*
Ann		*23*		*500.00*
Zany		*20*		*500.00*
Sarah		*18*		*500.00*
Dennis		*14*		*400.00*
Jerry		*12*		*350.00*
John	*Child of Ann }*		*8*	*200.00*
Cattle no. of Head			*11*	*44.00*
Horses no. of Head			*1*	*75.00*
Hoggs [sic]			*1*	*2.00*
Cotton no. of lbs	*200 lbs in the seed*			*7.00*
Corn no. of bushels			*60*	*5.00*
1 Grind Stone				*3.00*
1 Cross cut saw				*2.50*
1 Rifle Gun				*12.00*
1 Lot of tools				*2.00*
1 Brass 8 Day clock				*12.00*
1 lot of Books				*50*
				3997.00

On December 9, 1847, Judge Crabtree ordered that all the deceased's property, except the "Negroes," be sold at public auction. He apparently did not consider Celia's family to be slaves or they would have been included in the auction as personal property belonging to the estate. On February 15, 1848, however, Bryan's white Georgia relatives filed a sworn affidavit with the probate court, claiming the deceased's eleven remaining family members as the heirs' personal property. The affidavit was signed by Josiah J. Everett and James Archer. Josiah Everett was the son-in-law of Bryan's widowed sister, Jane Archer, and would become a driving force behind the efforts to secure the slaves for his family. James Archer was one of the eight children of Bryan's deceased sister, Mrs. Darcus Archer.

Two weeks after the Bryan heirs' affidavit was filed, Judge Crabtree appointed Isaiah D. Hart administrator of the Bryan estate. Isaiah Hart filed his return for the Bryan estate on May 15, 1848, eleven days before Judge Douglas sentenced Celia to death. His return was based on an appraisal that did not include the slaves as part of the estate. The appraisers explained that "*… upon inquiry and the examination of a deed in their possession we are of the opinion … [and] … we have no doubt that they are free.*"

On February 12, 1849, Jacob Bryan's white relatives filed a petition in the probate court naming Isaiah Hart and Thomas Ledwith as respondents, and demanding that all of Bryan's "Negroes" be distributed to them. The same day that he received the heirs' petition, Judge Crabtree ordered Isaiah Hart and Sheriff Ledwith to show cause why the petitioners should not be granted the relief they requested. A hearing was held on March 5, 1849 at which time the respondents filed their responses to the petition, and the petitioners and respondents all presented oral argument through their attorneys. Isaiah Hart through his attorney, Mr. Fraser, filed a lengthy response to the petition.

Mr. Hart first explained that he had not included the slaves in his return because Bryan had executed a deed of emancipation for the persons listed by Sheriff Ledwith as slaves, and that he (Hart) had prepared the deed himself and recorded it in the Duval County records while he was Clerk of the County Court. Isaiah Hart further alleged that the "slaves" had never come into his hands because the curator, Thomas Ledwith, had declined to deliver them to him, *"…alleging that the said persons were free."* Mr. Hart also asserted that for the court to strike his return, as requested by the petitioners, would create a "manifest injustice," and furthermore, the court had no jurisdiction to strike the return.

Hart concluded his response with a purely legal argument:

> if the allegations in the said petition that the manumission of said persons of color was made in contravention of the laws of this State, which he does not admit [to] be true, the petitioners could take no interest in them, but the said "negroes" or persons of color would escheat to and become the property of the State of Florida and liable to be taken and sold as such.

Hart based this argument on an 1829 enactment entitled *"An Act to Prevent the Manumission of Slaves, in Certain Cases, in this Territory."* This Act provided as follows with respect to slaves who were brought into Florida after the Act's effective date of November 22, 1829:

> (1) Anyone who manumitted a slave had to pay a fee (penalty) of two hundred dollars ($200.00) for each slave so freed;
> (2) Any manumitted slave had thirty (30) days to get out of Florida, and the slave's owner had to post a bond equal to the slave's value insuring that he left within thirty days; and
> (3) Any slave manumitted without complying with the Act's requirements was not deemed free, and was subject to being arrested and sold by the county marshal or sheriff.

Bryan had not complied with any of the Act's provisions when he freed his slaves on November 25, 1842, and they did not leave the state. By a horrendous stroke of misfortune, Mr. Bryan had brought his slaves *qua* family into the Florida territory in January, 1830 - two months after the effective date of the Act. Hart argued, however, that even if Bryan had not complied with the Act, his white heirs were not entitled to the slaves, because the Act provided that they became the property of the state. The petitioners argued in turn that since Bryan had not complied with the Act, and section 3 of the Act provided that such slaves *"shall not be deemed free,"* the slaves simply remained a part of the deceased's estate and descended with the rest of his personal property.

Judge Crabtree entered his order just over a week after the hearing. He concluded that slaves who had been manumitted by Bryan contrary to the Act's provisions were emancipated nonetheless, and they were not deemed free only in the sense that they were subject to being seized and sold by the state. Improperly manumitted slaves could never be assets of an estate because such assets signify property that can be used to pay the estate's debts. Since improperly manumitted slaves are subject to seizure and sale by the state, they could not be used to pay the estate's debts. He stated categorically that manumitted slaves *"are free persons until the State exerts the right to sell them & reduce them again to bondage."* (underlining in original). The final paragraph of his order provides that "said colored persons are hereby declared to be free persons of color so far as said Petitioners are concerned and ought not to be inventoried or appraised as a part of the Estate of Jacob Bryan deceased."

Florida's first Governor: William D. Moseley.

Six days later, the petitioners filed their "Notice for Appeal" to the circuit court. Unfortunately, there is no existing record of the circuit court case because the great fire of 1901 destroyed the courthouse. But considerable evidence of the events that occurred at the time of, and subsequent to, the case appear in two Florida Supreme Court decisions that resulted from the Bryan estate litigation.

The Florida Supreme Court decision described the lower court proceedings as being *"… commenced by petition in Chancery, before the Judge of the Circuit court of Duval county for the recovery of certain negroes …."* The "petition in Chancery" was filed by the Bryan heirs on February 21, 1850, and an order was issued the following day for the arrest of at least three of the Bryan slaves, Dennis, Mary and Sarah.

Dennis and Sarah were the children of Jacob Bryan and his slave wife, Susan. At the time of their arrests, Dennis was probably fifteen years old, and Sarah was probably twenty years old; Mary was Celia's daughter, and she was probably fourteen years old. In May of 1850, Dennis and Mary were released on a $4,000 appearance bond posted by Isaiah Hart and John Sammis.

On November 26, 1851, nearly two years after the three slaves were arrested, Judge Douglas ruled that Dennis and Mary were free, but that Sarah, who was born outside Florida, must be sold. Jacksonville's FLORIDA REPUBLICAN informed readers that *"Sarah, a Mulatto woman about twenty-one years of age, [will*

be] sold [on the first Monday in February, 1852] in obedience to order of the Circuit Court of Duval county in the matters of the Heirs of Jacob Bryan deceased." A seventeen-year-old-"mulatto" boy, three oxen, one parcel of land and a "large lumber cart" were sold at the same sale.

If Dennis and Mary were watching the sale of Sarah, they must have been terrified. Dennis, who was now 17 or 18 years old, and Mary, age 16, undoubtedly knew that Judge Douglas's order setting them free had been appealed to the Florida Supreme Court by Jacob Bryan's heirs. They also surely knew that his heirs had persuaded the Florida Legislature a year earlier to enact a law releasing all of the state's interest in the slaves of Jacob Bryan to his heirs.

In their appeal of Judge Douglas's order freeing Dennis and Mary, the Bryan heirs were represented by J.P. Sanderson in the Florida Supreme Court case, who had also represented them in the trial of the case before Judge Douglas. Dennis and Mary were represented by Felix Livingston and Philip Frazer in the Florida Supreme Court. By all accounts, these two lawyers were considered excellent, and they undoubtedly represented these two poor, illiterate slaves for free. Felix Livingston was actually a county judge while representing Dennis and Mary.

The Supreme Court that heard the Bryan appeal at the February, 1852 term sitting in Jacksonville was composed of Chief Justice Walker Anderson, Justice Albert Gallatin Semmes, and Justice Leslie Atchinson Thompson.

The Supreme Court's decision first set out the arguments that the parties had made before Judge Douglas. The appellants (the Bryan heirs) had argued that (a) strict compliance with the Act of 1829 was required because (i) it inflicted a penalty and was therefore a penal statute, and (ii) the policy and history of the state was against manumission; (b) Bryan had failed to comply with any of the act's provisions; (c) the manumission deed was therefore void and conveyed nothing; (d) title to the slaves remained in Bryan's estate until the state enforced its rights; and (e) the state had by statute relinquished all its rights to the Bryan heirs.

Messrs. Livingston and Frazer argued on behalf of Dennis and Mary that (a) if Bryan's manumission deed failed to comply with the Act of 1829, it only created a forfeiture to the State of Florida, who could proceed (or not proceed) against the slaves in the manner set out in the statute; (b) the Act of 1829 was a penal statute and in derogation of the common law and should therefore be strictly construed and "not extended further than the case requires"; (c) Dennis and Mary were born in Florida and were not subject to the terms of the Act of 1829; (d) the Act of 1829 was repealed by an 1842 law that was enacted prior to the execution of the manumission deed; (e) the deceased had a common law right to emancipate his slaves; and (f) the state's right to the slaves was not a right that could be assigned or released as the state had attempted to do via the Act of 1850, because (i) Bryan's heirs had neither been in possession nor had any legal interest in the slaves when the Act of 1850 was passed, (ii) there was no privity between the releasor (the state) and the releasee (the Bryan heirs), and (iii) the state's right to the slaves was a "chose in action" which is not transferable by release unless the transferee is the person against whom the remedy existed.

Justice Albert Gallatin Semmes wrote the Court's decision. He made short work of the arguments raised by Messrs. Livingston and Frazer on behalf of Dennis and Mary. In fact, he admonished them for even representing the two slaves in the first place. He began the legal portion of the decision by stating that the repealing clause of the Act of 1842, section 9, *"is restricted to laws in relation to 'free Negroes and free mulattoes; the act of 1829 is in reference to slaves."* Since Dennis and Mary had never been "free Negroes" or "mulattoes" (in his opinion), they did not fall within the repealing clause of the Act of 1842.

Justice Semmes had to do a little dancing to get around the fact that Dennis and Mary were born in Florida since the first paragraph of the Act of 1829 provided in unequivocal terms that it only applied to ***"… slaves brought into this Territory after the passage of this act…"*** (emphasis supplied). He wrote that although Dennis and Mary did not fall within the letter of the law, they were clearly within its spirit because laws relating to the public welfare could be enlarged or restrained so as to *"repress the mischief [free blacks] and advance the remedy for which they were written."* Justice Semmes continued by explaining how Florida's policy had always been opposed to free blacks living within its borders:

> The conviction upon the public mind is settled and unalterable as to the evil necessarily attendant upon this class of population, ***and although treated by our laws humanely,*** they have ever been regarded with a distrust bordering on apprehension – a class of people who are neither freemen nor slaves, their presence at all times deleterious and often dangerous to the public welfare. (emphasis supplied).

He was definitely correct that state policy had always been against free blacks, but for a Florida Supreme Court justice to state in 1852 that blacks were treated humanely by Florida laws is truly puzzling. Florida was awash with laws that treated blacks, both free and enslaved, anything but humanely. These laws were rewritten constantly to impose greater restrictions on both free blacks and slaves.

Justice Semmes concluded his explanation of why Dennis and Mary must be included within the ambit of the 1829 act, notwithstanding its express terms that excluded them, by stating:

> If we construe this law so as to restrict its application to slaves brought into the State, and not include their descendants within its provisions, we at once lose sight of the whole policy of the law, and entail upon the State an evil of the most dangerous character, and which it is manifest it was the design of the Legislature to suppress.

Thus, Justice Semmes summarily disposed of the fact that the law expressly restricted its application to "slaves brought into the state." Two other Florida judges had interpreted the law (1846-1851) differently - i.e., Judge William F. Crabtree and Judge Thomas Douglas. Judge Douglas had sat on the Florida Supreme Court for five years before Judge Semmes' term, and he was elected to a second term after Justice Semmes was voted off the court in 1853.

After disposing of, or ignoring, the other issues raised by Dennis and Mary as the appellees, Justice Semmes, speaking for all three members of the Court, concluded with a slighting and unnecessary statement embracing the property rights of the Bryan heirs:

> Before the passage of this act for their relief [the Act of 1850] the appellants [the Bryan heirs] had the right to reduce this property [Dennis and Mary] to possession, and since its passage, their right of possession and right of property is [sic] paramount and complete. And we do not understand the necessity that existed of instituting the proceedings in this case in their behalf, or of invoking in any way the action of the Circuit Court in asserting their rights over their property.

The final sentence of this decision reflects the Court's disdain for anyone who might even consider assisting a slave. The lawyers who had tried to help them had not only been unsuccessful, but the Florida Supreme Court had now admonished those lawyers for even trying to help them.

In this summary way, Judge Douglas's order freeing Dennis and Mary was reversed. Several days later, Dennis "absconded," and a year later he was still a fugitive. He apparently was never heard from again.

When the Bryan heirs learned that Dennis had fled, they filed suit to collect the appearance bond posted by Isaiah Hart and John Sammis. Although the trial court refused to enforce the bond, the Florida Supreme Court reversed. Accordingly, Isaiah Hart and John Sammis were ultimately required to pay the Bryan heirs the sum of $900.00 for the missing Dennis.

Before Jacob Bryan's death, his family had consisted of thirteen members. Jacob was killed by Celia, Celia was hanged, Sarah was sold, and Dennis ran away. But what happened to the rest? Since Mary was released under bond at the same time as Dennis, and since only Dennis is named as absconding after the Florida Supreme Court reversed Judge Douglas's order freeing the two of them, it seems likely that she was taken by the Bryan heirs in February or March of 1852. She was around sixteen years old at the time. Thereafter, the Bryan heirs probably either kept her or sold her at a private sale, because there appears to be no evidence that she was sold publicly like her aunt Sarah.

The fates of the remaining eight members of Jacob Bryan's family are far less certain. There is the possibility that the remaining members of Jacob Bryan's family found refuge among the Seminole Indians. For many years, the Seminoles had welcomed runaway slaves. They respected them as both skilled farmers and warriors. Blacks who lived and fought with the Seminoles were called "Negro Indians." There were still a few hundred Indians and their black allies throughout much of the 1850's. But there is no real evidence that any remaining members of Celia's family joined the Seminoles, and their fate remains a mystery.

CONCLUSION

Two facts stand out from this sad tale. First, from the beginning of their ordeal, Celia and her family never had a chance of receiving justice in the sense of a free white person's justice. They were almost totally helpless. Moreover, Celia herself never had a chance for anything other than a death sentence. Regardless of the circumstances that may have offered some justification for the killing, her execution was inevitable.

Her family likewise never had a chance of gaining their freedom. As blacks, they were in a no-win situation. In spite of the commendable efforts of a number of decent white men, they simply never had a chance. The Florida Supreme Court and the Florida Legislature were determined to protect the property rights of the white heirs in Bryan's improperly manumitted slaves.

Second is the sad reality that the Bryan heirs never honored their deceased relative's desire to have his slaves freed. At the time of his death, Jacob Bryan undoubtedly believed that he had freed his slave family in November, 1842. But instead of carrying out his wishes, his white heirs did everything in their power to thwart his indisputable intent.

One is left wondering how many times incidents similar to Celia's, and others far more horrible, hidden by time, occurred prior to emancipation. Dr. Livingston was surely correct in remarking that slavery was "the open sore of the world." ■

For the footnotes to this article, please refer to the Society website: http://www.flcourthistory.org.

Photographs provided by the State Library and Archives of Florida.

2013 LIFETIME ACHIEVEMENT AWARD GIVEN TO REUBIN O'DONOVAN ASKEW

The Florida Supreme Court Historical Society

Lifetime Achievement Award

Presented to

Reubin O'Donovan Askew

Florida's three branches of government were enormously enhanced over the decades of the leadership of Reubin Askew. From his election to the Florida House of Representatives in 1958, the Florida State Senate in 1962 and his two terms as Governor, ending in 1979, he transformed the legislative, executive and judicial branches of Florida government.

While in the state senate, Askew provided the impetus and leadership to modernize the old Florida constitution, which had existed basically unchanged since 1885. He was also a leader who recommended wide ranging changes and improvements to the executive and legislative branches which were adopted while a member of the Legislature. As Governor, he implemented a corporate income tax upon which he campaigned in 1970, reorganized the budgetary responsibility for the State under the Department of Administration, created meaningful and enforceable environmental controls, helped to create limitations on campaign spending and effective financial disclosure for public officials, created an ethics commission, and reformed the prison system.

Governor Askew also made significant and wide-ranging improvements to the judicial branch of the State. He reorganized the judiciary, making it non-partisan and introducing merit selection for appellate judges. He formed judicial nominating committees at all levels of the judiciary throughout the state. He created a state-wide juvenile justice system.

But it is Governor Askew's commitment to civil rights that is perhaps his most lasting legacy. He was one of the first "New South" governors who espoused equal opportunities for all citizens. He supported school desegregation, as well as the idea of busing to achieve racial balance, and he was a calming influence on the passions that were inflamed by these efforts. He named the first Black to the state Supreme Court, and appointed the first Black, who was also the first woman, to head a state agency. Racial justice and honesty in government were the hallmarks of his governorship.

Barred by term limits from seeking a third term as governor, Governor Askew was later appointed by President Carter to be the United States Trade Representative, an ambassador level position, and he served to the end of President Carter's term.

In recognition of his lifetime of public service, Governor Askew was named one of America's Top Ten Governor's of the 20th century. His name graces several institutes and programs in the State university system.

Today, he is recognized and honored for his service to the State of Florida, and especially its judiciary, with the Florida Supreme Court Historical Society's Lifetime Achievement Award.

Officers and Trustees of the
Florida Supreme Court Historical Society
January 31, 2013

2013 LIFETIME ACHIEVEMENT AWARD GIVEN TO WILLIAM REECE SMITH, JR.

SEPTEMBER 19TH, 1925 - JANUARY 11TH, 2013

The Florida Supreme Court Historical Society

Lifetime Achievement Award

Presented to

William Reece Smith, Jr.

In recognition of his quiet and unswerving leadership of the Society, his continuous wise counsel in advancing the Society's growth and mission over many decades as a Society President, Trustee and Lifetime Member, his extraordinary service to the judiciary and the legal profession at every possible level and in every part of the world, his timeless efforts to assure access to justice for the poor, his service, by his conspicuous example, as a role model to generations of law school students and young lawyers with respect to the important of professionalism by lawyers in all aspects of their work, and as an expression of its profound respect, high esteem and warm affection of a living legend…the Society presents this Lifetime Achievement Award to William Reece Smith, Jr.

Officers and Trustees of the
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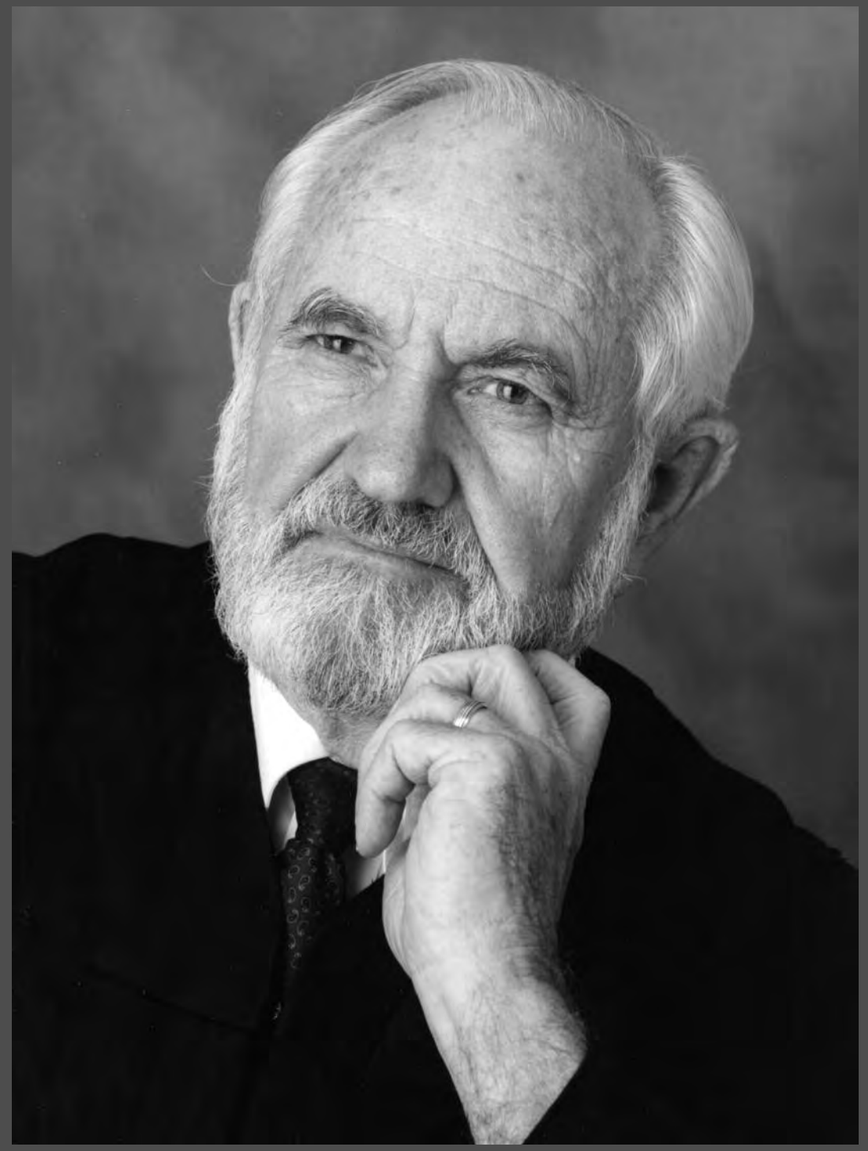
January 31, 2013



JUSTICE BEN F. OVERTON:

CONFRONTING HIS OWN PRIOR DECISIONS

BY JOSEPH H. LANG, JR.

Justice Ben F. Overton had many opportunities to confront the Florida Supreme Court's prior decisions in his twenty-five years on the Court. A smaller subset of those prior decisions, however, is comprised of decisions in which he participated in the first instance. One consequence of such a long tenure on the Court is that Justice Overton occasionally was confronted with his own prior decisions in later cases. This essay juxtaposes several of those cases in which Justice Overton had the opportunity to give issues a second look.

Justice Overton's Dissents That Were Later Adopted by the Court

Chief Justice Hughes observed: "A dissent in a Court of last resort is an appeal . . . to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed." "Judicial history shows that the dissenting opinion has exercised a corrective and reforming influence upon the law."

Justice Overton put down markers for the future in a number of dissents. On occasion, he was still on the Florida Supreme Court when his dissenting views ultimately prevailed and were adopted. For instance, in *State v. Bobbitt*, 415 So. 2d 724 (Fla. 1982), Justice Overton dissented from the majority's determination "that the privilege not to retreat, premised on the maxim that every man's home is his castle which he is entitled to protect from invasion, does not apply here where both Bobbitt and her husband had equal rights to be in the 'castle' and neither had the legal right to eject the other."

He wrote: "I strongly dissent. . . .I would treat cotenants, other family members, and invitees the same and would hold, as to these types of antagonists, that one assailed in one's own home has only a limited duty to retreat." Seventeen years later, while Justice Overton was still on the Court, the chance arose to confront the Bobbitt decision again. In 1997, the Second District Court of Appeal certified the following question to be of great public importance:

> SHOULD THE RULE OF STATE V. BOBBITT, 415 So. 2d 724 (Fla. 1982), BE CHANGED TO ALLOW THE CASTLE DOCTRINE INSTRUCTION IN CASES WHERE THE DEFENDANT RELIES ON BATTERED-SPOUSE SYNDROME EVIDENCE (AS NOW AUTHORIZED BY STATE V. HICKSON, 630 So. 2d 172 (Fla. 1994)[)] TO SUPPORT A CLAIM OF SELF-DEFENSE AGAINST AN AGGRESSOR WHO WAS A COHABITANT OF THE RESIDENCE WHERE THE INCIDENT OCCURRED?

The Court accepted jurisdiction, rephrased the question, and answered the rephrased question in a way that was consistent with Justice Overton's earlier dissent. In doing so, the Court observed that,

Facing page: Justice Ben F. Overton

> At the time we rendered our decision in *Bobbitt* in 1982, we were in a minority of jurisdictions that refused to extend the privilege of nonretreat from the residence where the aggressor was a co-occupant. Since our decision in *Bobbitt*, an even greater number of jurisdictions have declined to impose a duty to retreat from the residence.

In the end, the Court concluded "that it is appropriate to recede from *Bobbitt* and adopt Justice Overton's well-reasoned dissent in that case." Justice Overton, by that time serving as a senior justice near the end of his tenure, joined that decision.

Similarly, the Florida Supreme Court adopted one of Justice Overton's earlier dissents in *State v. Gray*, 654 So. 2d 552 (Fla. 1995). In *Gray*, the issue was whether a crime of attempted felony murder exists. In an earlier case, *Amlotte v. State*, 456 So. 2d 448, 449 (Fla. 1984), the Court determined that such a crime does exist. Justice Overton dissented in *Amlotte*. The *Gray* Court explained that dissent as follows:

> Justice Overton maintained in a dissent that the crime of attempted felony murder is logically impossible. He pointed out that a conviction for the offense of attempt requires proof of the specific intent to commit the underlying crime. He recognized that the crime of felony murder is based on a legal fiction that implies malice aforethought from the actor's intent to commit the underlying felony. This means that when a person is killed during the commission of certain felonies, the felon is said to have the intent to commit the death--even if the killing was unintended. The felony murder doctrine also imputes intent for deaths caused by co-felons and police during the perpetration of certain felonies. But, Justice Overton maintained, "Further extension of the felony murder doctrine so as to make intent irrelevant for purposes of the attempt crime is illogical and without basis in law."

When confronted with the *Amlotte* question again eleven years later, the Court in *Gray* concluded that "[w]e now believe that the application of the majority's holding in *Amlotte* has proven more troublesome than beneficial and that Justice Overton's view is the more logical and correct position." Justice Overton joined in the *Gray* decision.

The *Gray Cour*t acknowledged the importance of the doctrine of stare decisis before it receded from *Amlotte*, but also noted that the doctrine does not require "blind allegiance" to precedent: "Perpetrating an error in legal thinking under the guise of *stare decisis* serves no one well and only undermines the integrity and credibility of the court."

Justice Overton's Votes to Recede from Prior Decisions that He Originally Joined

In turn, Justice Overton also had occasion to face the choice whether to recede from prior decisions that he originally joined. There were times that he agreed the Court should so recede.

In *Fine v. Firestone*, 448 So. 2d 984 (Fla. 1984), Justice Overton again faced the question whether a ballot initiative proposal should be evaluated, in part, on the basis of its purported conflict with other parts of the existing Florida Constitution. In *Floridians Against Casino Takeover v. Let's Help Florida*, 363 So. 2d 337 (Fla.1978), the Court held that "'conflict' with existing articles or sections of the Constitution can afford no logical basis for invalidating an initiative proposal." Justice Overton joined the *Floridians Against Casino Takeover* decision in 1978.

Six years later in *Fine*, however, Justice Overton authored the opinion for the Court, which receded from *Floridians Against Casino Takeover* as follows:

> In *Floridians* we also held that the question of whether an initiative proposal conflicted with other articles or sections of the constitution had "no place in assessing the legitimacy of an initiative proposal." We recede from that language and find that how an initiative proposal affects other articles or sections of the constitution is an appropriate factor to be considered in determining whether there is more than one subject included in an initiative proposal.

It should be mentioned that, later in life, Justice Overton had occasion to explain his view of the *Fine* opinion. He did not think the Court's action was an abrupt turnabout, but rather a minor clarification: "[I]n *Fine*, this Court reaffirmed a majority of the principles set forth in *Floridians*. We simply receded from *Floridians* to the extent that we approved a factor to be considered in evaluating the single-subject requirement of an initiative petition that had been rejected in *Floridians.*"

The Court also reversed course in *Strickland v. State*, 437 So. 2d 150 (Fla. 1983), with Justice Overton's participation in both the earlier and later decisions. In 1980, the Court held "that attempts to commit a capital felony are sentenced as first-degree felonies and hence carry a maximum sentence of thirty years in the absence of a statutory provision authorizing a life sentence" and vacated a life sentence because "there was no such authorizing statute." That decision overlooked a statutory provision that would have applied. The First and Second District Courts of Appeal realized this mistake and refused to apply the Court's apparently mistaken opinion. Thereafter, the Court reviewed the case from the First District, acknowledged its own mistake, and receded from its earlier decision:

> We noted [in the earlier opinion] that the state conceded error on this issue. By the state's mistake in conceding error, this Court was deprived of argument on the applicability of section 775.087. That statute was apposite to both *King's* and *Strickland's* cases. We regret, in addition, that we on our own did not discover the relevance of section 775.087 when we were deciding *King*. That error was decidedly ours. . . . We hereby recede from the above-quoted language of *King*.

In correcting its prior mistake, however, the Court gave a nod to the doctrine of *stare decisis* and reiterated the proper way to rectify such mistakes. It is not, the Court said, for the district courts of appeal to simply ignore or overrule supreme court precedents, even if such precedents are mistaken: "[T]he district courts are without authority to overrule supreme court precedents and are bound to follow the case law set forth by us. . . . In the instant case, the proper course that the district court should have followed would have been to reverse petitioner's life sentence on authority of our decision in *King* and then to certify to this Court the question of the correctness of *King* in light of section 775.087."

Justice Overton's Refusal to Support Adoption of His Prior Dissent

In *Perez v. State*, 620 So. 2d 1256 (Fla. 1993), Chief Justice Barkett remarked that, "in what must be the first time in history, this Court is issuing a majority decision with which the majority disagrees." A vote by Justice Overton, when confronting one of his prior decisions, sparked that comment.

In *Perez*, Justice Overton was presented with the opportunity to cast the deciding vote for one of his prior dissents, which would have led to the adoption of the view Justice Overton previously urged. But he decided not to overrule the earlier decision, despite his earlier dissent. His concurring opinion is a good read in its entirety. These excerpts, however, give a flavor of Justice Overton's thinking on the matter.

He set out the problem as follows:

> In this case, I am presented with a difficult choice because Justices Shaw and Kogan have now accepted my dissenting view in *Bernie v. State*, 524 So. 2d 988 (Fla. 1988), in which Justice Barkett joined. In that partial dissent, I disagreed with the majority by stating that the 1982 amendment to article I, section 12, of the Florida Constitution simply required this Court to interpret Florida's Constitution in accordance with decisions of the United States Supreme Court existing at the time the amendment was adopted. I wrote that, under the amendment, we were not required to make "unknown United States Supreme Court decisions part of our Florida Constitution." *Id.* at 994 (Overton, J., concurring in judgment). On the other hand, the majority in *Bernie*, and Justice Ehrlich in his concurring opinion, stated that the people of Florida voted to adopt under the Florida Constitution, the identical principles governing search and seizure that apply under the Fourth Amendment to the United States Constitution, including both past and future United States Supreme Court interpretations.

By 1993, two justices had changed their minds, giving Justice Overton an opportunity to see his dissent adopted as the Court's decision: "Justice Shaw and Justice Kogan have now changed their minds regarding their votes in *Bernie* and have accepted my view on this issue. Thus, the question with which I am currently presented is whether I should join them and as a result, overrule *Bernie*." Justice Overton candidly acknowledged that it was not an easy judgment call to make: "This is a difficult question because, although I still believe in the view I expressed in *Bernie*, I also strongly believe that adhering to precedent is an essential part of our judicial system and philosophy of law."

In explaining his thinking, Justice Overton emphasized that "[m]ore than ten years have passed since the 1982 amendment to article I, section 12, of the Florida Constitution was adopted, and our 1988 decision in *Bernie* has been consistently applied by this Court and other courts of this state for the past five years" and that "there is no question that our Bernie decision is a significant watershed case that has major ramifications involving multiple search and seizure issues that are regularly raised in the trial courts of this State."

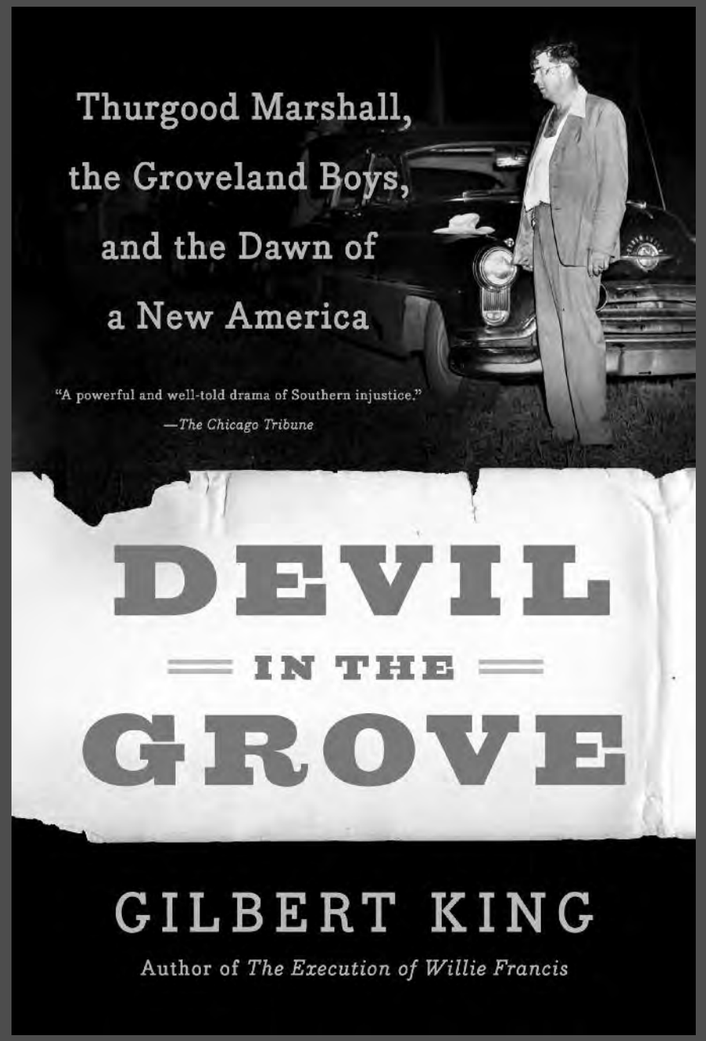
Moreover, Justice Overton observed that, "how appellate judges who participated in a precedent-making decision adhere to that precedent depends largely on their view of the decision." He elaborated that "[s]ome judges, if they believe that no reasonable, legal basis for the majority's holding existed, never accept the majority's view in subsequent cases." But "[d]issenters ordinarily accept the majority view in subsequent decisions where the issue involved two intellectually reasonable but opposing views."

In the end, Justice Overton concurred with the majority decision and concluded that, "[a]lthough I still adhere to the views I initially expressed in *Bernie*, I cannot, with intellectual honesty, say that the majority's position was entirely without a factual or legal basis" and that "I find that nothing has changed or occurred since the *Bernie* decision to justify altering the majority's holding in that case."

Conclusion

The decisions mentioned above represent but a small sliver of Justice Overton's enormous contributions to the law of this State. Yet, they show at a human level the art of balancing a deep respect for precedent, what with the stability and predictability it fosters, and the recognition that the high court must have the ability to correct mistakes or right the ship, so to speak, when the appropriate circumstances arise. ■

For the footnotes to this article, please refer to the Society website: http://www.flcourthistory.org.



Pulitzer Prize Winning *Devil in the Grove* by Gilbert King

A REVIEW BY BRUCE ROGOW

"The arc of the moral universe is long, but it bends towards justice." Martin Luther King's comment is a tribute to optimism. But in Gilbert King's telling of the travails of Thurgood Marshall and the four young men arrested in Lake County, Florida in 1949 for raping a white woman, the arc of justice never bent in a good direction. The story of the arrests, the beatings, the trials, the mob violence, the fatal shooting of one of the young men by a posse, and the killing of another (and almost killing of a third) by the Sheriff of Lake County who was returning two of the boys to be retried after the Supreme Court of the United States reversed their convictions, provides a sad picture of Florida in the 40's and 50's.

The list of Florida Groveland villains is long: the Sheriff, deputy sheriffs, judges, prosecutors (one of whom later partially redeems himself), Governors, lawyers who would not help, the Klu Klux Klan, and Lake county citizens. The list of victims is long too: Charles Greenlee, Walter Irvin, Samuel Shepherd, Ernest Thomas (the Groveland Boys); Harry Moore, the Florida NAACP Director and his wife, Harriet, murdered in their bed by the Klu Klux Klan; the burning of black-owned houses, farms and businesses in Groveland, driving people out of their community to the cry of "We wanna wipe this place clean of niggers."

So bad was the situation that in April, 1951, having granted certiorari to review the Florida Supreme Court, the Supreme Court of the United States, in one sentence, reversed the convictions and death sentences of Shepherd and Irvin in *Shepherd v. Florida*, 341 U.S. 50 (1951). A concurring opinion by Justice Jackson, joined by Justice Frankfurter, found that the roles played by the judge, the state attorney and the Sheriff "do not meet any civilized conception of due process of law" and that "prejudicial influences outside the courtroom . . . [that] were brought to bear on this jury with such force that the conclusion is inescapable that these defendants were prejudged as guilty, and the trial was but a legal gesture to register a verdict already dictated by the press and the public opinion which it generated."

Justice Jackson continued: "This case presents one of the best examples of one of the worst menaces to American Justice." He wrote: "The only chance these "Negroes" had of acquittal would have been in the courage and decency of some sturdy and forthright white person of sufficient standing to face and live down the odium among his white neighbors that such a vote, if required would have brought." Among the examples of the "outside influences" were the prejudicial press reports and a cartoon published in the Orlando Morning Sentinel "picturing four electric chairs and headed 'No Compromise – The Supreme Penalty.'"

The Florida Supreme Court decision had unanimously affirmed the convictions and death sentences. The Court spoke of a "New York attorney, having a connection with a certain fund under the control of the National Association for the Advancement of Colored People came to Florida. . . ." It acknowledged that Shepherd's family home was "burned by a mob and the family and other "Negroes" were removed from the Groveland area to prevent a lynching" and that "strained racial relations existed in about a five mile square area which embraced Groveland. . . ." Nevertheless the Court concluded the trial was fair, the jury selection process passed muster, and that trying the defendants within 45 days of the commission of the alleged crime was not error: "Frequently the minds of reasonable men differ on what constitutes sufficient time to prepare for trial."

Judicial courage was in short supply in Florida in those years, necessitating Supreme Court review. *Chambers v. Florida*, 309 U.S. 227 (1940), unanimously reversed the convictions and death sentences of four black men convicted of murdering a white man, rejecting the Florida Supreme Court affirmances of the confessions, convictions and sentences. Justice Black wrote that the defendants' "questionings" were "such as to fill petitioners with terror:"

> We are not impressed by the argument that law enforcement methods such as those under review are necessary to uphold our laws. . . .[T]his argument flouts the basic principle that all people must stand on an equality before the bar of justice in every American court . . . Due process of law preserved for all by our Constitution commands that no such practice as that disclosed by this record shall send any accused to his death.

Id. at 241-242.

Lawyer courage was also lacking. Thurgood Marshall and Franklin Williams, the NAACP Legal Defense Fund lawyers who agreed to represent the Groveland Boys, sought a white lawyer to try the case in Lake County. A distinguished Daytona Beach criminal lawyer begged off, saying "you know Franklin, those clay eating crackers down there in Lake County would just as soon stand off and shoot me with a high power rifle as they would you." Spessard Holland, Jr., the son of a Florida Governor and sitting United States Senator, declined, "dissolving into tears" as he tried to explain why he too would not handle the case. So great was the fear that when Williams asked Joe Louis, the world heavyweight champion, who was at the Orlando rooming house that also housed Williams, to accompany him to Lake County: "Joe would not go."

But Alex Akerman, Jr., did go. Akerman, Jr. was the son of Alexander Akerman, a former federal judge who had founded his law firm in Orlando in 1920. Akerman Jr. was the only Republican member of the Florida Legislature. He was representing Virgil Hawkins, a black Bethune-Cookman College faculty member, who sought (unsuccessfully) admission to the University of Florida College of Law. If there is a Florida hero here, it is Akerman, Jr. He tried the Shepherd and Irvin case in Lake County, along with Franklin Williams. He made the record that laid the groundwork for the appeal. He argued the case before the Florida Supreme Court. He worked on the briefs with the Legal Defense Fund lawyers, and accompanied them to Washington for the argument. He obtained a change of venue from Lake County to Marion County for the retrial; he successfully argued against the trial judge's initial refusal to admit Thurgood Marshall *pro hac vice*, and, with Marshall and Jack Greenberg, who later became the head of the Legal Defense Fund, Akerman defended Irvin in the retrial.

Irvin had rejected a life sentence for a guilty plea brokered by the prosecutor, the judge and then Governor Fuller Warren, because "I am not guilty." Marshall admired Irvin's courage, although he feared that a death sentence would be the outcome from the all-white jury. Marshall divided the closing argument with Akerman. Marshall "reasoned with the jurors in conventional tones; he spoke 'patiently, politely, softly but fluently and with dignity' as one reporter noted." Moments later, Jack Greenberg heard one juror say to another as the jury recessed for lunch: "Damn, that nigger was good."

Not good enough. Irvin was convicted and sentenced to death.

Why was Irvin the only defendant in the retrial? Because Ernest Thomas had been shot by a posse of "more than a thousand armed men" in the woods of North Florida. And Samuel Shepherd had been shot and killed by Lake County Sheriff McCall on a back road on the trip from Raiford to Lake County for the new trial proceedings ordered by the United States Supreme Court. McCall had taken both Shepherd and Irvin alone in his Oldsmobile, and claimed they tried to escape. Irvin was shot too, laying by the side of the road shackled to Shepherd. The Sheriff and his deputy, who arrived later, had no choice but to take him to the hospital, although the evidence indicated that the deputy shot Irvin too, after his arrival.

In the first trial of Shepherd, Irvin and Greenlee, the jury took mercy on young Charles Greenlee and the decision was made to not appeal for fear of a death sentence at a new trial. The Supreme Court had not yet decided *North Carolina v. Pearce*, 395 U.S. 711 (1969), which prohibited a harsher sentence on a retrial. Irvin's death sentence in the Marion County trial was affirmed by the Florida Supreme Court. His execution was stayed by United States Supreme Court Chief Justice Fred Vinson, only after Thurgood Marshall tracked the Chief Justice to a hotel room playing cards with President Truman, and showed him the motion for a stay. Vinson asked Marshall if the facts were true, and Marshall stated "Yes, Sir. I wrote it." The Chief Justice replied "I'll tell you one thing, if you've got guts enough to break in on this [card game], I've got guts enough to sign it."

There can be no happy ending to this kind of story. King's telling of it is detailed, insightful, and full of Thurgood Marshall anecdotes and attitudes. King had access to firsthand accounts, to court records, to Legal Defense Fund files, to contemporary newspaper clippings, and to interviews. In the book, Thurgood Marshall plays a major role throughout; his strategies, his relationships with NAACP leaders, a smidgen about his smoking, drinking and family life, all make for interesting reading. But this book is really about a Florida of the first half of the 20th Century; a Florida that from 1882 to 1930 "recorded more lynchings of black people (266) than any other state, and from 1900 to 1930, a per capita lynching rate twice that of Mississippi, Georgia or Louisiana."

(Library of Congress, Prints & Photographs Division, Visual Materials from the NAACP Records)

As we begin the first half of the 21st century, will we find ourselves in situations that allow us to move the arc of the moral universe towards justice? We will. The task is to know when those moments face us and to avoid repeating errors of the past. We are an interesting country, a country created on land stolen from one people, and worked by people stolen from another continent. *Devil in the Grove* reminds us of the demons of the past with the hope that the future will avoid such Satans.

The survivor, Charles Greenlee, did find a future. Greenlee was paroled in 1960. Walter Irvin's death sentence was commuted. He was paroled in 1968, with the stipulation that he not return to Lake County. In 1969 his parole officer granted Irvin permission to go to Lake County for the funeral of his uncle. After his arrival relatives found him in his car. He was dead. ■

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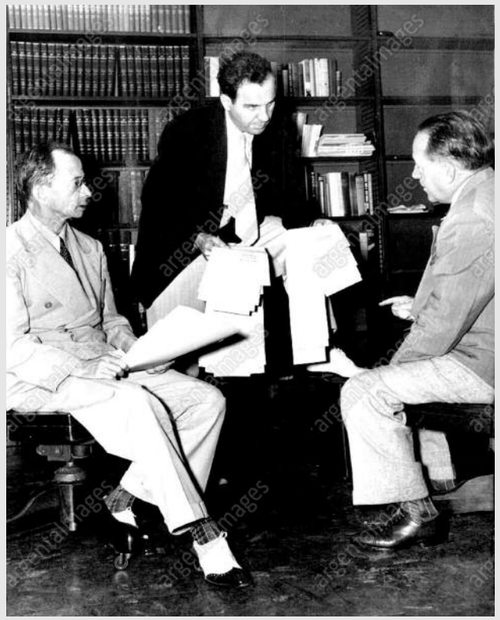
FREE PRESS IN 1940S FLORIDA:
PENNEKAMP V. FLORIDA

BY JUDGE SCOTT D. MAKAR



1941 Press Photo of H. Bond Bliss, conductor of "In Today's News" John D. Pennekamp, managing editor and author of "Behind the Front Page" and Arthur Griffith, editorial Writer and columnist (author's collection).

On November 2, 1944, *the Miami Herald* published an editorial and a cartoon, both of which were directed at legal proceedings about public nuisances such as illegal gaming. The editorial, entitled "'Courts Are Established--For The People," began by saying the judicial branch belongs "to the people" who "have established them to promote justice, insure obedience to the law and to Punish Those Who Willfully Violate It." It bemoaned that the local judges had all been appointed by the governor to fill vacancies, excepting only one who was popularly elected. It proclaimed: "These twelve judges represent the majesty and the sanctity of the law. They are the first line of defense locally of organized society against vice, corruption and crime, and the sinister machinations of the underworld."

It then scolded the judiciary for the delays and perceived leniency toward defendants in criminal cases.

> Every accused person has a right to his day in court. But when judicial instance and interpretative procedure recognize and accept, even go out to find, every possible technicality of the law to protect the defendant, to block thwart, hinder, embarrass and nullify prosecution, then the peoples' rights are jeopardized and the basic reason for courts stultified. The seeming ease and pat facility with which the criminally charged have been given technical safeguard have set people to wondering whether their courts are being subverted into refuges for lawbreakers.

The editorial criticized judicial actions in rape cases, a "padlock action" against a club, and a bookmaking operation, specifically naming the judges whose actions were deemed questionable. For example, it criticized Judge Marshall C. Wiseheart, who "appeared ... out of the blue sky" after a five month delay to dismiss the injunction in the club case; the *Herald* proclaimed the "defense got delay when it wanted a prompt decision from the court when it profited it." It also complained about Judge George E. Holt, who struck affidavits in the bookmaking case because the "defendant cannot cross-examine an affidavit." The editorial said "[t]his may be good law" but it causes "people to raise questioning eyebrows and shake confused heads in futile wonderment. If technicalities are to be the order and the way for the criminally charged either to avoid justice altogether or so to delay prosecution as to cripple it, then it behooves our courts and the legal profession to cut away the dead wood and the entanglements." Accompanying the editorial was a cartoon, depicting a judge dismissing a case with the "public interest"—depicted as a common man imploringly saying "But, Judge"—being ignored.

A second editorial appeared five days later on November 7, 1944, entitled "Why People Wonder," again highlighting Judge Wiseheart's action in the club case as "an example of why people wonder about the law's delays and obstructing technicalities operating to the disadvantage of the state-which is the people-in prosecutions." It disparagingly characterized the judge as acting with "speed, dispatch, immediate attention and action for those charged with violation of the law. So fast that the people didn't get in a peep." Likewise, the immediate release on bail of a bus driver (who had beaten up a taxi driver causing a bus strike) was criticized as another example of the legal system working "against the prosecution. Speed when needed. Month after month of delay when that serves the better."

The Contempt Order

On November 2, 1944, citations were issued to the Herald and its associate editor, John D. Pennekamp, ordering them to explain why they should not be held in contempt for the editorial(s) and cartoon. Pennekamp and the paper

Cartoon depiction as it appeared in the actual written decision.

unsuccessfully moved to dismiss the citation, and defended themselves by "admit[ting] full responsibility for each publication but den[ying] any intention to misrepresent the facts or to charge the individual judges with wrongdoing." They claimed they sought to "correct abuses in the law of Florida and that they were protected in all they said by freedom of the press."

After a trial, they were found guilty of contempt; Pennekamp was fined $250 and the Herald was fined $1000, neither insignificant amounts at that time. Off they went to the Florida Supreme Court, seeking to overturn the order and fines.

The Florida Supreme Court's Ill-Fated Decision

On July 24, 1945, the case came before the Florida Supreme Court, which issued a 5-2 decision affirming the contempt orders. Justice Terrell wrote for the majority, with Justices Buford and Sebring dissenting. The majority framed all issues raised as turning on "whether or not the cartoon and the editorials were of such content as to warrant the judgment for contempt."

Justice Terrell's majority opinion found little merit to the Herald's legal position, finding that "the vice in both the editorials was the distorted, inaccurate statement of the facts and with that statement were scrambled false insinuations that amounted to unwarranted charges of partisanship and unfairness on the part of the judges." Continuing on, the cartoon was deemed "if possible, a worse perversion than the editorial."

> The symbol of the judge in the cartoon does not reflect one attribute of this well-known judicial concept. He wears the bloated 'Beer blossom' face of the gay nineties and looks as though he had spent the night before on a jag. The symbol of the defendant fawning over the judge may typify the wishful thinking of the organized criminal gang but to one indoctrinated with respect for law and order it has more the likeness of the overlord of Pluto's kingdom. At any rate, a defendant seated on the dais by the side of and fawning over the judge is a gross slander of our method of administering justice and warrants severe censure. The symbol of a manikin representing the public imploring the court is likewise irrational and a prostitution of anything known to court room procedure.

The cartoon and editorials combined showed a court "grabbing at technicalities to free criminals, that the voice of the people is thrown to the discard, that trials are juggled at the behest of the criminal, that the courts are in league with the underworld and will sanction any species of sham plea to give it the breaks. We can think of no better build-up on which the cerebral plummet could fathom a state of partisanship and unfairness more libelous to the court."

Having determined the *Herald's* editorials and cartoon were libelous, Justice Terrell sidestepped the then-recent U.S. Supreme Court case of *Bridges v. California*, claiming it "did more than decide the law of that case." After much derogation of the newspaper, he concluded that "[p]artisan assaults on judges, juries, or witnesses are not within the compass of a free press so long as the case is pending" and, accordingly, the contempt order was affirmed.

Justice Buford and Sebring dissented. Justice Buford began by coyly agreeing "with much of what is said in the very able opinion prepared by Mr. Justice Terrell and I think it would be very easy to follow that opinion in the main and arrive at an opposite conclusion." He quickly showed his hand, saying:

> As I read the editorials and view the cartoon constituting the basis of the charge, there is nothing in either which imputes a want of fairness, impartiality or integrity to any Judge or any Court. Nor do they appear to have for their purpose or intent the influencing or controlling the determination of the result in any particular case then pending in any court. They appear to adversely criticise a judicial system which, to protect the rights of the righteous, must, by the same token, see that the alleged rights of the unrighteous are determined.

He concluded by saying he felt the "*Bridges* case is binding and that in the absence of showing of *clear* and *present danger* of influencing or controlling the determination in any particular case, then pending in any court, created by the publication complained of, no punishable contempt is made to appear." In the briefest of opinion, Justice Sebring simply said that *Bridges* required reversal.

Defeated in Florida's highest court, Pennekamp and the *Herald* pushed onward up the judicial ladder. On November 5, 1945, the United States Supreme Court accepted review.

The United States Supreme Court Weighs In

Just three months after the high court accepted the case, oral argument was held on Thursday, February 7, 1946. Pennekamp and the Herald had top flight legal counsel: Elisha Hanson, a prominent D.C. attorney with much experience in the high court, was chief counsel for the American Newspaper Publishers Association, which represented newspapers' interests nationwide. Hanson argued the case with Milam, McIlvane & Milam, the third of six in Hanson's career and the last of three in the 1945 Term. The American Civil Liberties Union filed an amicus brief in support of the Herald.

Arguing for the State of Florida were Florida Attorney General J. Tom Watson of Tallahassee (1941-1949), and former Florida State Bar Association presidents Giles J. Patterson of Jacksonville (1933) and James M. Carson of Miami, each of whom had appeared previously in many Supreme Court cases.

After four months of much media anticipation, the Court issued its unanimous decision. Following up on its recent precedent overturning restrictions on the media, the Court—through Justice Stanley Reed's opinion—issued a strongly-worded denunciation of the Florida courts. Reed, a former Solicitor General of the United States and the last justice who was not a law school graduate, began by noting that the Court had recently in the *Bridges v. California* decision, "fixed reasonably well marked limits around the power of courts to punish newspapers and others for comments upon or criticism of pending litigation." *Bridges*, a 5-4 decision, was a watershed case because it applied the "clear and present danger" test from Justice Holmes's majority opinion for a unanimous Court in *Schenck v. United States*, 249 U.S. 47 (1919), upholding a conviction under the Espionage Act for distribution of circulars to draftees advocating against the draft. By broadening the First Amendment's protection of media commentary on the judicial system, the Court in *Bridges* made the unanimous decision in Pennekamp seem almost a fait accompli.

In overturning the Florida Supreme Court, Reed touched upon a number of points about balancing a free press with the administration of the judicial system in pending cases, concluding:

In the borderline instances where it is difficult to say upon which side the alleged offense falls, we think the specific freedom of public comment should weigh heavily against a possible tendency to influence pending cases. Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice.

En banc portrait of Supreme Court Justices from 1947-Tallahassee, Florida. Justices are (L-R): "Associate Justice" Leo Fabisinski sitting in place of Harold Sebring who was appointed for 1 year to be a judge at the Nuremberg War Crimes Tribunal, Roy H. Chapman, Glenn Terrell, Elwyn Thomas, Rivers Buford, Alto Adams, Paul Barns. Shown in the Whitfield Building courtroom.

The Florida Supreme Court's majority opinion fared poorly. Reed acknowledged deference to state supreme courts' findings, but pointed out their "authority is not final. Were it otherwise the constitutional limits of free expression in the Nation would vary with state lines." As one commentator recently summarized:

> Justice Reed's majority opinion came down hard on Florida, applying the clear and present danger test to find that the contempt citations were inappropriately issued. He explained that, while judges retain some degree of latitude to restrict actions that may prejudice the administration of justice in cases before them, the ability of the press to discuss and critique the judicial system should rarely be impugned. In other words, unless there is substantial evidence to suggest the existence in press commentary of a clear and present danger to the orderly administration of justice, a court is not able, consistent with the First Amendment, to punish the media for its criticisms.

Justice Reed's opinion, read together with the concurrences of Justices Frankfurter, Murphy and Rutledge, reflects agreement with the basic assessment of Pennekamp and his legal counsel of the core free press principles at stake.

Reed and the concurring justices noted that the Herald's criticism was about judges and the technicalities and delays that were perceived as thwarting the prosecution of criminal cases. That this criticism might affect the mindsets of judges, some being "of a more sensitive fiber than their colleagues," was insufficient to "close the door of permissible public comment." Justice Frankfurter went further, saying:

Weak characters ought not to be judges, and the scope allowed to the press for society's sake may assume that they are not. No judge fit to be one is likely to be influenced consciously except by what he sees and hears in court and by what is judicially appropriate for his deliberations.

Justice Murphy's short concurrence came quickly to the point: the freedom of the press "includes the right to criticize and disparage, even though the terms be vitriolic, scurrilous or erroneous. To talk of a clear and present danger arising out of such criticism is idle unless the criticism makes it impossible in a very real sense for a court to carry on the administration of justice. That situation is not even remotely present in this case."

What can best be remembered about the case is the tenacity of Pennekamp and the Herald, and their unflinching belief in a robust press. Upon his death at the age of 80 in 1978, then Herald staff writer Carl Hiaasen noted that "Pennekamp once said the bright spot in his career was the Supreme Court fight in 1945-46 that scored a victory for freedom of the press." ■

For the footnotes to this article, please refer to the Society website: http://www.flcourthistory.org.

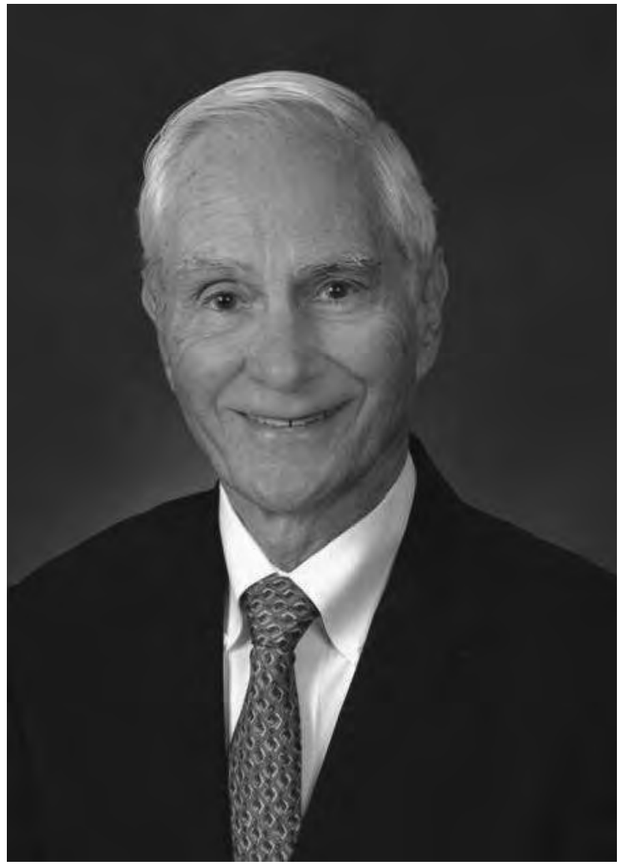
Photographs provided by the State Library and Archives of Florida.

IN MEMORIAM

W. DEXTER DOUGLAS

DECEMBER 6TH, 1929 - SEPTEMBER 17TH, 2013

IN MEMORIAM



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