The Florida Senate

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Committee on Criminal Justice Senator Stephen R. Wise, Chair

CONSTITUTIONAL PROHIBITIONS AFFECTING CRIMINAL LAWS

SUMMARY

The purpose of this report is to inform legislators about the analyses applied by the courts when criminal legislation or criminal laws are challenged as violating the single subject rule, the prohibition against ex post facto laws, the separation of powers doctrine, the nondelegation doctrine, the overbreadth doctrine, and the void-for-vagueness doctrine. Findings summarize important points from the discussion of the courts' analyses of these constitutional prohibitions and suggest some measures that may help legislators avoid issues relating to them. Staff recommends that legislators use this report as an informational resource and that special attention be paid to the Florida Supreme Court's recent clarification of its single subject analysis. Based on staff's review of the Court's analysis, staff is of the opinion that legislators should be cautious about using broad subjects like "criminal justice" in criminal legislation.

BACKGROUND

This report provides information regarding the analyses applied by the courts when criminal legislation or criminal laws are challenged as violating the single subject rule, the prohibition against ex post facto laws, the separation of powers doctrine, the nondelegation doctrine, the overbreadth doctrine, and the void-for-vagueness doctrine.

The consequences of judicial rulings supporting challenges based on these constitutional prohibitions can be serious. If legislation or laws are found to be unconstitutional by the courts than resources devoted to them were for naught and further resources must be devoted to remedial legislation and review of criminal cases, which may number in the hundreds, if not the thousands. If legislators understand the courts' analyses of these constitutional prohibitions, they may be able to avoid some of the issues relating to them.

Single Subject Rule

Article III, section 6 of the Florida Constitution, "[t]he single subject clause[,] contains three requirements. First, each law shall 'embrace' only 'one subject.' Second, the law may include any matter 'properly connected' with the subject. The third requirement, related to the first, is that the subject shall be 'briefly expressed in the title.'"[1]

The purposes of the single subject clause are "(1) to prevent hodge podge or 'log rolling' legislation, i.e., putting two unrelated matters in one act; (2) to prevent surprise or fraud by means of provisions in bills of which the titles gave no intimation, and which might therefore be overlooked and carelessly and unintentionally adopted; and (3) to fairly apprise the people of the subjects of legislation that are being considered, in order that they may have opportunity of being heard thereon."[2]

Although the Florida Supreme Court's decisions addressing the single subject clause span more than a century,[3] the Florida appellate courts' interpretations of those decisions have not been uniform. Consequently, the Florida Supreme Court recently clarified its single subject analysis, the important features of which the Court described as follows:

- "The key to determining whether a legislative enactment violates the single subject clause of the Florida Constitution is the method by which the court defines the 'single subject' of the legislation

[1] *Corey Franklin v. State of Florida*, Case No. SC03-413 (Slip Op.) (September 30, 2004), pp. 12-13.
[2] *State ex rel Flink v. Canova*, 94 So.2d 181, 184 (Fla.1957), discussing Cooley, *A Treatise on the Constitutional Limitations* (3d ed. 1874), at pp. 141-146.
[3] In *Franklin*, the Florida Supreme Court noted: "Starting with *State v. Gibson*, 16 Fla. 291 (1877), this Court has addressed the single subject clause approximately 135 times. In approximately seventy-five percent of the cases, we have upheld legislation against attacks based on single subject assertions." *Id*. at p. 16, n. 15.

and the analysis employed to determine matters 'properly connected therewith.'"[4]

- "Although the full title may be as lengthy as the Legislature chooses, the actual expression of the single subject within the full title must be *briefly* stated."[5] "[T]he single subject of an act is derived from the short title...." (The short title is the relating clause of the title, e.g., "An act relating to sentencing"). A citation name for an act is "not synonymous with the single subject."[6]

- "[O]nly the subject, not matters connected to the subject, must be expressed in the title."[7] While there is no constitutional requirement to index the provisions of an act in the act's title, "the full title ... must be 'so worded as not to mislead a person of average intelligence as to the scope of the enactment and [be] sufficient to put that person on notice and cause him to inquire into the body of the statute itself.'"[8]

- There is a "caveat" to deriving the subject from the short title. "[T]he short title ... cannot be so broad as to purportedly cover unrelated topics, and thus provide no real guidance as to what the body of the act contains."[9] If "the short title is suspect for being overly broad, a court should look to the remainder of the act and the history of the legislative process to determine if the act actually contains a single subject or violates the constitution by encompassing more than one subject."[10]

- Provisions of an act must be "properly connected" to the act's single subject. "A connection between a provision and the subject is proper (1) if the connection is natural or logical, or (2) if there is a reasonable explanation for how the provision is (a) necessary to the subject or (b) tends to make effective or promote the objects and purposes of legislation included in the subject."[11]

- The subject of the act and its purpose(s) are different. An act may contain several purposes germane to the subject, which "may be instructive in determining whether there is a reasonable explanation for the inclusion of a specific provision in the chapter law[,]" but those purposes neither define nor expand the single subject.[12]

- To determine "whether a reasonable explanation exists[,]" a court may look at the entire act. If a reasonable explanation is not discernable from the entire act, the Court may look at the act's legislative history "to determine how the challenged provision was added to the act."[13]

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[4] *Id*. at p. 16.
[5] *Id.* at pp. 19-20 (emphasis by the Court).
[6] *Id*. at p. 20.
[7] *Id.*
[8] *Id.* at p. 21, quoting *Loxahatchee River Environmental Control District v. School Board of Palm Beach County*, 515 So.2d 217, 219 (Fla.1977) (quoting *Williams v. State*, 370 So.2d 1143, 1144 (Fla.1979). Cases quoted by the courts in their remarks quoted in this report are cited in this report; however, other citations and any footnotes appearing in those quotes are deleted.
[9] *Id.* at pp. 21-22.
[10] *Id.* at pp. 22-23. In *Franklin*, the Court stated that an example of an overly broadly short title could be found in *State v. Thompson*, 750 So. 2d 643 (Fla.1999), rehearing denied. In *Thompson*, the original subject of the bill (that became the act reviewed by the Court) was "career criminals" and the matters addressed in the body of the bill related only to that subject until, shortly before the bill passed, the title was amended to "justice system," and domestic violence provisions were added to the bill. "Noting that nothing in the career criminal provisions addressed any facet of domestic violence, we determined it was 'clear' that the 'various sections of [the chapter law] ... address two different subjects: career criminals and domestic violence.'" *Franklin* at p. 22, quoting *Thompson* at p. 648.
[11] *Id.* at p. 25. Although not discussed by the Court in *Franklin*, the Court has previously rejected a single subject challenge to an act containing seemingly disparate subject matter because the act was comprehensive legislation intended to address a "crisis." In *Burch v. State*, 558 So.2d 1, 2 (Fla.1990), rehearing denied, the act that was challenged on single subject grounds dealt with "three basic areas: (1) comprehensive criminal regulations and procedures, (2) money laundering, and (3) safe neighborhoods." A preamble to the act indicated that the Legislature was trying to address a "crime rate crisis." The Court stated: "Each of these areas bear a logical relationship to the single subject of controlling crime, whether by providing for imprisonment or through taking away the profits of crime and promoting education and safe neighborhoods. The fact that several different statutes are amended does not mean that more than one subject is involved."
[12] *Franklin* at pp. 26-27.
[13] *Id*. at pp. 26-27. The Court stated in *Franklin* that "[i]n *Thompson*, we noted that the offending domestic violence provisions were added to the bill near the end of the regular session after the provisions had failed to pass on their own. We stated that '[i]t is in circumstances such as these that problems with the single subject rule are most likely to occur.'" *Id.*, quoting *Thompson*, *supra*, at p. 648.

- "[P]articular combinations of various statutory provisions may not be properly connected. To date, this Court has regarded two such combinations with caution: substantive changes to the criminal law that are contained in acts that do not predominately address the substantive criminal law, and chapter laws that combine civil and criminal provisions."[14]

Ex Post Facto Prohibition

Article I, section 10 of the Florida Constitution prohibits an "ex post facto" law or its equivalent.[15] "Although the Latin phrase 'ex post facto' literally encompasses any law passed 'after the fact,'"[16] the state and federal "ex post facto" clauses apply "only to criminal legislation and proceedings[,]" not to other impermissible retrospective applications.[17]

"The policy underlying this prohibition is 'to assure that legislative [a]cts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed'"[18] and to "restrict[ ] governmental power by restraining arbitrary and potentially vindictive legislation."[19]

"There are four general categories of ex post facto laws proscribed by the federal and Florida constitutions: 1) a law that makes conduct criminal that was not criminal before the law was enacted; 2) a law that aggravates a crime or makes it more severe; 3) a law that increases the punishment for an offense; 4) a law that alters the legal rules of evidence by permitting less or different testimony to obtain a conviction than was permitted when the particular offense was committed…. Retrospective application of such laws is generally prohibited."[20]

"[A] law or its equivalent violates the prohibition against ex post facto laws if two conditions are met: (a) it is retrospective in effect; and (b) it diminishes a substantial substantive right the party would have enjoyed under the law existing at the time of the alleged offense."[21]

If there is an "express command" that a law be applied retroactively, it has retroactive application; otherwise, courts presume that the law applies prospectively, unless this presumption is rebutted by clear evidence of legislative intent to the contrary.[22] However, the ex post facto clauses apply only to a law that "changes the legal consequences of acts completed before its effective date."[23] Courts look at "the time of the offense" and at "subsequent time frames as well to determine whether a possible, yet speculative benefit has become more definite."[24]

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[14] *Id.* at p. 28.
[15] *Dugger v. Williams*, 593 So.2d 180, 181 (Fla.1991).
[16] *Collins v. Youngblood*, 497 U.S. 37, 41 (1990).
[17] *Goad v. Florida Department of Corrections*, 845 So.2d 880, 882 (Fla.2003), rehearing denied. "The invalidation of retroactive civil legislation which 'impairs vested rights, creates new obligations[,] or imposes new penalties' ordinarily is based on the conclusion that the legislation violates due process…. Where contract rights are involved, the invalidation of the retroactive application of civil legislation may be based on the conclusion that the legislation impairs the obligation of contract." *R.A.M. of South Florida, Inc. v. WCI Communities, Inc.*, 869 So.2d 1210, 1217 (Fla. 2d DCA 2004), quoting *State Farm Mutual Automobile Insurance Co. v. LaForet*, 658 So.2d 55, 61 (Fla.1995). *See Bryan v. State*, 753 So.2d 1244 (Fla.2000), certiorari denied, 490 U.S. 1028 (1989). The court discussed Article X, section 9 of the Florida Constitution, which operates as a savings clause to preserve laws in effect at the time of a defendant's crime that affect prosecution or punishment of the defendant for that crime.
[18] *Waldrup v. Dugger*, 562 So.2d 687, 691 (Fla.1990), quoting *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981).
[19] *Weaver* at p. 29.
[20] *State v. Dione*, 814 So.2d 1087, 1092 (Fla. 5th DCA 2002), review granted, *Dionne v. State*, 841 So.2d 466 (Fla.2003), case dismissed, 865 So.2d 1258 (Fla.2004).
[21] *Williams*, *supra*, at p. 181. In *Winkler v. Moore*, 831 So.2d 63, 68 (Fla.2002), rehearing denied, the Court determined that the retroactive cancellation of overcrowding credits for a group of offenders who had received the credits was not an ex post facto violation because there was no right for the offenders to receive the credits at the time they committed their offenses. Similarly, the Court determined that habitual offenders laws do not generally offend the ex post facto clauses because "[a] habitual offender sentence is not an additional penalty for an earlier crime; rather, it is an increased penalty for the latest crime, which is an aggravated offense because of the repetition." *Grant v. State*, 770 So.2d 655, 661 (Fla.2000).
[22] *Metropolitan Dade County v. Chase Federal Housing Corp*., 737 So.2d 494, 499-500 (Fla.1999), rehearing denied.
[23] *Miller v. Florida*, 482 U.S. 423, 430 (1987).
[24] *State v. Lancaster*, 731 So.2d 1227, 1233 (Fla.1998), rehearing denied. In *Lancaster*, the Court stated that in *Lynce v. Mathis*, 519 U.S. 433, 446 (1997), "the grant of overcrowding credits was speculative at the time of that inmate's offense because no one could tell for sure whether the prison overcrowding levels would become so extreme as to trigger the relevant overcrowding statutes. Nevertheless, Lynce was subsequently awarded a certain amount of credits which ultimately led to his release from

While ex post facto cases generally involve substantive matters, "some procedural matters have a substantive effect."[25] "There is no requirement that the substantive right be 'vested' or absolute, since the ex post facto provision can be violated even by the retroactive diminishment of *access* to a purely discretionary or conditional advantage."[26] For example, in *Waldrup v. Dugger*,[27] "the violation occurred precisely because inmates were denied access to a discretionary procedure by which more advantageous amounts of gain-time possibly might be awarded, thereby reducing the inmates' prison terms. The *Waldrup* case did not turn on the fact that the inmates lacked any absolute right to this gain-time and later could be lawfully denied it. Rather, the case turned on the fact that the inmates clearly were denied the possibility of receiving the more advantageous awards."[28]

Violations of the Separation of Powers and Nondelegation Doctrines

The "separation of powers doctrine" is codified in Article II, section 3 of the Florida Constitution, which "encompasses two fundamental prohibitions. The first is that no branch may encroach upon the powers of another. The second is that no branch may delegate to another branch its constitutionally assigned power."[29] The latter prohibition is referred to as the "nondelegation doctrine."

An example of how separation of power issues may or may not arise from the interplay of separate branch powers is the interplay between the Legislature's authority to enact substantive law and the Florida Supreme Court's authority to adopt rules for the practice and procedure in the courts.

The Florida Supreme Court has described the difference between substantive law and procedural law: "Substantive law prescribes the duties and rights under our system of government. The responsibility to make substantive law is in the legislature within the limits of the state and federal constitutions. Procedural law concerns the means and method to apply and enforce those duties and rights. Procedural rules concerning the judicial branch are the responsibility of this Court, subject to repeal by the legislature in accordance with our constitutional provisions."[30] The Court has acknowledged that "[t]he distinction between substantive and procedural law is neither simple nor certain…."[31]

In *Kalway v. State*,[32] the Court stated that the "interplay" between a rule and a statutory provision relevant to the time for filing a complaint for extraordinary relief from disciplinary action taken by the Department of Corrections "is not anomalous and does not constitute a separation of powers violation."[33] The rule specified that a complaint was to be filed "within the time provided by law" and the applicable "law" (statute) specified that time.[34] The Court stated that "[t]he setting of an interim time frame for challenging the Department's disciplinary action following the exhaustion of intra-departmental proceedings is a technical matter not outside the purview of the Legislature. We do not view such action as an intrusion on the Court's jurisdiction over the practice and procedure in Florida courts."[35]

In contrast to *Kalway*, in *Allen v. Butterworth*,[36] the Court held that the Legislature impermissibly encroached on the Court's "exclusive power to 'adopt rules for the practice and procedure in all courts'"[37] when the Legislature enacted deadlines for postconviction motions by inmates sentenced to death. These deadlines appeared in an act entitled the "Death Penalty Reform Act" (DPRA). The Court stated that time limitations for these postconviction motions were

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incarceration. Therefore, by the time Lynce was released, the credits were clearly no longer non-quantifiable or unknown. On the contrary they had become a certainty." *Id.*

[25] *Williams, supra*, at p. 181.

[26] *Id.* Gain-time, including overcrowding gain-time, "can constitute one determinant of a prisoner's sentence because a 'prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed.'" *Meola v. Department of Corrections*, 732 So.2d 1029, 1032 (Fla.1998), rehearing denied, quoting *Lynce*, *supra*, at pp. 445-46 (quoting *Weaver*, *supra*, at p. 32).

[27] 562 So.2d 687 (Fla.1990).

[28] *Williams, supra*, at p. 181, discussing *Waldrup, supra*.

[29] *Chiles v. Children A, B, C, D, E, and F*, 589 So.2d 260, 264 (Fla.1991).

[30] *Benyard v. Wainwright*, 322 So.2d 473, 475 (Fla.1975).

[31] *Caple v. Tuttle's Design-Build, Inc.*, 753 So.2d 49, 53 (Fla.2000). *See School Board of Broward County v. Price*, 362 So.2d 1337, 1339 (Fla.1978) (describing a statutory prohibition as "surely procedural, just as it is substantive").

[32] 708 So.2d 267 (Fla.1998).

[33] *Id.* at p. 269.

[34] *Id.* at pp. 268-269.

[35] *Id.* at p. 269.

[36] 756 So.2d 52 (Fla.2000).

[37] *Id.* at p. 53, quoting Article V, section 2(a) of the Florida Constitution.

a procedural matter, which the Court had addressed by a rule that functionally embraced claims formerly raised by a petition for writ of habeas corpus. The Court distinguished the statute in *Kalway* from DPRA, noting that in *Kalway* the Court had agreed with the statutory time limitations and adopted a rule consistent with them, and that the statute reviewed in *Kalway* was not constitutionally infirm like DPRA. The Court also clarified that its holding in *Kalway* "did not cede to the Legislature the power to control the time in which extraordinary writ actions must be commenced."[38]

Challenges to a statute based on the nondelegation doctrine often involve a legislative delegation to an administrative agency. "Generally, the Legislature may not delegate the power to enact a law or the right to exercise unrestricted discretion in applying the law. However, the Legislature may 'enact a law, complete in itself, designed to accomplish a general public purpose, and may expressly authorize designated officials within definite valid limitations to provide rules and regulations for the complete operation and enforcement of the law within its expressed general purpose.'"[39] The Legislature must provide the agency with "sufficient standards to guide the agency in the administration of the law."[40] "[T]he sufficiency of adequate standards depends on the complexity of the subject matter and the 'degree of difficulty involved in articulating finite standards.'"[41]

In *B.H v. State*,[42] the Florida Supreme Court held that the Legislature unconstitutionally delegated to the (former) Department of Health and Rehabilitative Services (HRS) the power to define the elements of the crime of escape from a residential commitment facility. B.H. was charged with and convicted of this offense, which was a third degree felony if the facility was restrictiveness level VI or above. Although the Legislature directed that there be eight restrictiveness levels for this facility, it gave DHS complete discretion to define restrictiveness levels. "[B]y simply numbering the restrictiveness levels 1-4, no crime would have been committed under the statute.... HRS might well not have given the numbers 'VI or above' to any of the facilities. Hence, HRS not only was vested with complete power to define the crime, one could not determine from the statute alone what conduct would constitute a criminal violation."[43]

The Court stated in *B.H.* that "[i]t is clearly impossible to adopt a single bright-line test to apply to all alleged violations of the nondelegation doctrine. The delegation of authority to define a crime, for example, is of such a different magnitude from noncriminal cases that more stringent rules and greater scrutiny certainly is required." The Court opined that "modern society requires that administrative agencies receive some flexibility in how they may use their authority," but qualified that "this may be true to a lesser extent … in the criminal law context." One principle that the Court was certain "emerges" from its precedent is that "[t]he legislature may not delegate open-ended authority such that 'no one can say with certainty, from the terms of the law itself, what would be deemed an infringement of the law.'" This delegation violates due process because the statute on its face fails "to give adequate notice of the prohibited act[.]" It also violates the separation of powers "in the attempt to give an administrative agency power to define a crime."[44]

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[38] *Id.* at p. 62, n. 4.

[39] *Sims v. State*, 754 So.2d 657, 668 (Fla.2000), certiorari denied, *Sims v. Florida*, 467 U.S. 1246 (1984). The Court quotes *State v. Atlantic Coast Line Railroad Co.*, 56 Fla. 617, 636-637, 47 So. 969, 976 (1908).

[40] *Metropolitan Dade County v. P.J. Birds, Inc.*, 654 So.2d 170, 175 (Fla. 3d DCA 1995).

[41] *Avatar Development Corp. v. State*, 723 So.2d 199, 207 (Fla.1998), quoting *Askew v. Cross Key Waterways*, 372 So.2d 913, 918 (Fla.1978).

[42] 645 So.2d 987 (Fla.1994), certiorari denied, *B.H. v. Florida*, 515 U.S. 1132 (1995).

[43] *Avatar, supra*, at p. 203, discussing *B.H.* In *Avatar*, the Court approved a statute that granted to the Department of Environmental Protection (DEP) "the power to create special conditions on permits, the violation of which constitutes a misdemeanor." *Id.* at p. 202. The Court stated that this statute was "an enforcement tool to ensure compliance with DEP's rules, regulations and permit conditions and does not provide DEP with unlimited discretion to define which acts constitute a crime." *Id.* at p. 204. The Court distinguished this statute from the statute reviewed in *B.H.*, noting that it did not leave to DEP "the decision to determine which acts constitute a crime" and did not grant the agency "authority to pick and choose which rule, regulation, or permit condition shall be prosecuted upon its violation." *Id.* "DEP utilizes its expertise and special knowledge to flesh out the Legislature's stated intent" regarding pollution prevention and control. The statute also provided clear notice of the acts prohibited. "The statute unequivocally prohibits the willful violation of any rule, regulation or permit condition. The permit issued by DEP expressly states the conditions upon which it was issued. Thus, permit holders are aware that violation of any one of the conditions stated in the permit could result in criminal repercussions." *Id.*

[44] *B.H, supra*, at p. 993, quoting *Conner v. Joe Hatton, Inc.*, 216 So.2d 209, 211 (Fla.1968) (emphasis removed).

Overbreadth Doctrine and Void-for-Vagueness Doctrine

"The overbreadth doctrine applies to statutes that are 'susceptible of application' to constitutionally protected conduct, *e.g.*, protected speech."[45] However, the United States Supreme Court has stated that "particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."[46]

In *Cashatt v. State*,[47] the Florida First District Court of Appeal rejected a facial overbreadth challenge to a law that punished computer solicitation of a minor for illegal sexual activity. The defendant, who appealed his conviction of a violation of the statute, claimed that the law "chill[ed] all sexually oriented communication[.]" The court disagreed, finding that "[c]onsenting adults are free to engage in sexually oriented communication without violating the statute, and not all sexually oriented communications seduce or lure, as recognized by the Florida Senate Criminal Justice Committee when it noted: 'This provision does not proscribe transmitting, by computer means, a personal predilection to have sex with children; it does proscribe soliciting a person to have sex with children.' Furthermore, sexually oriented communication on a computer on-line service which is viewed by a child is not a violation of the statute unless the sender of the communication 'knowingly' attempts by that communication to seduce the child."[48]

The "void-for-vagueness doctrine" "has a broader application" than the overbreadth doctrine "because it was developed to assure compliance with the due process clause of the United States Constitution."[49] The void-for-vagueness doctrine "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[50]

The Florida Supreme Court has stated that, "[s]ignificantly, in evaluating criminal or quasi-criminal enactments against a challenge for vagueness, the Supreme Court has long recognized that a mens rea or scienter requirement to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid."[51]

"Criminal statutes must assuredly be strictly construed, but they are not to be construed so strictly as to emasculate the statute and defeat the obvious intention of the legislature. In other words, such strict construction is subordinate to the rule that the intention of the lawmakers must be given effect."[52] The fact that the Legislature may not have defined words or chosen the clearest or most precise language in a statute does not necessarily render the statute unconstitutionally vague.[53] The courts may look "to case law or related statutory provisions which define the term, and where a statute does not specifically define words of common usage, such words are construed in their plain and ordinary sense."[54]

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[45] *Russ v. State*, 832 So.2d 901, 907 (Fla. 1st DCA 2002), review denied, 845 So.2d 892 (Fla.2003). The court quotes *Carricarte v. State*, 384 So.2d 1261, 1262 (Fla.1980). Laws can restrict protected speech or conduct, if the applicable constitutional test is met for restricting the right. For example, content-based speech can be restricted if "the government can show that the regulation promotes a compelling government interest and that it chooses the least restrictive means to further the articulated interest." *Cashatt v. State*, 873 So.2d 430, 434 (Fla. 1st DCA 2004), rehearing denied.

[46] *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

[47] *Cashatt*, *supra*.

[48] *Id.* at p. 436.

[49] *Southeastern Fisheries Association, Inc. v. Department of Natural Resources*, 453 So.2d 1351, 1353 (Fla.1984).

[50] *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Related to the void-for-vagueness doctrine is the "rule of lenity." If a law is "indefinite and susceptible of differing constructions, the rule of lenity applies; the statute must be construed in the manner most favorable to the accused." *Richardson v. State*, 2003 WL 21697171, p. 2 (Fla. 4th DCA 2004) (unpublished opinion). This rule, which is codified, at s. 775.021(1), F.S., is "a sort of junior version of the vagueness doctrine," which "ensures fair warning by resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *United States v. Lanier*, 520 U.S. 259, 266 (1997), quoting H. Packer, *The Limits of the Criminal Sanction* 95 (1968). The rule "simultaneously saves a statute from being struck down as void for vagueness or overbreadth and ensures that people who rely upon a reasonable interpretation of statutory language are not punished as criminals." *Cuellar v. State*, 70 S.W.3d 815, 825 (Tex.Crim.App. 2002).

[51] *M.C. v. State*, 695 So.2d 477, 482-483 (Fla. 3d DCA 1997), review denied, 700 So.2d 686 (Fla.1997).

[52] *St. Surin v. State*, 745 So.2d 514, 515 (Fla. 3d DCA 1999).

[53] *See State v. Barnes*, 686 So.2d 633, 637 (Fla. 2d DCA 1997), rehearing denied; review denied, *Barnes v. State*, 695 So.2d 698 (Fla.1997); certiorari denied, *Barnes v. State of Florida*, 522 U.S. 903 (1997).

[54] *State v. Hagan*, 387 So.2d 943, 945 (Fla.1980).

In *State v. Barnes*,[55] the Florida Second District Court of Appeal rejected a challenge that the terms "high-speed vehicle pursuit" and "high speed," which appeared in a statute punishing unlawful flight from a law enforcement officer, were impermissibly vague in all of their applications. Although neither term was defined, the court ascertained the meaning of the term "high" from a dictionary definition of the term and, based on a plain reading of the term "high speed vehicle pursuit," determined that the act prohibited by the Legislature was the "act of a fleeing motorist which causes a 'law enforcement officer' to engage in a vehicle pursuit of that motorist at a 'relatively great and abnormal degree' of speed." "[T]his language is not so imprecise that it is impossible to determine from its plain and ordinary meaning what the legislature intended to prohibit." The court was certain it did not apply to the specific facts of the appellee's case, and if those terms "may pose the possible risk of unconstitutional application to a fact pattern different from that of the appellee's, 'the precise limitations to be placed on the words in question can best be specified when actual cases requiring such interpretation are presented.'"[56]

METHODOLOGY

This report briefly summarizes relevant case law reviewed by staff.

FINDINGS

Single Subject Rule

- A bill may only have one subject, which must be briefly expressed in the title. This subject is "derived" from the "short title" (the relating clause of the title); this is where the courts will look for the subject, unless the subject is "suspect for being overly broad,"[57] in which case the courts may look at the entire act and its legislative history. "Eleventh hour" amendments to a bill to add provisions and broaden a title are flags to the courts to look for "log rolling." Therefore, single subject issues may be avoided by limiting use of broad subjects like "criminal justice" and "eleventh hour" amendments to amend a title to provide for a broad subject to accommodate new provisions.

- Matters in the body of the act must be "properly connected" to the subject. A proper connection is established if the matters are "naturally or logically connected" to the subject or there is a "reasonable explanation for how the provision is necessary to the subject or tends to make effective or promote the objects and purposes of legislation included in the subject."

- The Florida Supreme Court has regarded with "caution" two combinations of provisions: "substantive changes to the criminal law that are contained in acts that do not predominately address the substantive criminal law, and chapter laws that combine civil and criminal provisions." This does not mean that the Legislature is precluded from enacting laws that contain such combinations, but single subject issues may be avoided by limiting their inclusion in legislation to legislation addressing a crisis or in which it is abundantly clear that the matters are properly connected to the subject.

Ex Post Facto Prohibition

- The prohibition against ex post facto laws applies only to criminal legislation and proceedings. An ex post facto law is a law that is retroactive and affects a "substantial substantive right." This right does not have to be vested or absolute because "retroactive diminishment of *access* to a purely discretionary or conditional advantage can be an ex post facto violation." While the general rule is that the state and federal ex post facto clauses apply to substantive matters, they may also apply to procedural matters that have a "substantive effect."

- The ex post facto clauses apply only to a law that "changes the legal consequences of acts completed before its effective date." Courts look at "the time of the offense" and at "subsequent time frames as well to determine whether a possible, yet speculative benefit has become more definite."

- Legislators appear to be aware of the ex post facto consequences of retroactive application of criminal penalties. Recent decisions of the federal and state courts have clarified many issues regarding retroactive cancellation of gain-time. Regarding retroactive application of "procedural" provisions, legislators will have to use their best judgment as to whether the provisions may have a "substantive effect." It is possible that a similar "procedural" provision may have been reviewed by a state or

[55] *Barnes, supra*.
[56] *Id.* at p. 639, quoting *State v. Dye*, 346 So.2d 538, 542 (Fla.1977).
[57] See "Background" section of this report for remarks quoted in this section.

federal court in the context of an ex post facto challenge. These cases may be helpful in making the judgment call.

Violations of the Separation of Powers and Nondelegation Doctrines

- The "separation of powers" doctrine is violated when one branch encroaches on the constitutionally conferred powers of another branch. Separation of powers issues may be avoided by careful attention to the Florida Supreme Court's decisions interpreting its constitutionally conferred and inherent powers and the powers conferred upon the legislative and executive branches.

- "Generally, the Legislature may not delegate the power to enact a law or the right to exercise unrestricted discretion in applying the law. However, the Legislature may 'enact a law, complete in itself, designed to accomplish a general public purpose, and may expressly authorize designated officials within definite valid limitations to provide rules and regulations for the complete operation and enforcement of the law within its expressed general purpose.'" The Legislature must provide the agency with "sufficient standards to guide the agency in the administration of the law." "[T]he sufficiency of adequate standards depends on the complexity of the subject matter and the 'degree of difficulty involved in articulating finite standards.'"

- Legislators will have to use their best judgment as to whether legislation contains "sufficient" standards for purposes of the nondelegation doctrine. The nondelegation analysis applied by the courts offers little practical guidance to legislators in making this judgment call. However, legislation that provides for criminal sanctions for violations of an agency's rules and regulations and criminal offenses, the elements of which may arguably be determined by an agency's definition or interpretation of terminology, clearly merit special attention and scrutiny by legislators.

Overbreadth Doctrine and Void-for-Vagueness Doctrine

- The overbreadth doctrine applies to statutes that may threaten rights protected by the First Amendment. If there is a question as to whether legislation restricts constitutionally protected speech or conduct, legislators may want to examine the legislation in light of the constitutional test applicable to such restriction.

- The constitutional concern addressed by the void-for-vagueness doctrine is due process**.** Penal statutes must define the criminal offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."

- A law is not necessarily unconstitutionally vague because the Legislature may not have defined words or chosen the clearest or most precise language in a statute. The courts may look "to case law or related statutory provisions which define the term, and where a statute does not specifically define words of common usage, such words are construed in their plain and ordinary sense."

- In some instances vagueness issues may be avoided by defining a term in a bill, such as when a term has a technical or specialized meaning or is defined by reference to definitions of the term in various statutes that may be inconsistent, inapposite or conflicting. Vagueness issues may also be avoided by the inclusion of a mens rea or scienter requirement.

RECOMMENDATIONS

Staff recommends that legislators use this report as an informational resource on the single subject rule, the prohibition against ex post facto laws, the separation of powers doctrine, the nondelegation doctrine, the overbreadth doctrine, and the void-for-vagueness doctrine.

Staff recommends that special attention be paid to the Florida Supreme Court's single subject analysis because the Court has recently clarified that analysis. Based on staff's review of the Court's analysis, staff is of the opinion that legislators should be cautious about using broad subjects like "criminal justice" in criminal legislation.