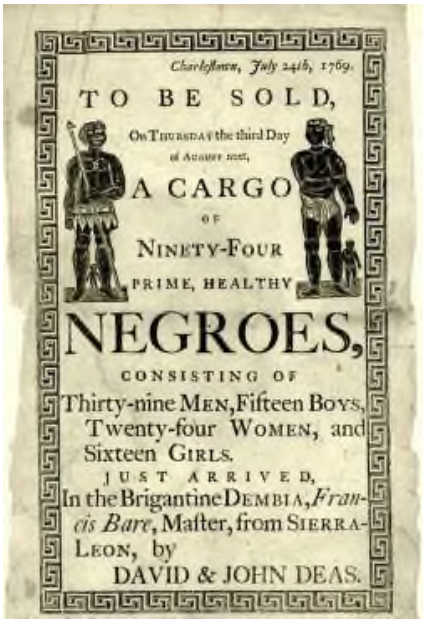
From Chattel To Justice


Charlestown, July 24th, 1769.

TO BE SOLD,

On THURSDAY the third Day of AUGUST next,

A CARGO OF NINETY-FOUR PRIME, HEALTHY

NEGROES,

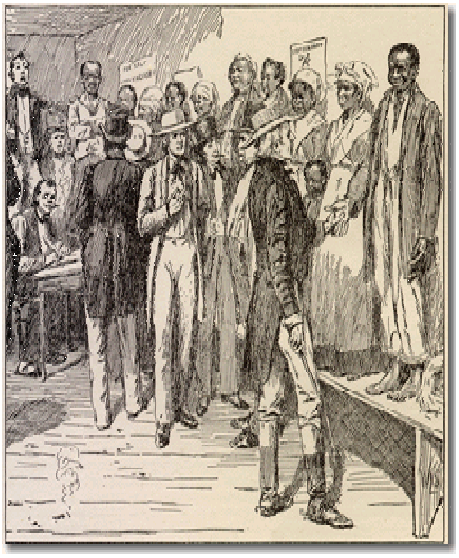
CONSISTING OF

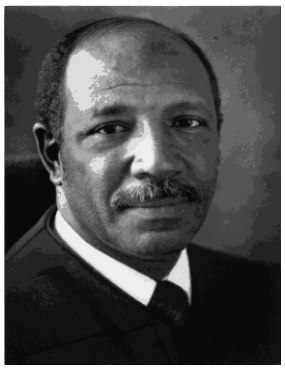
Thirty-nine MEN, Fifteen BOYS, Twenty-four WOMEN, and Sixteen GIRLS.

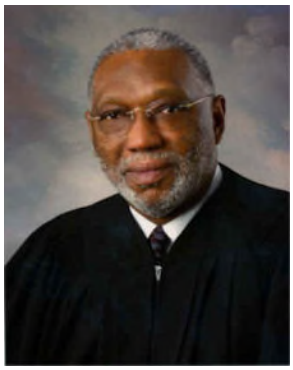
JUST ARRIVED,

In the Brigantine DEMBIA, *Francis Bare*, Master, from SIERRA-LEON, by

DAVID & JOHN DEAS.







By Sylvia H. Walbolt and Andrew D. Manko
Carlton Fields, P.A.

From Chattel to Justice

It has been a long journey for African-Americans in the Florida Supreme Court, from decisions in which the Court considered them property over which other persons had rights in them as slaves, to decisions addressing their fight for civil rights, to later decisions in which African-Americans were justices of the Court helping to shape the law of Florida for all of its citizens. This article does not attempt to discuss all such decisions, but rather addresses a sampling that demonstrates the evolution of our state from a slave-owning society, to a segregated society, and now a fully integrated society in which African-Americans sit as justices of the Court.

Because African-American slaves were considered chattels, not persons, the early decisions of the Florida Supreme Court involved arcane, technical principles of property law, difficult for even a lawyer to understand today. Despite this, they provide fascinating insight into the long-ago society that viewed African-Americans as valuable chattels that could be sold or passed on to heirs, just like any other piece of property. We begin with those decisions.

1. Property Rights in African-Americans

In *Dred Scott v. Sandford*, 60 U.S. 393 (1856), the United States Supreme Court held that a slave lacked the right to sue in federal court to regain his freedom after living in a state where slavery was illegal. In so holding, the Court said the Constitution "makes no distinction" between a slave and "other property owned by a citizen." *Id.* at 451. An African-American slave "was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it." *Id.* at 407. That certainly was the casual, unquestioning attitude of the Florida Supreme Court for many years – a Court which had slaveholders as justices in its early days. See Manley, III, Walter W., et al., The Supreme Court of Florida and Its Predecessor Courts, 1821-1917 113, 117 (1997).

One of the first reported decisions of the Florida Supreme Court involving African-Americans appears to be *Horn v. Hartman*, 1 Fla. 63, 1846 WL 1001, at *1 (Fla. Jan. Term 1846). As was common in the Court's early decisions, the legal documents at issue are set forth in the reported decision. There, in an "action of trover, for the conversion of a negro man," the plaintiff had received a deed conveying a slave named Will (and his wife Milly and seven cows and calves) to plaintiff, but reserving a life interest in this "property" to the grantor. *Id.* at *1-2. Sustaining the plaintiff's argument that a property bequest in a later will to convey Will to others did not control, the Court stated that "[n]othing is better settled than that, an interest in remainder, after an interest for life expires, may be limited in a deed for slaves." *Id.* at *3-4.

During the same term, the Court decided two other cases dealing with issues involving property rights in slaves. *See, e.g., Edwards v. Union Bank of Florida*, 1 Fla. 136 (1846) (holding corporation could be liable in tort for seizure and detainer of negro slaves); *Manley v. The Union Bank of Florida*, 1 Fla. 160 (1846) (holding mortgaged slaves could be foreclosed and sold).

In the January 1847 term, the Court addressed a challenge to a levy and sale under execution of "certain negro slaves . . . ." *Betton v. Willis*, 1 Fla. 226, 1847 WL 1042 (Fla. Jan. Term 1847). The slaves were alleged to belong to the appellant as trustee for the owner of the slaves who purportedly had been "assigned to her as her dower," but "a jury . . . sworn to try the right of property" found otherwise. *Id.* at *2. The levy was affirmed by the Court after finding that the technical requirements for such a levy were satisfied. *Id.* at *2-3.

In the following term, the Supreme Court considered the 1825 will of William Gore in *Watts v. Clardy*, 2 Fla. 369, 1848 WL 1268 (Fla. Jan. Term 1848). After saying "I lend unto my beloved wife Mary, during her natural life, . . . as many of the negroes as [the Executors] shall deem proper for her

comfortable support," Gore's will provided that all of them thereafter shall be "equally divided between my lawful heirs, share and share about." *Id.* at *1-2. The will then stated that Gore's executors "shall divide all the remainder and residue of my negroes, stock of all kinds, household furniture, plantation tools, ready money, debts that are due me, and all other any personal property not already divided, betwixt my said sons and daughters having an equal share," with the further provision that the property is "only lent" to his daughters "during their natural lives and then to return in manner above mentioned." *Id.* at *3-4. However, Gore had by deed "loaned" to one of his daughters, Anna Clardy,

> during her natural life, and after her death, . . . unto the heirs of her body which shall survive her, to be equally divided amongst them, the following negroes, with their future increase, viz: Charlotte, Silvey and Tenor; the said Anner Clardy to have and to hold and enjoy during her natural life, the said negroes Charlotte, Silvey and Tenor, and their future increase, and after her decease, to be then equally divided between her surviving heirs, as their exclusive property.

Id. at *2.

The question for the Court was whether the will and deed (or either of them) conveyed such an absolute interest and estate in the slaves that it vested the same interest and estate in her husband as absolute owner. *Id.* at *4. Finding such an interest was vested in her husband, the Court concluded that her children did not have a vested interest in the estate residue. *Id.* at *4-5.

Issues concerning property rights in African-American slaves continued to come before the pre-Civil War Court. For example, in *Summerall v. Thoms*, 3 Fla. 298, 1850 WL 1229 (Fla. Jan. Term 1850), the Court reversed a judgment in an action of detinue to recover possession of a female slave named Sue, who was worth $400, ordering a new trial over dissent. *Id.* at *5-7. In *Young v. McKinnie*, 5 Fla. 542, 1854 WL 1286 (Fla. Aug. Term 1854), the Court concluded that a legacy of property, including "negroes, horses, and stock of every kind," to the testator's wife, son and daughter, to be divided equally between them, was "as to the personalty a vested legacy." *Id.* at *2-4. As such, the slaves passed at her death to her sole heir. *Id.*

The Court also decided cases involving a woman's rights in slaves. In the April 1855 term, two such issues came before the Court. In *Sanderson v. Jones*, 6 Fla. 430, 1855 WL 1400, at*10-12 (Fla. Apr. Term 1855), the Court upheld a husband's right to convey an interest in certain slaves who were part of his wife's marriage settlement. Then, over dissent, the Court held in *Maiben v. Bobe*, 6 Fla. 381, 1855 WL 1399, at *4 (Fla. Apr. Term 1855), that "the *feme*, Mrs. Shomo, [had the "power"] to "dispose of the property," the property being "several negroes" who had been deeded to her by her brother, "with the provision that they were 'not to be subject to the control, or debts, or contracts of her husband,'" and were to be "'solely invested as the property of his sister.'" Although recognizing that "[m]arried women are entitled to the peculiar regard of Courts of Equity, . . . when they present a case of fairness and of equity, free from unfair dealing and impropriety," the Court found the purchaser of the negroes was a bona fide purchaser, without notice of the alleged coercion by the seller's husband to make the sale. *Id.* at *12.

Rights of married women in slaves continued to be litigated in the Florida Supreme Court. *See Crowell v. Skipper*, 6 Fla. 580 (1856), (rejecting claim that slave could not be levied upon for husband's debt because of deed of marriage settlement for wife); *May v. May*, 7 Fla. 207 (1857) (holding deed of trust to daughter of certain slaves conveyed interest, share and share alike, to issue of both marriages of daughter); *McHardy v. McHardy*, 7 Fla. 301 (1857) (rejecting son's claim to the "increase of the labor" of slaves belonging to his mother); *Broome v. Alston*, 8 Fla. 307 (1859) (holding widow's deed of slaves void

because she had two distinct titles to the slaves and the particular interest she conveyed belonged to the estate); *Smith v. Hines*, 10 Fla. 258 (1863) (reviewing evidence in detail and holding husband's purported conveyance of slaves was a contrivance to avoid wife's dower rights); *Owens v. Love*, 9 Fla. 325 (1861) (addressing procedural issues in suit to quiet title to slaves).

A particularly interesting decision was rendered in *Tyson v. Mattair*, 8 Fla. 107, 1858 WL 1642 (Fla. 1858). The deed of gift of the following described "property" -- "a negro man named Primus, aged about twenty-three years; a negro woman named Clarissa, aged about 17 years, and a negro man named William, aged about 12 years" -- is set out in the decision, as are the arguments of counsel. *Id.* at *1-2. The Court held, over dissent, that the deed to a married woman and the heirs of her body to have and to hold the property to their "own proper use and behoof forever" did not constitute a separate estate in her, and thus was insufficient to deprive the husband of his marital rights in the negroes. *Id.* at *4, 7-9. Accordingly, the wife's claim to "the right of property in the slave Primus" was rejected "so as to leave the property subject to her husband's debts." *Id.* at *9; *see also*, *Price & Wife v. Sanchez*, 8 Fla. 136 (1858) (holding "negro boy John" was liable to the debts of the slave owner's husband); *Abernathy v. Abernathy*, 8 Fla. 243 (1858) (reporter's syllabus summarizes pleadings and testimony; court affirms injunction of sale of negro under execution to pay for husband's debts, but directs sheriff to hire slave out for year 1856).

The Court also dealt with jurisdictional issues concerning suits claiming rights in slaves. *Linton v. Walker*, 8 Fla. 144, 1858 WL 1644, at *1 (Fla. 1858), another very interesting opinion (where again the reporter summarized the pleadings and the testimony), was an action of assumpsit to recover the value of fifteen slaves from 1850 to 1855. The agreement for the hiring of the slaves, identified as usual in the indenture by their first names, expressly included a covenant by the lessee "to treat said slaves kindly and to supply them with the usual amount of food and clothing, and on the first day of January, 1855 to return such of them as shall be alive, with the increase of the females" to the lessor. *Id.* at *3. The Court held the action of assumpsit was "unsuited to cases of this nature," as an accounting would be required, which was more properly the task of a court of chancery, to which the case was referred. *Id.* at *8.

Several years later the Court again grappled with a jurisdictional issue created by a request to a court of equity to adjudicate title to five slaves. *See McLeod v. Dell*, 9 Fla. 427, 1861 WL 1292 (Fla. 1861). The Court held that the "bill on its face expressly alleges the *legal* title to these slaves to have been in the complainant's intestate," which negated "a *trust* in the defendant." *Id.* at *13.

Equitable and trust principles were applied in subsequent decisions. In *Marvin v. Hampton*, 18 Fla. 131, 1881 WL 2954 (Fla. Jan. Term 1881), the Court addressed an equitable claim to land, asserted to have been conveyed in trust. The plaintiff was the ultimate beneficiary of a will bequeathing certain slaves. *Id.* at *3-4. When earlier beneficiaries wished to exchange the slaves mentioned in the will for certain land in Madison County, the plaintiff agreed, "provided she should have the same interest in the land so purchased as in the property bequeathed . . . ." *Id.* at *4. According to the testimony recited in the opinion, the land was obtained by an exchange of "personal property [that] consisted of slaves." *Id.* The Court concluded it could not be determined that all of the land was paid for by the exchange of the slaves and accordingly denied relief. *Id.* at *7-8.

Trust principles also were applied by the Court in *Gale v. Harby*, 20 Fla. 171, 1883 WL 2628 (Fla. June Term 1883). There, the dispute centered on a tract of land that the plaintiffs contended was the subject of a trust. *Id.* at *2-3. Plaintiffs contended the mortgage was paid from "funds realized from the after cultivation of the land by slaves belonging to the trust fund . . . ." *Id.* at 2. After reviewing the testimony of various witnesses for both parties, the Court affirmed the decree for the plaintiffs. *Id.* at *2-

16.

In its early precedents, then, the Florida Supreme Court dealt with African-American slaves as mere property owned by their masters – property that could be sold and bequeathed. They were not persons; they were chattels just like the horses and farm equipment the owners bought and sold for their plantations.

2.Decisions Dealing With The Effects of Slavery

During the post-Civil War reconstruction period, the Florida Supreme Court grapples with a variety of issues concerning the legal effects of slavery. For instance, in *Kingsley v. Broward*, 19 Fla. 722, 1883 WL 2596 (Fla. Jan. Term 1883), the Court addressed legal issues with respect to "quarteroon" children. The relevant deed left certain land to "my freed mulatto woman, Flora H. Kingsley" and her "quarteroon children." *Id.* at *1. The court held the deed to the "quarteroon children" void because "they were not then begotten, and were not and could not be identified and named, and they were not legitimate." *Id.* at *6-9.

The absence of legal formalities upon the birth of slave children led to the Court's order of a new trial in *Williams v. State*, 20 Fla. 777, 1884 WL 2098 (Fla. June Term 1884). The African-American appellant was convicted of rape of a married white woman and sentenced to death. *Id.* at *1-2. He sought a new trial, challenging the court's instruction to the jury that an "infant under fourteen years is presumed to be unable to commit a rape, but you must be satisfied that he is under that age, and incapable, from the testimony and appearance." *Id.* The defendant's brother testified he knew the defendant "was between thirteen and fourteen years of age . . . from what his father told him." *Id.* The defendant testified that "according to his mother's statement he was thirteen years of age."

The Court held the trial court's instruction to the jury was error because the "*appearance* alone of the boy is not legal evidence against him of either age or puberty" and there was no evidence he was fourteen years old. *Id.* at *2. The court declined to determine whether there should be a rebuttable presumption, as in Ohio and New York, that a person under the age of fourteen is incapable of rape. *Id.*

As to divorce, the Court had to decide whether it was "extreme cruelty" for a husband to, among other things, tell his wife that "a negro was as good as she." *Donald v. Donald*, 21 Fla. 571, 1885 WL 1798 (Fla. June Term 1885). Because of the Court's ruling on other grounds, it did not expressly decide whether that was a basis to grant a divorce, although it appears to have implicitly rejected that ground. *Id.* at *2-4.

Some of those early decisions even carry through to today. The Court's decision in *Simon, a Slave, v. State*, 5 Fla. 285, 1853 WL 1278 (Fla. 1853), has long been cited by public defenders seeking to exclude confessions. The appellant was a slave who had been convicted of arson and sentenced to be hung. *Id.* at *1-2. The slave asked those present to "send for my master and I will tell the whole." *Id.* at *6. When his master appeared, and the mayor's prior statements were repeated to him, he confessed. *Id.*

Over dissent, the Court reversed, finding the slave's confession had been coerced. *Id.* at *5. The Court held that whether the confession was given voluntarily was an issue for the Court, not the jury, declaring the "confession was the only immediate security for his person and his life":

> He was taken before the mayor of Pensacola, at his office. A large and excited crowd was present, declaring that the accused should be hung, and but for the firmness and determination of the mayor, would have seized upon him. He was informed by the mayor that the crowd was satisfied as to his guilt, that he would be put upon his trial, and would certainly be hung. That if he had accomplices they would be put upon their trial, and not him-- that he would become State's evidence. The mayor further testifies "that the accused was greatly

> alarmed." The city marshal, who was also present, testifies, that the accused was under great excitement, was laboring under great terror, and that he never saw any one more terrified.

Id. at *6-7.

The Court concluded that "[t]he fear of immediate punishment may be as powerful an agent in extorting a confession, as the punishment itself." *Id.* at *6. As the Court explained:

> [T]he fact that the accused is a slave, and the confession to, and at the instance of his master, are circumstances entitled to the most grave consideration; *the ease with which this class of our population can be intimidated, and the almost absolute control which the owner does involuntarily exercise over the will of the slave,* should induce the courts at all times to receive their confessions with the utmost caution and distrust.

Id. at *7 (emphasis supplied).

Even into the 20th Century, the legal effects of slavery still were being litigated. In *Payne v. Payne*, 89 So. 538, 538 (Fla. 1921), two grandchildren of an African-American who died intestate claimed they were entitled to inherit from him through their father. Their grandfather had declared during his lifetime that he had married "Sarah 'in slavery time,' according to the custom of marriage between slaves . . . ." *Id.* Their father was born of that marriage and, "after slaves were emancipated in this state," their father was recognized by their grandfather as his son. *Id.* The trial court nonetheless denied the claimed right of inheritance, finding there was "no evidence that the cohabitation of Tobias and Sarah was recognized by others, to be that of husband and wife . . . ." *Id.* at 538-39.

The Court reversed, holding the chancellor had strictly construed the Florida statute providing that children of slave marriages were legitimized, so long as cohabitation existed prior to 1866. *Id.* Instead, the statute "should be liberally construed to carry out the beneficent public policy of the state." *Id.* As the Court explained, "the law does not intend that the right [to legitimacy] shall depend upon proof of express recognition by others of the cohabitation as husband and wife" if it "in fact existed and the child is the issue of that cohabitation." *Id.*

As these decisions demonstrate, the Court dealt with the legal effects of slavery for decades. With the end of the 19th Century, though, the Court was faced with new questions concerning the rights of African-Americans, who formerly were considered property but now were free persons.

3. No Longer Property, But Still Without Civil Rights.

With President Lincoln's 1863 Emancipation Doctrine, decisions addressing rights in African-Americans as property finally came to an end. The issue then became what legal rights the freed slaves possessed. As both history and the Court's precedents demonstrate, though they were no longer considered property, it would take decades for African-Americans to travel the long road to equal civil rights under Florida law.

It bears mention that much of the more recent case law dealing with the civil rights of African-Americans arose in federal, rather than state, courts. Much of that case law arose in enforcing federal statutes granting civil rights that often were in conflict with Florida statutes and, indeed, the Florida Constitution. Many Florida decisions on these issues were rendered, sometimes quite grudgingly, in response to decisions of the United States Supreme Court reversing the Florida Court's initial decision on issues such as desegregation of Florida's public schools.

In 1895, the Florida Supreme Court addressed the right of a slave child, who was born of a slave marriage that terminated before emancipation, to inherit property acquired after emancipation. *See Williams v. Kimball*, 16 So. 783 (Fla. 1895). The record did not show whether the unsuccessful

appellant was a child of a "customary slave marriage, or some other cohabitation," but whatever the relationship was, it terminated before emancipation. *Id.* at 784. Although the appellant had been legitimized in Georgia, where he resided, the Florida Supreme Court nevertheless refused to allow him to inherit as a legitimate heir, stating that Georgia law was "not in harmony with our system . . . ." *Id.*

The Court then considered what rights a "bastard" had to inherit. *Id.* at 784-85. It began by noting that:

> The status of negroes born in marriages terminating before the general emancipation of the slaves in the Southern states is a peculiar one. To some extent the right of marriage was recognized among them. It is a part of the history of the extinct institution of slavery in the Southern states that these slave marriages were often had with the approbation of the owners of the slaves; that the marriage ceremonies were publicly celebrated, often by the ministers of the gospel, and were sanctioned by the churches of the country. The subsequent cohabitation of the parties was never regarded as illicit or immoral, but as perfectly right and proper, and it was regarded as a wicked thing for either party to be unfaithful to the marriage vow.

Id. at 785. The Court went on to say that:

> The children born of such marriages were regarded as standing upon a different plane to those slave children who were bastards, pure and simple. These views prevailed from regarding marriage as a Divine institution, and not from looking upon it from the standpoint of the law, which has concern with it only as a civil contract. The progeny of such marriages, while, perhaps, from a liberal point of view, they are not bastards, are yet, so far as want of inheritable blood is concerned, placed in the same category as bastards.

Id.

The Court concluded it was "entirely right and proper" to give the appellant the benefit of the statute adding to the "inheritable capacity of bastards." *Id.* Since he was not claiming under his mother, however, the property never vested in her and he could not inherit from collateral kindred on his mother's side. *Id.* at 785-86.

4.Still Not Respected as Equals to Whites.

Although slavery had been abolished for many decades, the Court's precedents in the early 20th century continued to refer to African-Americans in demeaning terms, consistent with the pejorative views of white society in general. *See, e.g.*, *Bailey v. State*, 79 So. 730 (Fla. 1918) (reversing rape conviction, describing the prosecutrix as a "20 year old married negro wench" and concluding the prosecutrix did not sufficiently resist the defendant's "solicitations," declaring that "what she said [to him] did not . . . exclude the idea that her opposition to his will was nothing more than pretense or, at any rate, that the act was consummated while she, though 'saying, "I'll ne'er consent," consented.'"); *Thomas v. State*, 68 So. 944 (Fla. 1915) (affirming death sentence for murder, finding premeditation from fact defendant was "slashing [his girlfriend] with a razor, a favored weapon of the negro race . . . ."); *Hickson v. Hickson*, 45 So. 474 (Fla. 1907) (citing allegation in divorce complaint that wife had made statements concerning husband's child insinuating child "had negro blood in her veins . . . .").

In fact, for a number of years, the Florida Supreme Court continued to publish decisions including the word "nigger." The reference usually was incorporated in quoting alleged statements

testified to at trial. Though some are only peripheral to the decision, in others it is central to the case.

In *Florida East Coast Ry. Co. v. Geiger*, 60 So. 753, 756 (Fla. 1913), for example, the plaintiff entered a coach containing white passengers just as the train moved away from the station and was ordered by the conductor to "get off here and go to the nigger coach, where you belong." The Court noted that "[t]he laws of the state forbid colored and white passengers to occupy the same coach on a railroad train." *Id.* The plaintiff was injured when he obeyed the conductor's order and jumped from the coach while the train was increasing speed. *Id.*

The jury found the defendant railroad liable, and the question for the court was whether the plaintiff was justified in jumping off the platform of the coach. *Id.* The plaintiff testified that the conductor rushed at him after ordering him to "go to the nigger coach," but did not threaten him. *Id.* The court reversed, holding that the trial court erroneously failed to give an instruction that it was the duty of a person getting off of a train to "exercise due and ordinary care . . . ." *Id.* at 757. In reversing for a new trial, the court observed as follows:

> It seems clear that, *even if, by reason of the well-recognized status and yielding disposition of the members of the colored race in the presence of commanding authority*, there was some incentive for the plaintiff, a colored man, to reach the colored coach by alighting and getting on again, rather than to ask permission or assert a right to pass through the white coach to the colored coach, or to remain on the platform until he reached a place of safety, yet there was, under the circumstances, no reasonable occasion or excuse for the plaintiff, a man of 23 years of age, and apparently accustomed to travel, to jump off the moving train against a truck that he could easily have seen; it being daylight.

Id. at 756-57 (emphasis supplied).

In a later case in which the Court denied a petition for habeas corpus, one dissent rested on the justice's view of the supposed nature of the Negro race. *See Carver v. State*, 134 So. 62, 62-65 (Fla. 1931) (Buford, C.J., dissenting). In *Carver*, the defendant was accused for murdering his wife and child (presumably for insurance), and an African-American servant in the home, so as to cover up the defendant's own acts. *Id.* at 62. One dissenting justice cited a witness' testimony that the defendant's wife had said on the day of the murder that she was afraid of "that nigger," concluding the evidence "is just as consistent with Carver's innocence as it is with his guilt." *Id.* at 64-65 (Buford, C.J., dissenting). A second dissenting justice similarly found that the evidence did not satisfy the stringent standard of being "inconsistent" with the defendant's innocence. *Id.* at 65 (Hutchison, J., dissenting). In so finding, he observed:

> In reaching a verdict of guilty, from the circumstantial evidence adduced at the trial, the jury doubtless reasoned that *the average southern negro often purloins his master's chattels, but seldom robs or assaults his master, or members of his master's household.* The jury was doubtless also influenced by the fact that the evidence presents a stronger probability that the defendant killed his wife and child, than that the negro did it. But this is not the rule by which one must be convicted of crime.

Id. (emphasis supplied); *see also Taylor v. State*, 22 So. 2d 639, 640-41 (Fla. 1945) (referring to dying declaration that decedent "walked over to the nigger and started to read him the papers," and noting that when a white man and a colored man "clash in

combat it is usually violent" in the context of reducing judgment to murder in the second degree).

Many cases point to a defendant's use of the pejorative term "nigger" in addressing the evidence supporting a conviction for a crime. *See, e.g.*, *Guyton v. State*, 86 So. 618, 622-24 (Fla. 1920) (holding defendant's statement that he was going to "kill me a damn nigger and pay for him" admissible in murder case); *Reid v. State*, 66 So. 725, 726 (Fla. 1914) (holding defendant's threat to kill "a nigger that stole my money" was admissible evidence in murder case). Even cases within the last twenty years have included such references. *See, e.g.*, *Asay v. State*, 769 So. 2d 974, 975, 982-83 (Fla. 2000) (quoting statements regarding "niggers" in finding racial motive for murders, in *per curiam* decision joined in by Justices Shaw and Quince, the Court's two African-American justices at the time); *Asay v. State*, 580 So. 2d 610, 611-13 (Fla. 1991) (holding premeditation established by defendant's statements that he did not have "to take no s--t from these f---ing niggers" and that "you got to show a nigger who is boss," in *per curiam* decision joined in by Justice Shaw, the Court's second African-American justice).

Unfortunately, but perhaps not surprisingly given those times, it is not just a witness's use of the "N" word in testimony that appears in Florida Supreme Court opinions. Indeed, even officers of the court used the pejorative term during trial proceedings, leading to complaints on appeal. For instance, in *Huggins v. State*, 176 So. 154, 155 (Fla. 1937), the defendant appealed his assault conviction by asserting that the State Attorney had "constantly appealed," over objection, to the jury's racial prejudice. He was alleged to have told the jury, among other things, that "niggers didn't pay any of the expense of government, and that you good people of Suwannee County are right today having to pay all of the costs and expenses of prosecuting these niggers . . . ." *Id.* The State Attorney was also accused of saying that "if a bunch of niggers had jumped on him . . . he expected he would have done more than Mr. Carver did." *Id.* Because there was no record transcript showing the statements attributed to the State Attorney, the Court found no reversible error, but emphasized that had the record shown such statements, a new trial would have been given. *Id.*

The record in *Ivey v. State*, 180 So. 368 (Fla. 1938), did show the State Attorney's reference to the defendant as a "nigger":

> 'Q. You worked at your own work, pursuing your own work, supporting your own family and supporting your own home? A. Yes, sir.
>
> 'Q. That's doing pretty good for a *nigger* in comparison with some white folks? A. Yes sir, I hope it is.

Id. at 370 (emphasis added). That was not the issue raised on the appeal, however, and the Court affirmed the defendant's conviction. *Id.* at 370-72.

On the other hand, in *Foster v. State*, 929 So. 2d 524, 533-34 (Fla. 2006), it was the defendant's own attorney who was accused of referring to him as "just another dumb nigger." In a motion under Florida Rule of Criminal Procedure 3.850, the defendant claimed the post-conviction court erred in denying, without an evidentiary hearing, his claim that his counsel was racially biased. *Id.* The defendant presented testimony of a social worker who was retained to provide a biopsychosocial assessment of the defendant. The witness testified that she met with the defendant's lawyer who was responsible for the guilt phase of the trial and that he commented that the defendant "is just another dumb nigger and who cares anyway about all this mitigation, the jury is not going to listen." *Id.* at 534. The State presented rebuttal evidence that the lawyer was not racially prejudiced, and the Court denied relief. *Id.* at 534-38.

Trial judges were not free from blame either. In *Peek v. State*, 488 So. 2d 52 (Fla. 1986), the original trial judge disqualified himself after the guilty phase of the murder one trial. In discussing the procedures for the penalty phase, the trial judge was said to have commented:

> Since the *nigger* mom and dad are here anyway, why don't we go ahead and do the penalty phase today instead of having to subpoena them back at cost to the state.

Id. at 56 (emphasis added). The Court did not need to reach this issue in light of its decision on others, but wrote about "this incident" as follows for "future guidance of the bench":

> Trial judges not only must be impartial in their own minds, but also must convey the image of impartiality to the parties and the public. Judges must make sure that their statements, both on and off the bench, are proper and do not convey an image of prejudice or bias to any person or any segment of the community. This type of conduct is required of our judiciary because "every litigant . . . is entitled to nothing less than the cold neutrality of an impartial judge." *Id.*

We end this section with several decisions in which the Court issued bold statements regarding society's need to absolve itself of the racial and civil strife existing between Whites and African-Americans. In *Huntley v. State*, 66 So. 2d 504, 507 (Fla. 1953), the white decedent, who had announced his intent to kill "four or five niggers" was himself killed after one of the African-American defendants snatched his gun from him. *Id.* at 505. As the decedent retreated, the defendants beat him so severely that he died later that night. *Id.* at 506. The Court's opinion is worth quoting in a large part:

> The decedent, a white man, it is true precipitated the conflict. He was in error and had no right nor authority to act as he did and his whole attitude can not be deplored too much. Racial clashes of this kind should be a thing of the past. Every man, regardless of color or creed, is entitled under our Constitution and laws to equal treatment. That this has not been accomplished is not the fault of the law, but of the individual who refuses to recognize such. The decedent was 'dead' wrong, and he practically invited his own destruction. But on the other hand, we must accept the facts as we find them, as the jury heard them, and as the trial judge evaluated them. The decedent was not wrong enough all the way through the controversy to have to pay with his life for what he did.

Id. at 507. Continuing, the Court declared:

> [The decedent] was rendered powerless to carry out his threats and intent of "killing four or five niggers," by the swift protective action of appellant Samuel Huntley, and there it should have stopped. Here the decedent realized (and there was no evidence of alcoholic drinking at all by anyone engaged in this fracas) he was unarmed and rendered helpless, with only one white man with him (Fred Brumley, who as the record discloses, fled as fast as any of the Negroes and was certainly of no aid to decedent), surrounded by seven Negroes, all of whom he had provoked, interfered with their freedom of movement, held up unlawfully from proceeding to their respective destinations, threatened and cursed at, decedent was determined to leave the scene in his truck as soon as he could get to the seat and start its engine. It is here then that the scales became overbalanced in favor of appellants and against decedent, and without justification in concert they

> proceeded to and did kill decedent Jim Chancey.

Id. at 507-08.

> Then, the Court ended with this eloquent plea: This savage physical personal encounter solved nothing; took the life of a young white man; and practically did the same for his two youthful assailants.
>
> As it is with individuals so it is with nations at war. Nations will never live in peace, nor will the world enjoy such blessedness until we as individuals learn to live in peace with all our neighbors.
>
> O! Lord when will we ever learn?

Id. at 508.

The Court similarly lamented on the civil strife between Whites and African-Americans as late as 1995, when it addressed alleged racial jokes and statements by jurors in the jury room during trial and jury deliberations. In *Powell v. Allstate Ins. Co.*, 652 So. 2d 354, 355 (Fla. 1995), the African-American insureds sought damages in excess of $200,000 under their underinsured motorist policy. When the all-white jury awarded less than $30,000, the plaintiffs moved to interview the jurors and requested a new trial. *Id.* One of the jurors contacted both the judge and the insureds' lawyer to recount the racial statements and jokes (such as the old "saw" – "hit a nigger and get ten points, hit him when he's moving get fifteen." *Id.* at 355-56, n.2.

The Court reversed, directing the trial court to hold an evidentiary hearing to determine whether the racial statements were made as asserted by the one juror and to grant a new trial if they were. *Id.* at 357-58. Declaring that "[t]he issue of racial, ethnic, and religious bias in the courts is not simply a matter of 'political correctness' to be brushed aside by a thick-skinned judiciary," the Court stated:

> The founding principle upon which this nation was established is that all persons were initially created equal and are entitled to have their individual human dignity respected. This guarantee of equal treatment has been carried forward in explicit provisions of our federal and state constitutions. It is not by chance that the words "Equal Justice Under Law" have been placed for all to see above the entrance to this nation's highest court. If we are to expect our citizens to treat one another with equal dignity and respect, the justice system must serve as the great example of maintaining that standard. And while we have been far from perfect in implementing this founding principle, our initial declaration and our imperfect struggle and efforts have served as a beacon for people around the world.
>
> It is with great dismay then that we must acknowledge, more than two hundred years after declaring this truth to the world, that there are still those among us who would deny equal human dignity to their brothers and sisters of a different color, religion, or ethnic origin. The justice system, and the courts especially, must jealously guard our sacred trust to assure equal treatment before the law. We attempt to uphold that truth today.

Id. at 358.

5. Sex Rears Its Ugly Head Without Respect For Race

Florida's Constitution of 1885, specifically article XVI, section 24, prohibited marriages between a white person and a negro or person of negro descent

to the fourth generation. By statute, the issue of any "such surreptitious marriage" were deemed a bastard incapable of inheriting. *See* §§2579, 3529, G.S. (1906). Moreover, section 3533, General Statutes of Florida 1906, prohibited a "negro man and white woman, or any white man and negro woman, who are not married" from "habitually" living in and occupying the same room in the nighttime. Given that men and women of whatever race are human, however, the inevitable happened. This led to decisions of the Florida Supreme Court addressing liaisons in violation of these Florida laws.

In *Whittington v. McCaskill*, 61 So. 236, 236 (Fla. 1913), the issue of inheritance arose when Elizabeth Anderson, "who had one-eighth or more of negro blood in her veins," married a white man in Kansas. After her death, her husband conveyed certain property in Florida and her mother challenged the transfer. *Id.* The Court denied the challenge, noting that the couple had not resided in Florida at the time of their marriage or thereafter and that Anderson had not moved to Kansas to marry or "with the intent to evade our statute." *Id.* at 236-37. With scant discussion, a unanimous Court held:

> Since the marriage was valid in the state of Kansas, where it was consummated and where the parties continued to reside until the death of the wife, we are of the opinion that neither our Constitution nor the statutes, referred to above, have any applicability thereto. Section 18 of our Declaration of Rights expressly provides: 'Foreigners shall have the same rights as to the ownership, inheritance and disposition of property in this state as citizens of the state.'

Id. at 237. Since Florida law provided for an intestate succession of a married woman to her husband, the woman's mother had no right to the property. *Id.*

In *Parramore v. State*, 88 So. 472, 473-74 (Fla. 1921), the Court affirmed the conviction of a White man and African-American woman of "habitually living in and occupying the same room in the nighttime." Although there was "little or no direct evidence of the two defendants occupying the same room at night, the circumstantial evidence was quite sufficient to support that conclusion." *Id*. at 473.

Decades later, an African-American man and a White woman challenged their convictions under the same statute, contending it was a denial of equal protection of the laws because it provided greater penalties for fornication between persons of different races as to those of the same race. *See McLaughlin v. State*, 153 So. 2d 1, 1-2 (Fla. 1963). The Florida Supreme Court relied on an 1883 decision of the United States Supreme Court, in which the Court upheld a similar Alabama statute. *Id.* at 2. The Court noted the defendants' counsel's admission during argument that "this appeal is a mere way station on the route to the United States Supreme Court where defendants hope that, in the light of supposed social and political advances, they may find legal endorsement of their ambitions." *Id*. at 2-3. Embracing its duty to follow Supreme Court precedent as the "law of the land," the Court held the defendants would have to look elsewhere for relief:

> This Court is obligated by the sound rule of stare decisis and the precedent of the well written decision in Pace. Supra. The Federal Constitution, as it was when construed by the United States Supreme Court in that case, is quite adequate but if the new-found concept of 'social justice' has outdated 'the law of the land' as therein announced and, by way of consequence, some new law is necessary, it must be enacted by legislative process or some other court must write it.

Id. at 3.

Two years later, the defendants got such relief after their case was heard by the United States Supreme Court and remanded back to the Florida

Supreme Court. *See McLaughlin v. State*, 172 So. 2d 460 (Fla. 1965). But that relief was not happily granted. The Florida Supreme Court began with a swipe at the United States Supreme Court, citing the Supreme Court's earlier decision upholding such a statute and proclaiming:

> Our judicial duty required that we follow the clear and unequivocal construction of the Federal Constitution announced in Pace, the assumption being that the Constitution, not having been amended in the manner therein prescribed, meant, in this cause, just what the Supreme Court of the United States had held it to mean in the Pace case.

Id. at 461. Since the Supreme Court now found the statute's "racial classification" to be "an invidious discrimination," the Florida Supreme Court had to follow this "new and contrary construction of the Constitution" and reverse and "remand the cause for disposition in accordance with the new Law of the Land." *Id.*

6. The Court's Defiant Response to the United States Supreme Court's Mandate of Desegregation of Public Schools

In *Brown v. Board of Education*, 347 U.S. 483, 495 (1954), the United States Supreme Court held that segregated public schools were unconstitutional. The Florida Supreme Court first grappled with that decision in *Board of Public Instruction of Manatee County v. State*, 75 So. 2d 832, 832-40 (Fla. 1954), holding that bonds validated for construction of separate White and Negro schools should be approved despite *Brown*. The case had been argued and submitted to the Court on technical bond arguments but, after *Brown* was rendered, supplemental briefs were filed asserting a new Constitutional argument based on *Brown*.[1]

Writing for the Court, which did not hold a new oral argument to address *Brown*, Justice Terrell declared, in the first of a series of opinions authored by him on the evils of desegregation, that "the Brown decision was a great mistake" and invaded matters for the legislature, not the courts. *Id*. at 838. He stated that:

> [t]he states so practicing [segregation] have voluntarily made great strides in removing the injustices and inequities of segregation. After all, when these are removed there will be nothing left to quarrel about. The effect of the Brown decision will retard rather than accelerate the removal of these inequities. It will in my judgment inject other stresses that will complicate removal, some of which have been enumerated, all of which it would not be possible to list.

Id. Pointing to reconstruction times, he stated that:

> Two parallel societies were thus established in the South to work out their salvation in their own way. These two societies have worked in harmony to do this and the proof is ample that great progress has been made. Attempts at hasty amalgamation of these societies will produce more stresses, troubles and conflicts than the good it can do will compensate for.

Id. at 839.

Justice Terrell stressed how long segregation had been in place, as well as the cost to the State of Florida of building and operating separate schools, and predicted that the problems of desegregating schools "are more numerous, more serious and more delicate than any with which the Court has grappled for a long time." *Id*. at 837. He further warned that:

[1] This information comes from Wm. Reece Smith, Jr., who wrote and filed the supplemental brief relying on *Brown*.

> To homogenize Topsy, Little Red Riding Hood and Mary who carried her little lamb to school is going to be slow and tedious. There are still parents of children of tender years who are sensitive to any innovation or influence that, to them, militates against the cultural well-being of their offspring. It will be a tragedy to attempt to enforce it. If there is anything settled under our democratic theory it is this-that it is a mistake to impose a law on any large segment of the people before they are ready for it or ask for it. When segregation comes in the democratic way it will be under regulations imposed by local authority who will be fair and just to both races in view of the lights before them. If it comes in any other way it will follow the fate of national prohibition and some other 'noble experiments'. If there is anything settled in our democratic theory, it is that there must be a popular yearning for laws that invade settled concepts before they will be enforced. The U.S. Supreme Court has recognized this.

Id. at 839.

Accordingly, the Court reversed the dismissal of the bond validation suit, with directions to enter a decree validating the bonds, concluding that "[a]ny reasonable pattern for desegregation that may be imposed will require a long time and the record discloses a pressing necessity for improved school facilities." *Id.* at 840.

Justice Mathews alone dissented, concluding the bond issue could not be validated "when it is shown that the proceeds are to be used for a purpose prohibited by the State Constitution . . . ." *Id.* at 840 (Mathews, J., dissenting). In his view, "if the buildings and plants now in existence cannot be used as a part of the free public school system providing for separate but equal facilities for Negro and white children, then it naturally follows that no school or school plant in the future can be so used." *Id.* at 844 (Mathews, J., dissenting). In his further view:

> There is no reason why we should dodge this question or why it should only be discussed behind closed doors or in whispers. It is a public question involving the Constitutions of the State and the United States, and is now presented to this Court openly, frankly and above-board.
>
> . . .
>
> It is begging the question and postponing the evil day to say that the Supreme Court opinion in the Brown case is not now effective because no decree has yet been entered. The Constitution of the United States provides for the Supreme Court, and its opinions and decisions are a part of the supreme law of the land. Irrespective of the date the Supreme Court of the United States may make its decree effective, its decision, or opinion, was effective on the day it was announced. There is no need to postpone the evil day. If we must have desegregated schools and if we cannot use money voted for segregated schools for the purpose of building desegregated schools, we should know it now. There is nothing more firmly established in this state than the principle that public money cannot be spent except in pursuance of appropriations made by law, Section 4, Article IX, State Constitution, unless it be the principle that public money cannot be spent for a purpose prohibited by law. *Id.* at 844, 848.

Thus, even in the face of United States Supreme Court precedent mandating the abolishment of separate schools for African-Americans, many of the Florida Supreme Court justices remained defiant and freely expressed their disagreement with this evolution in our country's law.

7. Virgil Hawkins's Long Journey to Law School

Prior to the *Brown v. Board of Education* decision, the Florida Supreme Court was faced with the question – whether an African-American could be constitutionally excluded from attending a state university law school. In *State ex rel. Hawkins v. Board of Control of Florida*, 47 So. 2d 608, 613-15 (Fla. 1950), the Florida Supreme Court, in a unanimous opinion written by Justice Sebring, held that Virgil Hawkins had not been deprived of equal protection of the law by being denied admission to the University of Florida College of Law since the Board of Control had directed, in response to his petition for mandamus to compel his admission there, the establishment of a "substantially equal" College of Law for Negroes at Florida A&M College for Negroes. Under the Board of Control's newly announced plan, African-Americans would be temporarily allowed to study at the University of Florida until a Negro law school could be established. *See id.* at 613.

The Court found the Board's plan would provide Hawkins "with the legal education requested as soon as such course of study will be furnished to new applicants of any other race group." *Id.* The Court further found it "entirely without legal significance" that Hawkins would have to attend a "law school established exclusively for Negroes and finally receive his degree from the latter institution if ever he successfully completes his course of study." *Id*. at 614. Citing *Plessy v. Ferguson*, 163 U.S. 537 (1896), as the law of the land established by decisions of the United States Supreme Court, to which the state courts must adhere on the issue of federal constitutional rights, the Florida Supreme Court held "substantially equal" facilities satisfied the U.S. Constitution. *Hawkins*, 47 So. 2d at 611-12, 614-16. Retaining jurisdiction over the cause, the Court gave Hawkins the right to apply for an appropriate final order if such facilities were not made available to him. *Id.* at 616-17.

Instead, Hawkins continued to seek an order compelling his admission to the University of Florida Law School. The Florida Supreme Court continued to deny relief, pointing to Hawkins's failure to come forward with proof that the new law school created exclusivity for African-Americans was not substantially equal to the University of Florida Law School for Whites. *See State ex rel. Hawkins v. Bd. of Control*, 53 So. 2d 116, 117-19 (Fla. 1951); *State ex rel. Hawkins v. Bd. of Control*, 60 So. 2d 162, 164-65 (Fla. 1952).

Thereafter, of course, the United States Supreme Court decided *Brown*, which receded from *Plessy* and held that "separate but equal" facilities violated equal protection requirements. *Brown*, 347 U.S. at 495. This was now the law of the land to which the Florida Supreme Court was required to follow. Indeed, one week after rendering its decision in *Brown*, the United States Supreme Court vacated the judgment in Hawkins's case and remanded for reconsideration in light of *Brown*. *See State ex rel. Hawkins v. Bd. of Control*, 347 U.S. 971 (1954).

Though the Florida Supreme Court, in its first Hawkins decision, had pointed to its obligation to follow Supreme Court precedent as the "law of the land" when that was consistent with Florida's practice of segregation, that worm had finally turned. Now the Florida Supreme Court did not want to follow United States Supreme Court controlling precedent precluding separate educational facilities for African-Americans.

Notwithstanding *Brown* and the United States Supreme Court's remand of his case in light of *Brown*, Hawkins still could not get admitted to the University of Florida College, despite the Florida Supreme Court's recognition that he was fully qualified, but for the color of his skin. *See Hawkins*, 47 So. 2d at 609 (noting that Hawkins "possesses all the scholastic,

moral and other qualifications, except as to race and color," for admission to the University of Florida College of Law). Instead of allowing him to attend University of Florida, the Florida Supreme Court instead adhered to its decision in *Board of Pubic Institution of Manatee County*, 75 So. 2d at 839-40, which was rendered after *Brown* and espoused its view of the necessity for "gradual adjustment" to an end to segregation. *See State ex rel. Hawkins v. Bd. of Control*, 83 So. 2d 20 (Fla. 1955).

Citing its equitable powers with respect to writs of mandamus and the United States Supreme Court's recognition that courts "may properly take into account the public interest in the elimination of such obstacles" to ending segregation in schools, the Court appointed a commissioner to make findings and recommendations so that "the necessary adjustments can be made as part of one over-all pattern for all levels of education as may be finally determined, and thereby greatly decrease the danger of serious conflicts, incidents and disturbances." *Id*. at 24-25.

In his now-infamous concurring decision in that case, Justice Terrell began by noting that *Brown* arose in Kansas, which had a very small African-American population, and thus had "not been required to incur the heavy burden that the segregated school system requires." *Id.* at 26 (Terrell, J., concurring). He opined that "equity" required the stay of "desegregation until the schools provided in reliance on the doctrine of *Plessy v. Ferguson* have ceased to be adequate and must be replaced by others to meet the new requirement." *Id*. at 26-27.

Justice Terrell then addressed "an intangible aspect" to integration, which is so remarkable that we quote from it at some length:

> It has to do with the diverse moral, cultural and I.Q. or preparation response of the white and Negro races. It may also be said to embrace the economy of the Negro Teachers. Account of the differential these factors present, it is a matter of common knowledge that whites and Negroes in mass are totally unprepared in mind and attitude for change to nonsegregated schools. The degree of one's culture and manners may resolve these differentials, but they will not resolve under the impact of court decrees or statutes. *Id.* at 27.

Noting that Whites and African-Americans "voluntarily segregate themselves by community" and that "segregation is not a new philosophy generated by the states that practice it," Justice Terrell continued:

> It is and has always been the unvarying law of the animal kingdom. The dove and the quail, the turkey and the turkey buzzard, the chicken and the guinea, it matters not where they are found, are segregated; place the horse, the cow, the sheep, the goat and the pig in the same pasture and they instinctively segregate; the fish in the sea segregate into 'schools' of their kind; when the goose and duck arise from the Canadian marshes and take off for the Gulf a [sic] Mexico and other points in the south, they are always found segregated; and when God created man, he allotted each race to his own continent according to color, Europe to the white man, Asia to the yellow man, Africa to the black man, and America to the red man, but we are now advised that God's plan was in error and must be reversed despite the fact that gregariousness has been the law of the various species of the animal kingdom.

Id. at 27-28.

Justice Terrell pointed to the state's capital investment in segregated schools and rhetorically asked:

> If 'equitable principles characterized by practicable flexibility' is to be the

guide, does desegregation mean that attendance at these institutions is to be scrambled and one of them abandoned and the other enlarged at great expense in order that white and Negroes may attend the new school? A negative answer to this question would appear to be evident.

Id. at 27. Continuing, he warned:

> In a democracy, law, whether by statute, regulation or judge made, does not precede, but always follows a felt necessity or public demand for it. In fact when it derives from any other source, it is difficult and often impossible to enforce. The genius of the people is as resourceful in devising means to evade a law they are not in sympathy with as they are to enforce one they approve. The early patriots turned Boston harbor into a teapot one night because they did not like the tax on tea. President Jackson is said to have once defied the order of the Supreme Court and challenged them to enforce it. He did not subtract from his fame or his integrity in doing so. Our country went to war to overthrow the Dred Scott decision and prohibition petered out, was made a campaign issue and was repealed because sympathy for it was so indifferent that it could not be enforced.
>
> States with segregated schools have them from a deep-seated conviction. They are as loyal to that conviction as they are to any other philosophy to which they are devoted. They are as honest and law-abiding as the people of any state where desegregation is the rule. Convinced as they are of the justice of their position, they will not readily renounce it if they are required to forfeit abruptly their conviction and their investment, are not convinced that their position is wrong or are required to adopt a system not shown them to be improvement over the one they are required to forfeit.

Id. at 28. Declaring that "the local school authorities have the character, integrity and the good judgment required to" arrange for desegregation of public schools, he concurred in the Court's "orthodox method to explore these equities . . . ." *Id.*

Justice Sebring, joined by Justice Thomas, disagreed. Declaring that "whatever may be our personal views and desires in respect to the matter," these justices had the courage to conclude they had a "judicial duty to give effect to this new pronouncement" that "'separate but equal' facilities . . . [have] no place in the field of public education in Florida, even though our own Constitution and statutes contain provisions that require in our schools the separation of the races." *Id.* at 31 (Sebring, J., concurring in part and dissenting in part). Justice Sebring explained "this new pronouncement" applied to all levels of public schools and, as such, the fact Hawkins was 48 years old and supposedly not subject to the "adverse psychological effect of segregation on Negro children" on which the *Brown* decision rested was not a "valid defense" to his claim. *Id.* at 31-33.

Refusing to countenance the delay allowed by the majority's decision, Justice Sebring said:

> Undoubtedly certain adjustments will have to be made by the respondents to accommodate the desires of the relator to attend the College of Law of the University of Florida. But it is impossible for us to believe, when we confine, as we must, our consideration of the issues to the case made by the pleadings, that these

> adjustments will be of such a major nature that the constitutional right of the relator to attend the school of his choice should be denied at this time simply because of the inconveniences that may be suffered by the respondents in eliminating the administrative obstacles that now prevent his attendance.

Id. at 33. Instead, Justice Sebring concluded that Hawkins should be admitted to the University of Florida College of Law "under the same rules and regulations, and upon the same conditions, that a white person would be admitted." *Id.* at 34.

Two years later, the Florida Supreme Court again refused to allow Hawkins to attend the UF College of Law until he could demonstrate that "his admission can be achieved without doing great public mischief." *State ex rel. Hawkins v. Bd. of Control*, 93 So. 2d 354, 360 (Fla. 1957). In a remarkable *per curiam* decision, to which Justices Thomas and Drew dissented, the Court rested its decision on the rights of "state sovereignty" and the right of the "highest court of a sovereign state . . . to control the effective date of its own discretionary process . . . in order to prevent a serious public mischief." *Id.* at 357-58. The Court pointed to a survey conducted by the commissioner it had appointed on the issue of desegregation, who found a "substantial number of students . . . and parents of students" would "take action" to prevent integration, which would financially impact the White institutions of higher education. *Id.* at 359. The survey showed "violence in university communities and a critical disruption of the university system would occur if Negro students are permitted to enter the state white universities at this time . . . ." *Id.*

Noting this evidence was "not in the record when the Supreme Court of the United States said 'there is no reason for delay,'" the Court sanctimoniously declared it had "an opportunity to prevent the incidents of violence which are, even now, occurring in various parts of this country as a result of the states' efforts to enforce the Supreme Court's decision in the Brown case." *Id*. Indeed, the Court stated: "The homely expression, 'An ounce of prevention is worth a pound of cure,' is especially applicable to the situation here--involving, as it does, the public welfare of all our people." *Id*. at 360.

The Court also justified its denial of relief by saying Hawkins did not "have a genuine interest in obtaining a legal education" because he declined the opportunity to attend the new law school at Florida A&M University and declined to appear before the court's commissioner to give evidence in favor of his immediate acceptance to the University of Florida College of Law. *Id*. at 358.

Justice Terrell again weighed in through a concurring opinion, by first invoking history where laws have been nullified by public officials: "In a free democracy the decisions of courts, even the Supreme Court of the United States, have never been considered sacrosanct or free from challenge." *Id*. at 360 (Terrell, J., concurring). He then, just as he had done two years before, directly attacked the *Brown* decision:

> Some anthropologists and historians much better informed than I am point out that segregation is as old as the hills. The Egyptians practiced it on the Israelites; the Greeks did likewise for the barbarians; the Romans segregated the Syrians; the Chinese segregated all foreigners; segregation is said to have produced the caste system in India and Hitler practiced it in his Germany, but no one ever discovered that it was in violation of due process until recently and to do so some of the same historians point out that the Supreme Court abandoned the Constitution, precedent and common sense and fortified its decision solely with the writings of Gunner Myrdal, a Scandinavian sociologist. What he knew about constitutional law we are

> not told nor have we been able to learn.

Id at 360-61.

Pointing to violence in other states seeking to integrate their schools, Justice Terrell also relied on the threat of violence if an African-American was admitted to a White law school. *See id.* at 361. In his words:

> . . . it has been revealed that these riots and outbreaks were not activated by local people but by interlopers from other places, in other words, social boll weevils, fruit flies, potato bugs, bean beetles, cane borers and other pests that we institute quarantines or other rigid measures against to get rid of. It takes time to do this and then it must be done by legal processes, otherwise we invoke that which is at least in the nature of the communist manifesto to enforce democratic processes. The problem is a different one in every state and in this state the governor and the educational authorities are pursuing legal methods to solve the problem. After all is said the big question is not one of defying constituted authority, it is one of finding a way of solving a serious problem recently thrust upon the states with segregated schools and at the same time preserve their traditions, their moral, social, cultural and educational standards.

Id. at 361-62. As to that question, Justice Terrell concluded that Florida had the sovereign right "to meet and solve the problem by which it is confronted in a sane and sensible manner . . . ." *Id.* at 362.

Justice Hobson similarly concurred, saying that the testimony before the court's commissioner, as well as the violent incidents of which the court could take judicial notice, showed that Hawkins' "immediate admission . . . would result in great public mischief." *Id.* at 362-63 (Hobson, J., concurring specially). He declared it was "[i]n the interest of both races, that is to say, the common weal," that the unit of mandamus be withheld "in the exercise of shared judicial discretion" until the United States Supreme Court could consider these new matters and "unequivocally" direct his admission. *Id.* at 363. Justice Hobson ended by stating that "since I am bound by the paramount federal law, if such ruling should be made by a fully informed Supreme Court, I could not fail to comply without stultifying my oath of office." *Id*.

Two justices dissented, believing the time had come for Hawkins to be admitted to law school. Justice Thomas said the Court's discretion "has been exhausted and the time has come to obey the mandate of the higher court":

> It seems to me that if this court expects obedience to its mandates, it must be prepared immediately to obey mandates from a higher court. In this case when the Federal question was presented and determined by the Supreme Court of the United States, the ruling became binding upon this court at once regardless of our lack of sympathy with the holding.

Id. at 367 (Thomas, J., dissenting).

Justice Drew stated the "fundamental truth that justice delayed is justice denied," noting that the case had "now reached the point where further delay will be tantamount to a denial of a constitutional right of [Hawkins]." *Id.* (Drew, J., dissenting). He concluded that "where the right is indisputable there is no room for the exercise of discretion other than in keeping with the law," stressing that:

> Courts are the mere instruments of the law and can will nothing. Judicial discretion is a legal discretion. It is a discretion to be exercised in discerning

> the course prescribed by law. When, as here, that course has been discerned and a determination has been reached that [Hawkins] is being denied his constitutional right, it is the clear duty of this Court to enforce the right. The power vested in the judiciary should never be exercised for the sole purposes of giving effect to the will of the judge. The power we possess is for the purpose of giving effect to the will of the law. I conceive it to be my plain duty to give effect to the law which has been established by the United States Supreme Court.

Id. at 367-68.

After the Court's 1957 decision, Hawkins withdrew his efforts to obtain admission to University of Florida. In 1976, Hawkins successfully graduated from a Massachusetts law school and was admitted to The Florida Bar soon thereafter.

8. Trial By Jury, But Not By a Jury of Peers

In addition to equal treatment in civil society, African-Americans fought long and hard to obtain the right to have fair, impartial jury panels in criminal cases, without discrimination against African-American venire members. Years later, the fight devolved into an effort to preclude African-Americans from being struck from jury panels on pretexual, discriminary grounds.

Challenging his conviction for murder in *Haynes v. State*, 72 So. 180, 181 (Fla. 1916), the defendant – "a negro of African descent" – asserted African-Americans were discriminated against for purposes of jury service based on their race. An African-American property-owner, who would have been qualified for jury service, testified he had never heard of any African-Americans having served on jury duty in Hillsborough County. *Id.* at 182. The clerk of the circuit court, who had been clerk of the county commission for three years, testified that he did not know of any African-Americans included in the certified list of jurors and declared he neither knew "any negroes in the county above the age of 21 who are 'of fair character, sound judgment, and intelligence'–the old-time negroes whom he knew are all dead," nor did he know the "new" ones living in Hillsborough County. *Id.* The Court nonetheless summarily dismissed the claim, concluding there was no evidence the officers selecting persons for jury duty discriminated against African-Americans based on their race or color. *Id.* at 182-83.

The Florida Supreme Court gave equally short shift to such a claim in *Shepherd v. State*, 46 So. 2d 880, 884, (Fla. 1950), holding "the evidence adduced fails to establish an unconstitutional, intentional and systematic discrimination . . . against the Negroes of Lake County" with respect to jury duty. The Court further held that 45 days was sufficient time to prepare for trial in this death penalty case and that a change of venue was not required despite the hostile atmosphere in Lake County after these black defendants were charged with the rape of a white woman. *Id.* at 883-85.

The defendants sought a change of venue because, among other things, a mob had gathered at the jail and demanded defendants be turned over to it, the home of the parents of one defendant was burned, other African-Americans were removed from the area to prevent a lynching, and troops were called out to maintain order in the area. *Id.* at 882-83. The Court acknowledged that "newspapers carried reports of the alleged crime" but found the "strained racial relations" had "subsided" before trial and that a fair and impartial jury had been empaneled. *Id.* at 883. As became clear from the later, concurring opinion in the United States Supreme Court's reversal, the cold words in the Florida Supreme Court's opinion denying a venue change hardly reveal the milieu in which these trials were held.

In a one-sentence *per curiam* decision, the United States Supreme Court reversed, based on the claimed discrimination in the jury pool. *See Shepherd v. State*, 341 U.S. 50, 50 (1951). Justice Jackson

wrote an impasse concurring opinion, concurred in by Justice Frankfurter, declaring that "for the Court to reverse these convictions upon the sole ground that the method of jury selection discriminated against the Negro race, is to stress the trivial and ignore the important." *Id.* at 54 (Jackson, J., concurring in result only). The concurring opinion concluded by saying:

> While this record discloses discrimination which under normal circumstances might be prejudicial, this trial took place under conditions and was accompanied by events which would deny defendants a fair trial before any kind of jury. I do not see, as a practical matter, how any Negro on the jury would have dared to cause a disagreement or acquittal. 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. To me, the technical question of discrimination in the jury selection has only theoretical importance. The case presents one of the best examples of one of the worst menaces to American justice.

Id. at 54-55.

The concurring justices focused on the mob violence and newspaper coverage of the events and the charges. *See id.* at 51. The "[n]ewspapers published as a fact, and attributed the information to the sheriff, that these defendants had confessed." *Id.* No one repudiated the story, which was read by witnesses and jurors, but no confession ever was presented at trial. *Id.*

The newspapers also reported "[e]very detail of the[] passion-arousing events" of the mob violence. *Id.* at 53. A cartoon published at the time of the grand jury showed four electric chairs with the caption "No Compromise–Supreme Penalty." *Id.* None of this coverage was addressed in the Florida Supreme Court's opinion, nor did that Court address the extraordinary measures taken by the trial court to prevent violence at the trial – measures that the concurring U.S. Supreme Court justices believed demonstrated the trial court's reaction to "the atmosphere which permeated the trial . . . ." *Id.* at 54. In their view:

> Projudicial [sic] influences outside the courtroom, becoming all too typical of a highly publicized trial, 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 gestrue [sic] to register a verdict already dictated by the press and the public opinion which is generated.

Id. at 51.

A recent news article described what happened after the United States Supreme Court's reversal of the convictions. *See A Southern town's other past*, St. Petersburg Times (April 25, 2010). The sheriff of Lake County, Sheriff McCall, picked the defendants up from prison and headed back to Lake County for a pre-trial hearing. *Id.* On the way, Sheriff McCall fatally shot one and wounded the other. According to this article:

> McCall claimed he fired in self-defense during an escape attempt. The surviving suspect said nobody tried to escape – it was cold-blooded murder. McCall was cleared by a subsequent investigation; in the retrial, the surviving prisoner was found guilty by an all white jury and returned to prison.
>
> The outraged director of Florida's NAACP, Harry T. Moore told reporters that McCall should be indicted for murder. Six weeks later,

> on Christmas night, a bomb exploded under Moore's house, Moore and his wife were killed. No one was ever arrested.

Id. It is well and good for all of us to remember that the Court's decisions controlled the lives of real human beings, who often were denied justice simply because of the color of their skin.

Despite the United States Supreme Court's decision in *Shepherd*, jury discrimination against African-Americans continued in Florida. The defendant's claim of discriminatory jury selection was unsuccessful in *Frazier v. State*, 107 So. 2d 16, 19 (Fla. 1958), however, where the Court held the issue was not preserved because it had not been raised at the trial court. The Court also noted that the defendant did not claim that African-American venire members were "systematically" excluded due to their race, but rather that the evidence only showed "there were no negro voters in the subject County, and no negroes on the juries." *Id*.

Challenges to all-White juries became more sophisticated than a mere assertion there were no, and never had been, African-Americans serving on juries. Statistics were presented to show disproportionate inclusions of African-Americans on jury lists. The claims nonetheless continued to be unsuccessful.

In *Porter v. State*, 160 So. 2d 104, 106 (Fla. 1963), the Court held that evidence that 10.8% of registered voters in the county were African-American, while only 1.2% of those included on the grand jury list were African-American, was insufficient to show there had been "systematic exclusion of Negroes from the subject jury list." The Court noted that the defendant's evidence did not show how many of the registered African-American voters were women or how many of those women had registered for jury service, which "could make a great difference in the percentages relied upon by the [defendant]." *Id.* at 108. While acknowledging it could not be assumed that many registered African-American voters lacked "good moral character" or otherwise were not qualified as jurors, it likewise could not be assumed all of those voters were qualified or that there were no African-American women who had volunteered for jury service. *Id.*

In rejecting the defendant's challenge, the Court concluded that the United States Supreme Court's decision in *Shepherd*, which, as just discussed, reversed a Florida Supreme Court decision finding the evidence in that case insufficient to establish discrimination in jury selection, was not controlling. *Porter*, 160 So. 2d at 108. The Court stated that, unlike the record in *Shepherd*, "there was no showing of selection by proportion to population, nor was it shown that Negroes were excluded from call by any arbitrary standard, or any standard or measure not prescribed by statute." *Id.* However, acknowledging that "a party to a cause has a right not to have members of his race or class excluded from jury lists or venieres arbitrarily or without sound basis," the Court went on to say:

> The Judicial Council of Florida recognized the need for a system or method which would successfully prevent the occurrence of discrimination and simultaneously distribute the burden of jury service more evenly on all qualified citizens. The Council made a study of the matter and developed a simple plan which is easy to use. Copies of the plan are available for those interested.

Id.

Challenges based on jury composition, however, continued to be rejected. For instance, in *Thomas v. State*, 223 So. 2d 318 (Fla. 1969), the Court held:

> [T]here is nothing to show that the percentage of Negroes whose names were on the Grand Jury list in 1966 (over 5% Of the registered voters) was so disproportionate to the number of Eligible [Negroes] . . . as to indicate a

> planned discrimination against members of his race in selecting the names to be place on the master jury list. The jury list need not be a perfect mirror of the community nor is it required to reflect accurately the proportionate strength of every identifiable group in the community.

Id. at 322.

Then the tide began to turn, albeit slowly. In *State v. Silva*, 259 So. 2d 153, 158-61 (Fla. 1972), the Court held that Dade County's system for selecting jury panels was violative of due process and equal protection, as well as a denial of the right to a speedy trial by an impartial jury. Dade County used a quota system to either exclude or include a certain percentage (15 - 19%) of qualified registered African-American voters on jury lists. *Id.* at 157. The Court "reluctantly" found that practice was precluded by the U.S. Supreme Court's decision in *Shepherd*, which it was obliged to follow. *Id.* at 158.

Writing through Justice Adkins, the Court stated that:

> The tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. This does not mean, however, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community, for such complete representation would frequently be impossible. But it does mean that prospective jurors must be Selected at random by the proof selecting officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. See *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 66 S.Ct. 984, 90 L.Ed. 1181 (1945). Selection from classes or groups on a proportion basis guarantees representation, but at the same time places a limitation on the number from each class or group. This is forbidden.

Id. at 160.

The Court went on to reference a new Report of the Judicial Council of Florida (17th Reports, 1972), on this issue:

> The designation of a prospective juror as being black or white does not, in itself, invalidate the jury selection. However, by using such designation, the State is saddled with the burden of showing that there was no racial discrimination in the selection of the prospective veniremen, in the event no blacks are selected as prospective jurors or only a token number consistently appear on the panel.
>
> Of course, this problem would be completely erased if Dade County would use its electronic date processing equipment in the random jury selection process.

Id. at 160-61 (citing Report of Judicial Council of Florida at 32).

Despite its decision in *Silva*, the Court just months later declined to invalidate the jury selection system in Jackson County. *See Foxworth v. State*, 267 So. 2d 647, 653-54 (Fla. 1972). The Court invoked, as it so often had done before, the presumption that every public officer performs his

duty in accordance with the law, *Id.* at 654, and held that:

> . . . the mere showing of a certain percentage of eligible negro jurors is insufficient to show that the particular jury panel was improperly selected. Such a showing may be considered in determining whether a systematic and intentional exclusion existed, but this is by no means conclusive.

Id. at 653.

On September 2, 1975, Justice Joseph Hatchett – who had attended segregated public schools in Florida and law school outside of Florida – became the first African-American justice on the Florida Supreme Court. In *Huffman v. State*, 350 So. 2d 5 (Fla. 1977), he joined the dissenting opinion of Justice Boyd; they concluded that the district court's decision conflicted with another decision by the same district court, *see Jordan v. State*, 293 So. 2d 131 (Fla. 2d DCA 1974), involving a similar conviction of a black defendant by an all white jury, where the chief complaining witnesses also were white. *Huffman*, 350 So. 2d at 6 (Boyd, J., dissenting). Both trials were held in Sarasota County, just two months apart. *Id.*

The district court had reversed the conviction in *Jordan*, stating

> the defendant had made a prima facie showing of unconstitutional racial bias in jury selection by demonstrating that there was an opportunity to discriminate and there was a "substantial statistical disparity between the proportion of blacks selected and the proportion of blacks eligible for jury duty." . . . [T]he court stated that once such a prima facie case is presented the burden shifts to the State to rebut the presumption that the venire panel is unconstitutionally composed. The prima facie showing was not rebutted by the state; thus Jordan's conviction was reversed.

Id. at 7 (footnotes and internal citations omitted). Indeed, the *Jordan* court noted that "2.65% of registered voters were nonwhite, while .297% of prospective jurors were black." *Id.* at 7, n.3. Though the "odds . . . of having a black on a jury in Sarasota County at the time of both Jordan and Huffman was only one in ten million," *Id.* at 7, n.3, the same district court later rejected the same challenge by Huffman.

Justice Boyd noted the statistical disparity at issue in both of the trials and concluded that Huffman could have made that showing, just as Jordan had done, had the trial court not "refused to allow him the opportunity to do so." *Id.* at 8. Similarly, Justice Sundberg's dissent rested on the "inescapable" conclusion that "the deficiencies attached to Jordan's jury were present in the selection of [Huffman's] jury." *Id.* at 9 (Sunberg, J., dissenting). Justice Sundberg wrote that, although the issue had not been preserved with all the "niceties," he

> would treat this petition as one seeking habeas corpus and grant the writ to the extent of requiring a new trial. To do otherwise in this case is to elevate form over substance.

Id.

Challenges such as these still were being raised in the 1990s. In *Hendrix v. State*, 637 So. 2d 916, 920 (Fla. 1994), the Supreme Court rejected the defendant's claim that African-Americans were underrepresented on the Lake County jury pool list:

> Lake County selects prospective jurors from voter registration lists, and Hendrix presented statistical evidence prior to trial showing a disparity between the percentage of African-American residents in Lake County and the percentage of African-American registered voters. Hendrix's

> conclusions, however, are based in part on estimates and projections, and this Court has previously ruled that voter registration lists are a permissible means of selecting venirepersons, even where minor variations between the number of residents and registered voters exist.

Justice Shaw, the second African-American to sit on the Court, joined in that decision. *Id.* at 921.

By the 21st Century, African-Americans were routinely serving on jury venires. Now the issue became whether they were being excluded from a particular jury based on the parties' use of peremptory challenges against them because of their race. As early as 1984, the Florida Supreme Court had established guidelines for the use of peremptory challenges to ensure they were not being used on the basis of race. *See State v. Neil*, 457 So. 2d 481 (Fla. 1984); *see also State v. Slappy*, 522 So. 2d 18 (Fla. 1988) (revising guidelines due in part to the United States Supreme Court decision in *Batson v. Kentucky*, 476 U.S. 79 (1986)).

In 1996, in a majority opinion authored by Justice Shaw, the Court revised the procedures and standards applicable to a claim that a peremptory challenge is based unlawfully on race because of the difficulty lower courts were having in applying its *Neil* and *Slappy* opinions. *See Melbourne v. State*, 679 So. 2d 759 (Fla. 1996). In *Melbourne*, the Court made it clear that peremptory challenges "are presumed to be exercised in a nondiscriminatory manner," that a "trial court's decision turns primarily on an assessment of credibility," and that the right to an impartial jury must be guided "by reason and common sense." *Id*. at 764-65.

Just a few years ago, in *Hoskins v. State*, 965 So. 2d 1, 7-12 (Fla. 2007), the Court published a detailed decision, in which it determined that the trial court did not abuse its discretion in concluding that the State's challenge of an African- American prospective juror who had family in prison for violent crimes was not pretexual. Justice Quince, the first female African-American justice on the Court, joined in that decision. In sum, although Florida Supreme Court precedent on the issue of non-discriminatory juries has progressed tremendously since the early 1900's, the Court continues to grapple with these claims.

9. The Right To Vote

The right to vote was long sought by African-Americans despite fierce resistance by local and state authorities. Like much of the rest of society, the Florida Supreme Court was slow to protect this vital right of a democracy.

In *State ex rel. Landis v. Dyer*, 148 So. 201, 202-03 (Fla. 1933), the Court held the City of Tampa's primary election process was constitutional, rejecting the claim that the statute provided for holding primary elections for a single political party (the "White Municipal Party of the City") at public expense in which African-Americans were clearly excluded. The Court distinguished the election plan from one that had been invalidated by the United States Supreme Court, saying this plan did not exclude African-Americans from voting and that no one personally affected by the statute was challenging it. *Id.*

Some years later, following U.S. Supreme Court precedent, the Florida Supreme Court required the Supervisor of Elections for Escambia County to register an African-American who "is otherwise a qualified elector." *Davis v. State ex rel. Cromwell*, 23 So. 2d 85, 87 (Fla. 1945). Indeed, the Florida Attorney General conceded in his brief that this result was required by controlling Supreme Court precedent. *Id.* (Thomas, J., concurring specially).

With the right to vote inevitably came shenanigans. For instance, in setting a special referendum election on consolidation, the Mayor of the City of Arcadia set an additional polling place in "the Negro quarters in the City." *Robarts v. State ex rel. Smith*, 37 So. 2d 577, 577 (Fla. 1948). A majority of voters at the regular polling place voted against consolidation but voters at the new polling place voted for it in sufficient numbers to override the other

vote. *Id.* The Court concluded "the election was so irregularly conducted as to justify the City Council to order the call of another election." *Id.*

The battle over the right to vote and the mischief resulting thereafter ultimately raged over reapportionment of voting districts to assure that "crazy quilt" districts did not deprive African-Americans of their voting franchise. *See In Re Apportionment Law Senate Joint Resolution No. 1305, 1972 Regular Session*, 263 So. 2d 797, 804 (Fla. 1972). African-Americans argued that their votes, and those of others living in the

> ghetto area, would be diluted so that they would have less political force or control over their legislators because the effect of their vote is cancelled out by other contrary interest groups in Marion County.

Id. In contrast, "[w]ith a single-member district, the ghetto area would elect three members of the House and one Senator." *Id.* The challengers argued they were discriminated against because the same number of Marion County African-Americans had the opportunity to influence the election of more legislators than they had. *Id.* at 804-05.

The Florida Supreme court held, in a split decision, that the apportionment plan before the Court, which provided for variable multi-member districts, were not per se unconstitutional, though potentially so under the circumstances of a particular case, if it operated "to minimize or cancel out the voting strength of racial or political elements of the voting population." *Id.* at 808. That "factual" issue could be raised in later proceedings. *Id.* By an order clarifying the opinion and denying rehearing, the Court explained that it held exclusive state jurisdiction to address any future challenges to the apportionment plan, and reiterated that further declaratory judgment relief could be sought and, if testimony were required, the Court would appoint a commissioner. *Id.* at 822-23.

The Court exercised such "retained jurisdiction" in *Milton v. Smathers*, 389 So. 2d 978, 979 (Fla. 1980), and approved the findings and recommendation of its commission that the Apportionment Resolution:

> did not operate so as to unconstitutionally minimize or cancel out the voting strength of the black members of the population by denying members of the black minority an opportunity equal to that of other residents of the district to participate in the political process and to elect legislators of their choice.

The plurality opinion stressed that "[d]isproportionate effects alone [in elections] will not establish a claim of unconstitutional racial vote dilution." *Id.* at 981. The Court also quoted the U.S. Supreme Court's statement that "past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *Id.* at 982 (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971)).

Justice Sundberg dissented, joined by Justice England, saying further proceedings were required. *Id.* at 984 (Sundberg, C.J., dissenting in part). Justice Adkins dissented as well, saying the multimember district "as designated and operated in Pinellas County invidiously excluded blacks from effective participation in political life." *Id.* at 991 (Adkins, J., dissenting).

Reapportionment again came before the Court in an original proceeding in *In Re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992*, 597 So. 2d 276 (Fla. 1992). The Court, in yet another split decision, concluded the new plan did not discriminate against minorities, stating:

> The plan is a material improvement over conditions under the 1982 plan, is not significantly less favorable to minorities than other proposed plans, and provides a substantial opportunity for minorities to influence elections and elect representatives of their choice. *Id.* at 285.

Chief Justice Shaw, the only African-American justice on the Court at the time, dissented. *Id.* at 287-93 (Shaw, C.J., dissenting). His opinion carefully reviewed the Senate Judiciary Committee Report with respect to the Voting Rights Act, and concluded the plan was invalid. *Id.* He began by noting that "Florida has a longstanding general history of official discrimination against minorities that has influenced the electoral process." *Id.* at 289. He ended by saying that:

> In my opinion, opponents of the plan have successfully demonstrated that there is no reasonable basis to conclude that the plan would pass muster under a full, fact-intensive section 2 challenge. Opponents have adequately established the presence of a number of Senate Report factors and have shown the existing plan flawed. While the proposed plan offers change, it fails to significantly foster the opportunity for minorities to elect representatives of their choice. Any appearance of true positive change is illusory. Under the proposed plan, many minority citizens in Florida will be unable to elect representatives of their choice.
> *Id.* at 293.

Shortly after that decision was rendered, the United States Department of Justice objected, pursuant to its authority under the Voting Rights Act, to the apportionment plan as to Hillsborough County. *See In Re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992*, 601 So. 2d 543 (Fla. 1992). Because the Legislature declined to convene a special session, the Court determined it would modify the plan to resolve the objection. *Id.* at 544-45. By a split decision, it adopted a proposed plan that contained "a district in which black voters have a reasonable opportunity to elect a candidate of their choice." *Id.* at 546.

The majority acknowledged the dissenters' point that "Polk County black voters have little community of interest with those in Hillsborough and Pinellas Counties other than their race," but concluded that "under the law community of interest must give way to racial and ethnic fairness." *Id.* Justice Shaw specially concurred because the revised plan satisfied the DOJ's objection, but he continued to adhere to his earlier dissent that the overall plan violated the Voting Rights Act by failing to "provide an equal opportunity for minorities to elect representatives of their choice to the Florida legislature . . . ." *Id.* at 548 (Shaw, C.J., specially concurring).

Conclusion

Over the last two centuries, the Florida Supreme Court has evolved on many fronts as it relates to the rights of African-Americans. Its first decisions were rendered by slave owners; now it is headed by the first female African-American Chief justice. In the early years, the Court's decisions treated African-Americans as mere chattels, whereas the Court now zealously protects their equal civil rights. The story of the Court's long journey and its treatment of African-Americans over the years is well worth examining. Not only does it help to appreciate the important role an independent judiciary must play in our society, but it helps to ensure that, in the future, the majority rule does not trample minority rights.

Sylvia H. Walbolt received her J.D. degree from the University of Florida. She has practice with Carlton Fields, P. A. since 1963, where she previously has served as chair of the board of directors for the firm and chair of its appellate practice and trial support group. She currently serves on the Board of Trustees for the Florida Supreme Court Historical Society. She acknowledges, with great appreciation, the assistance of her husband, Daniel R. Walbolt, Sr., on this article, including his contribution of its title. He is a former student of the FSU College of History.

Andrew D. Manko received his J.D. degree from Emory University in 2004. He has practiced with Carlton Fields, P.A., since 2008, primarily focusing on appellate litigation and trial support. Before coming to Carlton Fields, P.A., he was a staff attorney for Justice Barbara J. Pariente of the Florida Supreme Court, serving in that role from 2006-2008. He is currently a member of the Board of the Young Lawyer's Section of the Tallahassee Bar Association.