

IN THE DISTRICT COURT OF APPEAL  
FIRST DISTRICT OF FLORIDA

Case No. 1D03-2367

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GREGORY HENDERSON, et al.,

Appellants,

v.

JAMES V. CROSBY, Jr., et al.,

Appellees.

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AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS

SUBMITTED BY LEAVE OF COURT ON BEHALF OF THE  
AMERICAN ASSOCIATION OF LAW LIBRARIES  
SPECIAL INTEREST SECTIONS ON SOCIAL RESPONSIBILITIES  
AND LEGAL INFORMATION SERVICES TO THE PUBLIC

Appeal from a Final Judgment of the  
Second Judicial Circuit Court In and For Leon County, Florida

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**STATEMENT OF IDENTITY AND INTEREST  
OF THE AMICI CURIAE**

Legal Information Services to the Public (LISP) is a Special Interest Section (SIS) of the American Association of Law Libraries (AALL: pronounced “double A, double L”). LISP presents programs on legal research and works to promote wider access to legal information for the lay population, including self-represented litigants, whether or not incarcerated.

The Social Responsibilities SIS maintains a Standing Committee on Law Library Service to Institution Residents. Since 1972 that committee has compiled, published, and regularly updated a set of guidelines entitled Recommended Collections for Prison Law Libraries. Law librarians from all 50 states and from several U.S. territories have contributed input for the jurisdiction-specific checklists that are included in that publication. While a current revision is underway, the most recent published edition of the Recommended Collections was issued in 1996. It devoted five pages exclusively to Florida materials, including titles, publishers, initial purchase and annual upkeep costs, and shelf space requirements.

The Recommended Collections was developed to assist prison administrators to establish and maintain reasonably adequate law libraries with general, federal, and state-specific materials that would enable prisoners without counsel to litigate their

convictions or sentences, conditions of confinement, prison grievance issues, civil rights claims, and basic civil issues including divorce, child custody, visitation, and termination of parental rights. That publication has established AALL as a recognized authority on legal information resources for prisoners.

In 1972 the American Correctional Association adopted AALL's Recommended Collections for Prison Law Libraries and incorporated those standards into its own guidelines on prison law library issues. See Elizabeth Holt Poe, A Spark of Hope for Prisoners, 66 Law Lib. J. 59, 60 (1973). Shortly after that, the head of the Florida Department of Corrections attempted to resolve a prisoner rights lawsuit by proposing an identical list of materials for inclusion in Florida's prison law libraries. See Hooks v. Wainwright, 536 F. Supp. 1330, 1343 (M.D. Fla. 1982) (describing an earlier phase of a long-running case), rev'd on other grounds, 775 F.2d 1433 (11<sup>th</sup> Cir. 1985).

The American Association of Law Libraries (AALL) is the premier national organization of law libraries and professional law librarians. It has approximately 5000 members. Law librarians serve the legal profession and the general public in governmental, academic, private law firm, and business settings.

AALL has been in the vanguard of prison law library reform since 1970, when it created the forerunner of what is now the Standing Committee on Law Library

Service to Institution Residents. In 1972, AALL appropriated funds to print the first edition of that committee's Recommended Collections for Prison Law Libraries. In 1976, AALL published O. James Werner's Manual for Prison Law Libraries (AALL Publication No. 12). A second edition of Werner's Manual for Prison Law Libraries, revised by Arturo A. Flores, appeared in 1990 (AALL Publication No. 36). In 1991, AALL collaborated with its Social Responsibilities SIS (then known as Contemporary Social Problems) and with the American Correctional Association to produce Correctional Facility Law Libraries: An A to Z Resource Guide (1991).

Several of these contributions were noted by the Supreme Court of the United States in the case that first fully explored the role of prison law libraries in providing prison inmates with meaningful access to the courts. Bounds v. Smith, 430 U.S. 817, 820 n.4, 830 n.19 (1977), overruled in part by Lewis v. Casey, 518 U.S. 343 (1996).

The momentum for prison law library reform has come to a dead halt as a result of the Supreme Court decision in Lewis v. Casey, supra, 518 U.S. 343 (1996). The achievements of the past are now in jeopardy. The contributions of amici curiae are coming undone. The Florida prison law library collections that were created under the AALL guidelines are now being eviscerated.

Professional law librarians throughout the country view with profound dismay the drastic erosion of prison law library quality that has taken place in Florida and

other jurisdictions under the aegis of Lewis v. Casey's lowered standards. See, e.g., Rebecca S. Trammell, Out of Bounds: Lewis v. Casey Redefines Rights Previously Found in Bounds v. Smith— Seriously Undermining Prison Law Libraries and the Ability of Inmates to Seek Justice, AALL Spectrum, Sept. 1997, at 10.

We see this case as an opportunity to try to arrest that backward movement by driving a piton into the fallback position of state constitutional law. This case tests whether a lifeline to that piton will hold.

### INTRODUCTION

This case bears unfortunate comparison to a mass book burning. While there were no bonfires piled high with precious books ablaze, the symbolic impact and practical result of eviscerating the prison law libraries was the same: books were destroyed or placed beyond reach. The sources of knowledge dried up. The tools of learning vanished. And the opportunity for prisoners to learn how to vindicate their rights in court became obstructed.

Florida's own state constitution guarantees a right of access to the courts. But if prisoners are unable to review adequate legal practice and procedural materials, this right becomes nearly meaningless, because then they cannot effectively represent their legitimate interests in court. As a practical matter, therefore, the action of the Florida Department of Corrections has deprived state prisoners of meaningful access. We ask

this Court to reverse the decision below and restore practical meaning to the state constitutional provision by ensuring that prisoners will continue to have the information they need to be able to utilize the courts effectively.

The books that were removed were not expendable, nor were they thrown away due to obsolescence. Those books were in the prison law libraries precisely because it was foreseeable that prisoners would need them to help deal with their legal problems. The removed books had been acquired under the guidance of experts and appeared on the master checklists of the American Association of Law Libraries (AALL) and the American Correctional Association.

In decimating its prison law libraries, the Department of Corrections abandoned the very guidelines it had previously adopted. Renouncing professional minimum standards, it is forcing prisoners into a state of controlled ignorance and enforced procedural incapacity.

The only explanation offered for its mass removal of legal material is that the Department wanted to cut costs. That rationale seems a transparent pretext. Throwing away good books that have already been bought and paid for at taxpayer expense does not save money. It is a profligate squandering of capital assets. And if those books were sold for salvage at pennies on the dollar, their meager yield would scarcely balance the harm inflicted by their loss.

While many governmental law libraries have had to adjust to fiscal austerities due to periodic economic downturns, revenue shortfalls, or other causes of budgetary constraint, no competent professional law librarian ever responds to a fiscal crisis by throwing away half the books from an established collection while those books are still current and possess a significant remaining useful life.

Instead, the professional response of competent law librarians is typically to: (1) reduce or eliminate new acquisitions; (2) selectively cancel subscriptions to serials including periodicals, looseleaf sets, and annual update services; and (3) cut staff through layoffs or by leaving vacancies unfilled.

During the first year or two after the advent of a budget crunch, it is usually sufficient to maintain all existing items in place but to mark newly outdated material with caveat labels giving notice of the cancellation date and a cautionary warning that the item may no longer be reliable. If the budgetary constraints persist, the library will eventually have to resort to a weeding program to review each outdated item on an individual basis to determine when the hazards of obsolescence dangerously outweigh the continued value of the item as a starting point for research or form drafting. Some materials may retain significant usefulness at tolerable risk for ten years or more after the last update. See generally James S. Heller, *Collection Development and Weeding a la Versace: Fashioning a Policy for Your Library*, AALL Spectrum, Feb. 2002 at 12,

13-14; Erwin C. Surrency, Weeding a Law Collection, 50 Law Libr. J. 6 (1957).

Therefore, even if the Department's professed interest in saving money were genuine, less draconian measures were available through ample belt-tightening alternatives without resorting to a wholesale destruction of half of the prison law library holdings.

While the Department of Corrections has not shut down access to the courts overtly, it has achieved much the same result by removing the legal materials prisoners need to access the courts effectively. The elimination of legal resources has guaranteed that those who do arrive at the courthouse will be unable to proceed with the effectiveness and skill that can never come without knowledge.

The Department's wholesale banning and removal of law library books is irreconcilable with the prisoners' fundamental right of access to the courts under Mitchell v. Moore, 786 So.2d 521, 527-528 (Fla. 2001), and under the protections of Article I, Section 21 of the Florida Constitution. We outline our arguments in two parts below: (1) the Florida court's prerogative to apply its own state constitutional provisions rather than following in lockstep with the federal Supreme Court, and (2) AALL's collection development guidelines for state, federal and general materials and why the Department of Corrections should be ordered to comply with them.

We ask the Court to give meaningful effect to this right of access for prisoners

by ordering the Department of Corrections to restore to its prison law libraries the general, federal, and Florida state-specific legal materials outlined in AALL's Recommended Collections for Prison and Other Institution Law Libraries (1996).

## I

### UNDER THE PRIMACY METHOD FOR INTERPRETING THE STATE CONSTITUTION, THIS CASE QUALIFIES FOR PRINCIPLED DEPARTURE FROM THE HARSH RESULT OF THE LEWIS v. CASEY PRECEDENT

This case presents a classic conflict between state and federal constitutional values. The state constitutional right of access to the courts under Article I, Section 21 of the Florida constitution has entered an era of renaissance. The right to go to court to resolve disputes is cherished as “fundamental,” and it is liberally construed to guarantee broad accessibility. Psychiatric Associates v. Siegel, 610 So.2d 419, 424 (Fla. 1992). Even prisoners may claim the protection of that right, and any impairment of access is subject to strict scrutiny. Mitchell v. Moore, 786 So.2d 521, 527-528 (Fla. 2001).

A very different story appears in the federal treatment of that right under the U.S. Constitution. Formerly characterized as “fundamental,” see Bounds v. Smith, 430 U.S. 817, 828 (1977), the right today has undergone severe degradation at the hands of an overtly hostile Supreme Court majority. Its scope has shrunk. Its status is

anything but fundamental. Prisoners have scant claim to its protection. Lewis v. Casey, 518 U.S. 343, 354-355 (1996). Strict scrutiny does not apply. Id. at 361. See Jill Schachner Chanen, Banned in the Bighouse, A.B.A. J., Mar. 1998, at 26; Rebecca S. Trammell, Out of Bounds: Lewis v. Casey Redefines Rights Previously Found in Bounds v. Smith – Seriously Undermining Prison Law Libraries and the Ability of Inmates to Seek Justice, AALL Spectrum, Sept. 1997, at 10.

The trajectories of the state and federal versions of the right of access to the courts are moving in opposite directions. The cognate provisions are no longer congruent either in scope or substance.

The harsh influence of Lewis v. Casey has reached Florida. The Department of Corrections has accepted Justice Scalia's transparent invitation to launch into a crackdown on prisoners' rights and to choke off by all means anything that facilitates their access to the courts. The result: a blatant decimation of the prison law libraries, a mass banning of books on law and procedure, and a regression from the age of technology to the primitive era of scribbling pleadings by hand.

The federal right of access to the courts is moribund. So the prisoners in this case turned instead to state constitutional law, counting on the revival of state protections that have emerged in the face of federal retrenchment. See generally William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90

Harv. L. Rev. 489 (1977).

The prisoners asked the Circuit Court to review those prison cutbacks under the strict scrutiny standard of Mitchell v. Moore, supra, 786 So.2d at 527-528. The Circuit Court declined. She elected to ignore state supreme court precedent and to disregard the state constitution in order to adhere to the Lewis v. Casey standard, which she deemed controlling. The decision below was a clearly reversible error, and we turn now to address that error.

A. Florida Has No Obligation Under the Supremacy Clause to Ratchet Down Article I, Section 21 of the State Constitution to Conform to Inferior Federal Standards Governing Prisoners' Right of Access to the Courts.

In Mitchell v. Moore, 786 So.2d 521, 527-528 (Fla. 2001), the state supreme court prescribed a protocol for evaluating any claim that a prisoner's right of access to the courts has been impaired in violation of Article I, Section 21 of the Florida Constitution.

First, the evaluating court must determine whether state action has imposed a difficult procedural hurdle that obstructs or infringes the right of access to any significant degree. Id. at 527. If so, the court must proceed to a strict scrutiny analysis. To withstand that level of review, the government must show that it has acted in furtherance of a compelling interest that could not have been accomplished through less restrictive means. Id. at 527-528.

Mitchell v. Moore is a recent decision from Florida's highest court. It is binding on all trial courts of the state. Any refusal by a lower court to comply with controlling precedent is reversible error. Hernandez v. Garwood, 390 So.2d 357, 359 & n. 11 (Fla. 1980); Wood v. Fraser, 677 So.2d 15, 19 (Fla. 2d DCA 1996).

The circuit judge refused to comply. Instead, she treated this as if it were a proper case for federal preemption. She allowed federal constitutional law to override Article I, Section 21 of the Florida Constitution. And she allowed federal precedent to displace and supplant the controlling decisions of the Florida Supreme Court. Federal law is the supreme law of the land. See U.S. Const. Art. VI, cl. 2. The United States Supreme Court is its arbiter. Any inconsistency in state law must supposedly yield. Lewis v. Casey, 518 U.S. 343 (1996), dictated the outcome. The prisoners lost.

The fallacy in that reasoning stems from its fundamental misconception about the scope and operation of the Supremacy Clause. The Supremacy Clause is not a true procrustean bed that forces state law to stretch or crumble with every fluctuation in Supreme Court precedent. Supremacy doctrine is not a two-way street. In the context of constitutional interpretation involving individual rights, the doctrine operates in one direction only. When federal standards are high, supremacy doctrine compels the states to catch up. But when federal protections go into steep decline, the Supremacy Clause becomes inoperative. It does not compel the states to cut back or to degrade

their own ideals in order to conform to federal standards that have become watered down, less protective, or procedurally inferior. “There is no necessary conflict between the nation and a state when a state court goes beyond the Supreme Court in protection of human rights. Problems arise [only] when state standards fall short of federal standards.” John Minor Wisdom, Foreward: The Ever-Whirling Wheels of American Federalism, 59 Notre Dame L. Rev. 1063, 1078 (1984).

Each state always has a “sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution.” PruneYard Shopping Center v. Robins, 447 U.S. 74, 81 (1980). “[A] state court is entirely free to read its own State’s constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee.” City of Mesquite v. Aladdin’s Castle, Inc., 455 U.S. 283, 293 (1982). Accord, Oregon v. Hass, 420 U.S. 714, 719 (1975); Lego v. Twomey, 404 U.S. 477, 489 (1972); Cooper v. California, 386 U.S. 58, 62 (1967); In re T.W., 551 So.2d 1186, 1191 (Fla. 1989).

“We are not bound by the federal court’s construction of the federal constitution in interpreting analogous provisions of our organically separate state constitution; nor are we precluded from providing greater safeguards for individual liberties than those required by the federal constitution.” State v. Kinchen, 490 So.2d 21, 23 (Fla. 1985)

(Ehrlich, J., concurring in part and dissenting in part). “[T]he federal Constitution thus represents the floor for basic freedoms; the state constitution, the ceiling.”

Traylor v. State, 596 So.2d 957, 962 (Fla. 1992).

The autonomy of the states is a function of the Tenth Amendment, which secures the partition of power between the state and federal governments and allows each to be supreme within its realm. It is that reserved power which enables the state to confer greater protection on its own citizens than the federal constitution demands. Moreover, under the doctrine of adequate and independent state grounds, the jurisdiction of the Supreme Court to review state court decisions is limited to federal questions. On issues of state law, state courts are entitled to have the last word. See generally Laurence H. Tribe, American Constitutional Law § 3-24, at 502, 506 (3d ed. 2000); Charles G. Douglas, III, Federalism and State Constitutions, 13 Vt. L. Rev. 127, 128-129 (1988); Lawrence Friedman, The Constitutional Value of Dialogue and the New Judicial Federalism, 28 Hastings Const. L.Q. 93, 100 (2000); Kermit L. Hall, Of Floors and Ceilings: The New Federalism and State Bills of Rights, 44 Fla. L. Rev. 637, 638, 645-646 (1992); Judith S. Kaye, Contributions of State Constitutional Law to the Third Century of American Federalism, 13 Vt. L. Rev. 49, 58-60 (1988) (discussing role of the Ninth Amendment); Stewart G. Pollock, Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State

and Federal Courts, 63 Tex. L. Rev. 977, 980-982 (1985); Stephen F. Aton, Note, State Constitutions Realigning Federalism: A Special Look at Florida, 39 U. Fla. L. Rev. 733, 738-739 (1987); Rachel E. Fugate, Comment, The Florida Constitution: Still Champion of Citizen's Rights?, 25 Fla. St. U. L. Rev. 87, 93-96 (1997).

There is a always strong temptation to impute to Supreme Court decisions a quality of absoluteness. A presumption of correctness arises that is “not necessarily based on the persuasiveness of the Supreme Court’s reasoning, but rather on its position as the highest court in the land.” Robert F. Williams, In the Supreme Court’s Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result, 35 S.C. L. Rev. 353, 356 (1984). “The Supreme court decision casts a shadow over subsequent state litigation on what otherwise would be purely a question of state constitutional interpretation.” Id.

In this case, temptation came from a Supreme Court precedent that was not merely closely on point. Lewis v. Casey, supra, 518 U.S. 343 (1996), was itself the very inspiration that precipitated the Department of Corrections to strip its prison libraries and to throw obstacles between its prisoners and the courts. Justice Scalia announced the game plan. The Department of Corrections picked up and carried the ball. Under those circumstances the circuit judge became blinded to her responsibilities to examine and give full effect to the protections afforded prisoners

under state constitutional law.

The Supremacy Clause does not excuse that mistake. But there is a heightened need in this type of case to formulate principled criteria to justify a result contrary to the Lewis v. Casey decision. “A thoughtful application of state constitutional law requires the utilization of a methodology to determine the circumstances under which state courts should properly construe the provisions of the state constitution more protectively than the federal courts construe the federal constitution.” John C. Cooper, Beyond the Federal Constitution: The Status of State Constitutional Law in Florida, 18 Stetson L. Rev. 241, 282 (1989).

B. Florida’s Primacy Doctrine Calls for Independent Construction of the State Constitution, Unconstrained by Federal Precedent

How does a state court justify interpreting its own constitution differently than the Supreme Court has interpreted a cognate provision, express or implied, in the Constitution of the United States? American courts have developed at least four competing analytic models in an attempt to provide a principled answer to that question. Although labels vary, the most common designations are as follows, ranging across the spectrum from the most federally dependent to the most independent in approach: (1) lock-step; (2) interstitial; (3) dual sovereignty; and (4) primacy.

Under the “lock-step” model, the federal Constitution is always paramount. Federal precedent controls. National uniformity becomes an end in itself. State

experimentation with alternate approaches is unacceptable. The state constitution becomes nugatory, its words mere surplusage, lacking independent vitality or effect. This model is overtly hostile to the “New Federalism.” It prefers one pyramid with the United States Supreme Court at the top.

The “interstitial” model attributes presumptive validity to federal precedent. It favors national uniformity and usually frowns on overexuberant state experimentation. Unlike the lock-step school, however, advocates of the interstitial model preserve the option to depart from Supreme Court precedent in exceptional cases. There is some debate within the interstitial community over the exact guidelines for departure. Some judges view the interstitial model as no more than a preferred sequence for analysis. They start out with the federal Constitution, and go no further if adequate relief is there. But they keep the state constitution always waiting in the wings, available to provide a possible way out from unsatisfactory results in the federal domain. However, most adherents of the interstitial approach utilize a checklist of neutral criteria to determine when departure from federal precedent is justifiable on principled grounds.

A few jurisdictions have no particular agenda either to promote the evolutionary development of their own state constitution or to preserve conformity to a national standard. Instead, they favor a “dual sovereignty” analysis, which examines each case

under both the state and federal constitutions without preference for either. Their only objective is to identify the highest level of protection to which the individual litigant is entitled and to give the benefit of that protection, whether it comes from state or federal law. This approach is always fair to the parties but puts the court to extra work and produces an abundance of dicta.

The “primacy” model of analysis always starts out with an independent interpretation of the state constitution, unconstrained by federal precedent. Federal constitutional law becomes a mere fallback position, a safety net of last resort for those cases where federal constitutional standards are more protective than the state’s. The unabashed agenda of most primacy jurisdictions is to give full and independent effect to the state’s constitution, to treat that document as a source of unique vitality, to take local traditions fully into account, to foster a rich tapestry of experiment and variation, and to evolve a body of state constitutional law unfettered by any need to conform to a monolithic national standard dictated solely by the Supreme Court.

See Shirley S. Abrahamson, Criminal Law and State Constitutions: The Emergence of State Constitutional Law, 63 Tex. L. Rev. 1141, 1156-1180 (1985); Charles G. Douglas, III, Federalism and State Constitutions, 13 Vt. L. Rev. 127, 137-142 (1988); Lawrence Friedman, The Constitutional Value of Dialogue and the New Judicial Federalism, 28 Hastings Const. L. Q. 93, 102-112 (2000); Robert F. Utter,

Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds, 63 Tex. L. Rev. 1025, 1027-1030, 1047-1050 (1985); Rachel A. Van Cleave, State Constitutional Interpretation and Methodology, 28 N.M. L. Rev. 199, 206-220 (1998); Stephen F. Aton, Note, State Constitutions Realigning Federalism: A Special Look at Florida, 39 U. Fla. L. Rev. 733, 764-771 (1987); Rachel E. Fugate, Comment, The Florida Constitution: Still Champion of Citizen’s Rights?, 25 Fla. St. U. L. Rev. 87, 100-107 (1997); John W. Shaw, Comment, Principled Interpretations of State Constitutional Law— Why Don’t the ‘Primacy’ States Practice What They Preach?, 54 U. Pitt. L. Rev. 1019, 1025-1029 (1993).

Neither the circuit court nor this Court has any discretion to choose among those interpretive options. The Florida electorate amended Article I, Section 12, of the Florida Constitution in 1982 to impose a lock-step approach in search and seizure cases. See Christopher Slobogin, State Adoption of Federal Law: Exploring the Limits of Florida’s “Forced Linkage” Amendment, 39 U. Fla. L. Rev. 653, 654, 665 (1987).

For all other types of issues requiring interpretation of the state constitution, the Florida Supreme Court has adopted the primacy approach. Traylor v. State, 596 So.2d 957, 961-963 (1992). “When called upon to decide matters of fundamental rights, Florida’s state courts are bound under federalist principles to give primacy to our state

Constitution and to give independent legal import to every phrase and clause contained therein.” Id. At 962.

The circuit court, whether by design or not, applied the lock-step approach to the decision below. She disregarded the state constitution and conformed her decision to federal precedent. In doing so, she ignored the primacy model of constitutional analysis that is required under Traylor, and she failed to perform the strict scrutiny review that is obligatory under Mitchell v. Moore, 786 So.2d 521, 527-528 (2001). This is not a search and seizure case. The lock-step model does not apply. In failing to adhere to Traylor and Mitchell, the circuit court violated the requirements of stare decisis and committed reversible error. Hernandez v. Garwood, 390 So.2d 357, 359 (Fla. 1980); Wood v. Fraser, 677 So.2d 15, 19 (Fla. 2d DCA 1996).

Under a conscientious application of strict scrutiny analysis, the prisoners will win this case, because the Department of Corrections failed to utilize the least intrusive means to accomplish whatever compelling governmental interest it may have had. Nothing further is essential to decide this appeal.

In writing up its decision, this Court may wonder whether any reference to federal precedent is permissible under primacy analysis. The better view is that even a primacy court may take federal decisions into account. But the federal decisions should be treated just like the decisions of a sister state court. They have no

controlling status. They cannot dictate the interpretation of state constitutional law. They are available for consultation and guidance, but they are entitled to only so much weight as their persuasive value warrants. See, e.g., Immuno AG. V. Moor-Jankowski, 567 N.E. 2d 1270, 1278 (N.Y. 1991) (“[W]e decide this case on the basis of State law independently, and ... in our State law analysis reference to Federal cases is for guidance only, not because it compels the result we reach.”); Jerome B. Falk, Jr., The State Constitution: A More Than “Adequate” Nonfederal Ground, 61 Cal. L. Rev. 273, 283 (1973) (“One would expect a state court to deal carefully with a Supreme Court opinion and to explain forthrightly why it found itself constrained to reason differently.”); Rachel A. Van Cleave, State Constitutional Interpretation and Methodology, *supra*, 28 N.M. L. Rev. 199, 217 (1998).

In reviewing federal cases, a primacy court may also look to dissenting opinions, for the whole point of the exercise is not a search for controlling precedent but to canvass the terrain for insight and guidance, wherever they may be. See, e.g., State v. Hunt, 450 A.2d 952, 960 (N.J. 1982) (Pashman, J., concurring) (“United States Supreme Court opinions, both majority and dissenting opinions, can be valuable sources of wisdom for us.”); Robert F. Williams, In the Supreme Court’s Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result, 35

S.C. L. Rev. 353, 374-376 (1984) (state courts have become a new audience for Supreme Court dissents on federal constitutional questions that may also arise under state constitutions).

We take that rationale one step further. For nineteen years, Bounds v. Smith, 430 U.S. 817, 828 (1977) was the law of the land. It governed prisoner court access issues in Florida. It remains inextricably entangled in the leading Florida state court decision dealing with prison law library issues. See Demps v. State, 696 So. 2d 1296, 1297 (Fla. 3d DCA 1997) (decided, problematically, more than a year after Bounds had been substantially overruled). Bounds is part of recent Florida history, part of Florida's tradition of solicitude for prisoner rights. If dissenting opinions in federal cases are proper grist for analysis in a state constitutional law appeal, then overruled cases should also be apt material for consideration.

If this court looks to federal cases for guidance as it approaches the work of interpreting Article I, Section 21 of the Florida Constitution, it should feel free to consult and utilize the full range of majority, concurring, and dissenting opinions not only in Lewis v. Casey, 518 U.S. 343 (1996), but also in the Bounds decision which it displaced.

C. The Explicit Language and Ancient History of Florida's Access to the Courts Guarantee Entitle it to a Broader Construction than its Implied Counterpart in Federal Law.

The Florida Supreme Court has laid out a step-by-step guide for utilizing primacy analysis. “[W]hen called upon to construe their bills of rights, state courts should focus primarily on factors that inhere in their own unique state experience, such as the express language of the constitutional provision, its formative history, both preexisting and developing state law, evolving customs, traditions and attitudes within the state, the state’s own general history, and finally any external influences that may have shaped state law.” Traylor v. State, 596 So.2d 957, 962 (Fla. 1992).

“The explication of standards such as these demonstrates that the discovery of unique individual rights in a state constitution does not spring from pure intuition but, rather, from a process that is reasonable and reasoned.” State v. Hunt, 450 A.2d 952, 967 (N.J. 1982) (Handler, J., concurring).

The Traylor checklist did not reappear except in sharply abbreviated form in the more recent case of Mitchell v. Moore, 786 So.2d 521 (Fla. 2001). It may have been superseded by Mitchell’s adoption of strict scrutiny analysis. Nevertheless, out of an abundance of caution, we shall address the first three items on the list.

1. Express Language. The right of access to the courts is guaranteed to Florida citizens by express language in Article I, Section 21, of the Florida Constitution. When we look to the federal counterpart of that right we find... nothing. The right exists in the federal constitution only by implication. It is not embodied in

express text. Like the federal right of privacy, the right of access to the courts is a derivative from other provisions. Rights that are specifically mentioned in Florida's constitution deserve more protection than rights which are found only by implication in the Constitution of the United States. Mitchell v. Moore, *supra*, 786 So.2d at 525, 527; In re T.W., 551 So.2d 1186, 1190-1192 (Fla. 1989); Winfield v. Division of Pari-Mutuel Wagering, 477 So.2d 544, 547-548 (Fla. 1985).

2. Legislative History. Because the federal right of access to the courts has no express text, it also has no legislative history. By contrast, the Florida right of access to the courts has ancient roots. The lineage of that right is traceable back through the events that precipitated the American Revolution, past the conflicts between the courts and the English king during the chief justiceship of Sir Edward Coke, and ultimately to historic and sacred origins within chapter 40 of the Magna Carta. The Florida version of that right first entered into the constitution of Florida in 1838, several years before Florida achieved statehood. It has remained continuously within a succession of revised constitutions, except for the seventeen-year period of the Reconstruction era constitution of 1868. See Joseph W. Little & Steven E. Lohr, Textual History of the Florida Declaration of Rights, 22 Stetson L. Rev. 549, 552-553, 555, 559, 576-578, 602, 605, 614, 617, 623, 634 (1993); Jonathan M. Hoffman, By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions,

74 Or. L. Rev. 1279, 1281, 1284-1286, 1291, 1296-1307 (1995).

3. Preexisting State Law. The Florida Supreme Court has recognized that the right of access to the courts is a fundamental right. Psychiatric Associates v. Siegel, 610 So.2d 419, 424 (Fla. 1992). Any impairment of the right is subject to strict scrutiny review. Mitchell v. Moore, 786 So.2d 521, 527-528 (Fla. 2001). By contrast, the federal counterpart of that right is a poor stepchild in the Supreme Court. The federal version is no longer fundamental in stature. Interference with the right is not subject to strict scrutiny analysis. Lewis v. Casey, 518 U.S. 343, 361 (1996). Florida prisoners have a right under the state constitution to pursue a variety of civil actions in the courts. See, e.g. Leone v. Florida Power Corp., 567 So.2d 992 (Fla. 1<sup>st</sup> DCA 1990) (workers' compensation claim); Lloyd v. Farkash, 476 So.2d 305 (Fla. 1<sup>st</sup> DCA 1985) (pro se legal malpractice action). But the federal right of access to the courts extends only to postconviction attacks on the prisoner's sentence, or to civil rights challenges to the conditions of the prisoner's confinement.

The state and federal versions of the right of access to the courts are incongruent. They share the same name but differ markedly in scope and substance. A state court interpreting the right of access to the courts under Florida constitutional law has no obligation to take the harsh and mean-spirited standards of Lewis v. Casey as its guide.

## II

AALL HAS DEVELOPED A WIDELY ACCEPTED STANDARD FOR PRISON LAW LIBRARIES THAT SHOULD REMAIN THE BASIS FOR FLORIDA'S PRISON LAW LIBRARY COLLECTIONS.

The Florida prison law library system was created to meet standards of constitutional adequacy required initially under Gilmore v. Lynch, 319 F. Supp. 105 (N.D. Cal 1970), aff'd sub nom. Younger v. Gilmore, 404 U.S. 15 (1971), and later under Bounds v. Smith, 430 U.S. 817 (1977). The leading court cases did not themselves prescribe detailed booklists of what an adequate prison law library should contain. Instead, prison administrators all over the country relied on the guidance of the American Association of Law Libraries (AALL), which in 1972 had published the first edition of its Recommended Collections for Prison Law Libraries, 65 Law Lib. J. 367 (1972) (sometimes hereafter AALL Recommended Collections).

In 1972 a federal district court in Florida concluded that the state has a constitutional duty either to provide adequate law libraries to its prison inmates or to furnish professional or quasi-professional services to assist prisoners in their legal endeavors. Hooks v. Wainwright, 352 F. Supp. 163, 165 (M.D. Fla. 1972). The court ordered the then Division of Corrections to submit a proposal for a comprehensive plan of implementation, including the detailed composition of each law library in the system. Id. at 169. In response to that order, the head of the prison system submitted a

booklist that was identical to the expanded version of the AALL recommendations.

Hooks v. Wainwright, 536 F. Supp. 1330, 1343 (M.D. Fla. 1982) (Hooks II), rev'd on other grounds, 775 F.2d 1433 (11<sup>th</sup> Cir. 1985).

When the Department of Corrections later eviscerated those libraries by summarily removing half of the items in them, it took law libraries that had been adequate by AALL standards and made them inadequate to meet the foreseeable needs of prisoners trying to represent themselves in the courts.

Shortly after the Gilmore case had been decided in California at the district court level, the American Association of Law Libraries created a special committee on law library service to prisoners. Farsighted members of that committee realized that if Gilmore were affirmed on appeal, prison wardens everywhere would need state-specific guidelines on how to start building a prison law library. The committee immediately embarked on a project to develop acquisition checklists for that task. They put together both a minimum checklist of general and federal materials that would be marginally adequate for basic legal research, and an expanded list for a more truly adequate collection. In addition, the committee drew on input from law librarians in all fifty states and Puerto Rico to compile supplemental checklists for each state.

Shortly after Gilmore was affirmed on appeal, the AALL collection development recommendations were ready for public release. The American

Correctional Association (ACA) voted acceptance of the AALL guidelines at its annual convention in August 1972. See Elizabeth Holt Poe, A Spark of Hope for Prisoners, 66 Law Libr. J. 59, 59-60 (1973). Thereafter, the American Correctional Association routinely incorporated the original and updated editions of the AALL Recommended Collections for Prison and Other Institution Law Libraries into its own publications. See, e.g., Correctional Facility Law Libraries: An A to Z Resource Guide (ACA 1991).

Most courts that have considered the issue have quietly recognized the AALL Recommended Collections as the appropriate measure of an adequate prison law library. The endorsements often remain unpublished. See, e.g., Howard v. Foti, No. 82-0460, 1989 U.S. Dist. LEXIS 14892, at \*2 (E.D. La. Dec. 14, 1989); Shango v. Jurich, No. 74 C 3598, 1988 U.S. Dist. LEXIS 7597, at \*7, 16, 17, 27 (N.D. Ill. July 18, 1988).

The law librarians who compiled the original edition of the AALL Recommended Collections and who have kept it up to date have not been beholden either to prisoner organizations or to prison administrators. The booklists are based on the reasonably foreseeable needs of prison inmates. But the editors have also kept an eye on cost-effectiveness in making their selections, and they have tried to smooth the acquisitions process by providing not only titles but also publisher contact

information, initial purchase price and estimated annual update costs, and even the shelf space requirements for each set.

The editors and contributors responsible for the AALL Recommended Collections have typically come from academic or governmental law libraries unconnected to any prison system. They have donated their work on the booklists as a public service and as a matter of conscience with no vested interest in the outcome. Many have gone into the prisons as unpaid consultants to help train prison law library staff. There is no ulterior motive here merely to promote full employment for professional law librarians in the prisons. From the very beginning it was expected that most prison law libraries would be staffed by inmates and by civilians lacking specific law library training. The American Association of Law Libraries has published two editions of O. James Werner's Prison Law Library Manual (AALL Publications Nos. 12 and 36, 1<sup>st</sup> ed. 1976, 2<sup>nd</sup> ed. 1990) expressly to help non-specialists to cope.

The American Association of Law Libraries has developed and refined prison law library standards over the course of more than a quarter of a century. We urge the Court to order the Florida Department of Corrections to adhere to the AALL Recommended Collections guideline for general, federal, and Florida-specific legal materials.

CONCLUSION

For the foregoing reasons, this Court should: (1) reverse the judgment below; (2) perform the strict scrutiny review required under Mitchell v. Moore, 786 So.2d 521, 527-528 (Fla. 2001); (3) find that the Department of Corrections' evisceration of Florida's prison law libraries has significantly obstructed the prisoners' right of access to the courts under Article I, Section 21, of the Florida Constitution; and (4) order the Department to restore the law libraries to their former condition, including all the general, federal, and Florida-specific titles recommended for Florida's state prisons in the 1996 edition of AALL's Recommended Collections for Prison and Other Institution Law Libraries.

Dated: August \_\_\_\_\_, 2003.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michael Kaye, hereby certify that on August \_\_\_\_, 2003 I served the foregoing AMICI CURIAE BRIEF IN SUPPORT OF APPELLANTS by depositing true and

correct copies thereof in the United States mail in sealed envelopes, first-class postage fully prepaid, addressed as follows to the attorneys of record and to the parties

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY that this brief was prepared using Times New Roman 14 point type, a font that is proportionally spaced.

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