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Volume XI, No. 2 **THE FLORIDA BAR** **Winter 2003**

When a State Court Cannot Bar Federal Review

by Gary Caldwell

A state court's use of a procedural default with respect to an issue of federal law usually, but not always, bars Supreme Court review of the state court's decision, even if the state court has ruled on the merits of the issue.[1] The question of whether the procedural default will bar federal review is itself a question of federal law to be determined by the federal court. *See Douglas v. Alabama*, 380 U.S. 415, 422 (1965). This article discusses three situations in which a state procedural default may not bar federal review.

1. *The state procedural rule has not been consistently or regularly applied.*

In *Staub v. City of Baxley*, 355 U.S. 313 (1958), Rose Staub, an orgarnizer for the International Ladies' Garment Workers Union ran afoul of the authorities in Baxley, Georgia, who prosecuted her for violation of an ordinance regulating the solicitation of union memberships. After she was convicted in the Mayor's Court, the state appellate court affirmed, relying, in part on the procedural ground that, although she had attacked the ordinance as a whole, she had failed to challenge its subsections individu-

See "Federal Review," page 2

Message from the Chair

by Angela C. Flowers

This year's renewed focus is on professionalism. As a profession, lawyers are called to conform to specific ethical standards. It is up to each of us to fulfill the ideals we swore to uphold in the oath of admission to The Florida Bar. These ethical standards represent the minimum requirements of the profession. Professionalism is a higher standard.

I proudly believe that appellate practitioners, as a group, are among the most professional of lawyers. The very nature of our practice lends itself to conducting ourselves with professionalism. The formality of the appellate courts engenders respect and the search for justice and integrity. We hold each other accountable for being diligent in conducting a good faith analysis of our client's legal rights and treating opposing parties and counsel with fairness and civility.

No matter how noteworthy we consider our past efforts, we should continually strive to improve the profession in everything we do. We can accomplish much when we lead by example. This is especially true when litigating with those who do not specialize in appellate practice. If you do not do so already, call your opposing counsel when he files a premature appeal and offer to coordinate relinquishment to perfect the appeal, agree to motions whenever you can, and shake the hand of your opponent after oral argument and tell him what a good job he did. By our conduct, we can create a more pleasant working environment and contribute to the dignity of the legal system.

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ally. The Supreme Court found no obstacle to federal review, noting that the state supreme court had only four years before found that one could challenge a law as a whole in the manner used by Staub, and that the state supreme court ruling was in keeping with a long line of precedents. *Id*. at 320.

A somewhat similar situation arose in *N.A.A.C.P. v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). The state attorney general obtained a contempt order against the Association in state court. The state supreme court denied the Association's certiorari petition, holding that the proper way to obtain review was by petition for the writ of mandamus. Again, the Supreme Court looked to prior state court decisions which allowed certiorari review in similar circumstances in concluding that there was no obstacle to its review. The Court wrote at pages 457-58: "Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights."

The lesson of these cases is that "a state procedural ground is not 'adequate' unless the procedural rule is 'strictly or regularly followed.'" *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964) (citing *Patterson* and other cases).

Anyone who has handled many appeals may have a sneaking suspicion that the courts are not always entirely rigorous in deciding issues of procedural default. Nevertheless, a claim of inconsistency must meet the hurdle of proof. Such proof could be available in circumstances such as arose in *Trotter v. State*, 576 So.2d 691, 693 (Fla.1990) in which the state supreme court arguably altered the rules regarding the preservation of issues concerning jury selection, and the new rule was applied retroactively.

2. Resolution of the state procedural law question depends on a federal constitutional ruling.

Upon his arrest for murder in Oklahoma, Glen Burton Ake's behavior in court was so bizarre that the judge ordered a mental examination, which led to a determination that he was incompetent to stand trial. *Ake v. Oklahoma*, 470 U.S. 68 (1985). After Ake was restored to competency by the use of 200 milligrams of Thorazine three times daily, counsel explored an insanity defense, and contended that Ake, an indigent, had the constitutional right to obtain funds for the assistance of a psychiatrist in preparing the defense. The trial judge rejected this claim. On appeal from Ake's conviction and death sentence, the state appellate court ruled against Ake on the merits of his claim, but also ruled that he had waived the issue by failing to raise it on his motion for new trial as required by state law.

Notwithstanding the state court's finding of a procedural default, the Supreme Court found no bar to its review. It noted that Oklahoma did not apply the default rule to federal constitutional errors, which were treated as "fundamental." It reasoned that, since determination to use the default necessarily entailed determination whether there was a federal constitutional error, the application of the default was itself an adjudication of the merits of the federal constitutional claim:

The Oklahoma waiver rule does not apply to fundamental trial error. [Cit. to state cases.] Under Oklahoma law, and as the State conceded at oral argument, federal constitutional errors are "fundamental." Tr. of Oral Arg. 51-52; [cit. to state cases]. Thus, the State has made application of the procedural bar depend on an antecedent ruling on federal law, that is, on the determination of whether federal constitutional error has been committed. Before applying the waiver doctrine to a constitutional question, the state court must rule, either explicitly or implicitly, on the merits of the constitutional question.

As we have indicated in the past, when resolution of the state procedural law question depends on a federal constitutional ruling, the state law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded. *See Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion"); *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157, 164 (1917) ("But where the non-Federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain"). In such a case, the federal law holding is integral to the state court's disposition of the matter, and our ruling on the issue is in no respect advisory. In this case, the additional holding of the state court – that the constitutional challenge presented here was waived – depends on the court's federal law ruling and consequently does not present an independent state ground for the decision rendered. We therefore turn to a consid-

This newsletter is prepared and published by
the Appellate Practice and Advocacy Section of The Florida Bar.

eration of the merits of Ake's claim. *Id*. 74-75.

Like Oklahoma, Florida has a rule of "fundamental error" which excuses procedural defaults, although it does not apply to all constitutional errors, and in fact its definition is rather fuzzy. Nevertheless, the supreme court has held that an error is fundamental "when it goes to the foundation of the case or the merits of the cause of action and is equivalent to a denial of due process." *J.B. v. State*, 705 So.2d 1376, 1378 (Fla.1998). Thus determination of whether an error is fundamental may necessarily entail a determination of whether it involves a due process violation, and application of a default may require determination of a federal constitutional question in the manner set out in *Ake*.

2. *The objection was ample and timely to bring the alleged federal error to the state court's attention.*

George Wechsler, having been injured on a railroad, brought suit in state court. The defendant "pleaded a general denial and also that the Court was without jurisdiction" on federal law grounds. *Davis v. Wechsler*, 263 U.S. 22, 24, 44 S.Ct. 13, 14 (1923). He later amended his complaint to name a substituted defendant, who entered an appearance and adopted his predecessor's answer. On the defendant's appeal from judgment for Wechsler, the appellate court held that the successor defendant had waived his jurisdictional argument by entering an appearance. The Supreme Court determined that there was no bar to federal review, with Justice Holmes writing for the Court: "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. … . The state courts may deal with that as they think proper in local matters but they cannot treat it as defeating a plain assertion of Federal right." *Id*.

The Court applied similar logic in *Douglas v. Alabama*, 380 U.S. 415 (1965). There, counsel thrice objected, and moved for a mistrial, regarding the state's use of a co-defendant's confession, saying that it was hearsay and not subject to cross-examination. He did not, however, object to specific individual matters contained in the confession, and the state appellate court found a procedural default, writing: "After the solicitor read portions to him and Loyd [the co-defendant] began claiming immunity from self-crimination throughout the twenty-one questions, Douglas's counsel stopped objecting. In this state of the record, even though it might be claimed that the repeated and cumulative use of the confession might have been an indirect mode of getting the inadmissible confession in evidence, yet the failure to object was waiver." *Douglas v. State*, 163 So.2d 477, 495 (Ala.App. 1963). The Supreme Court considered that Douglas had fairly presented the ground for the objection to the judge and that nothing would have been served by objecting further under the circumstances. It wrote at page 422 that "an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests, and therefore sufficient to preserve the claim for review here."

The Court seemed to take this principle a step further in *Osborne v. Ohio*, 495 U.S. 103 (1990). Just before his trial for possessing child pornography, Clyde Osborne unsuccessfully moved to dismiss the case arguing that the statute was unconstitutionally vague because it criminalized the innocent possession of nude photographs of children. *Id*. at 123-24. Defense counsel presented no proposed defense instructions requiring that the jury make a finding of lewdness at that time, and made no objection to the judge's charge to the jury, which contained no instruction on lewdness. *Id*. Although the state contended that the issue of the failure to instruct on lewdness was defaulted under Ohio law, the Court held that counsel's argument was sufficient to put the issue before the trial court and, "under the circumstances, nothing would be gained by requiring Osborne's lawyer to object a second time, specifically to the jury instructions. The trial judge, in no uncertain terms, rejected counsel's argument that the statute as written was overbroad." *Id*. at 124. Hence, relying on *Douglas*, the Court found no procedural bar to review of Osborne's claim.

The Court followed *Douglas* and *Osborne* recently in *Lee v. Kemna*, 534 U.S. 362 (2002). At Remon Lee's murder trial, his witnesses left the courthouse before being called to the stand and apparently disappeared. The judge denied Lee's motion for continuance so that counsel could try to find the witnesses. Upon Lee's appeal from his conviction, the appellate court "held the denial of the motion proper because Lee's counsel had failed to comply with Missouri Supreme Court Rules not relied upon or even mentioned in the trial court", which required that a motion for continuance be in writing and accompanied by an affidavit. *Id*. at 366. On federal habeas corpus review, the Supreme Court ruled that, pursuant to *Osborne*, this subsequently-applied procedural bar could not bar Lee's claim under the circumstances of the case.

Situations similar to those in *Osborne* and *Lee* often develop in Florida cases. Florida law requires that a party renew a pretrial objection to evidence in order to preserve the objection for appeal, even if the judge's ruling occurred immediately before the trial began. In such a case, *Osborne* may afford an avenue for federal review. Likewise, under the "tipsy coachman" doctrine, an appellate court may devise a procedural waiver even when none was contemplated in the trial court. Counsel contemplating federal review in such a case should study *Lee* to determine if the state procedural bar may be overcome.

Endnote:

[1] The state court must actually employ the procedural bar before it can be a bar to federal review: "The mere existence of a basis for a state procedural bar does not deprive this Court of jurisdiction; the state court must actually have relied on the procedural bar as an independent basis for its disposition of the case." *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985).

Gary Caldwell *is an assistant public defender in the office of Carey Haughwout, Public Defender of the Fifteenth Judicial Circuit.*

Florida Civil Appellate Opinions

by Randall Reder

In *Stallworth v. Moore*, 827 So. 2d 974 (Fla. 2002), the Florida Supreme Court held it has neither discretionary review nor extraordinary writ jurisdiction to review "per curiam denied" decisions issued without opinion or explanation. In the decision, the Court consolidated several petitions for review. Three petitioners sought to invoke the Court's "all writs" jurisdiction, under article V, § 3(b)(7), Florida Constitution, to review decisions denying a petition for writ of certiorari and a petition for writ of habeas corpus/belated appeal. Another petitioner filed a notice to invoke the Court's discretionary jurisdiction pursuant to article V, section 3(b)(3), seeking review of the denial of a petition for writ of certiorari. The final petitioner filed a petition for writ of habeas corpus under art. V, § 3(b)(9), seeking review of the district court's denial of a petition for writ of habeas corpus.

The Court noted that in substance, if not in form, the district court decisions were "all per curiam denials of relief issued without opinion or explanation." *Id.* at 976. The Court went on to explain that it would not entertain any motions for rehearing or clarification any cases dismissed in the future based on the reasoning set forth in its opinion. *See id.* at 979.

In connection with this holding, the Florida Supreme Court amended Florida Appellate Rule 9.330, governing rehearing, clarification and certification, to specifically address the procedure for requesting a District Court of Appeal to issue a written opinion. The amendment states:

> When a decision is entered without opinion and a party believes that a written opinion would provide a legitimate basis for supreme court review, the motion may include a request that the court issue a written opinion. If such a request is made by an attorney, it shall include the following statement:
>
> "I express a belief, based upon a reasoned and studied professional judgment, that a written opinion will provide a legitimate basis for supreme court review because (state with specificity the reasons why the supreme court would be likely to grant review if an opinion were written)."

Amendments to Florida Rules of Appellate Procedure, 827 So. 2d 888 (Fla. 2002).

In *Lussy v. Fourth District Court of Appeal*, 828 So. 2d 1026 (Fla. 2002), the Florida Supreme Court took the highly unusual step of dismissing the pleadings filed by a pro se litigant and ordering the clerk not to accept any further filings unless signed by a member of The Florida Bar. The Court noted the pro se litigant had "abused the processes of this Court with his constant filings," and had been chastised by both state and federal judges in Montana for abusing the judicial system. *See id.* at 1027-28.

There have been a few recent district court decisions concerning the finality of judgments for purposes of appeal. The Fifth District has held that although an order captioned "Order Granting Final Summary Judgment" did not seem to indicate finality, the order was, in fact, final because the body specifically provided: "Final Summary Judgment is entered herein in favor of Defendant." *Boyd v. Goff*, 828 So. 2d 468 (Fla. 5th DCA 2002). The Fourth District held that a notice of appeal filed within thirty days of entry of a corrective final judgment was not timely with respect to the original judgment that was final, notwithstanding the fact that the original judgment did not contain the words "for which let execution issue." *Friedman v. Friedman,* 825 So. 2d 1010 (Fla. 4th DCA 2002). Finally, the First District concluded that an order stating, "Plaintiff's Second Amended Complaint shall be dismissed with prejudice and judgment in favor of defendant shall be entered" was a nonfinal, nonappealable order because it only established entitlement to a judgment and did not actually enter or render a judgment. *Hoffman v. Hall*, 817 So. 2d 1057 (Fla. 1st DCA 2002). Interestingly, the Court refused to relinquish jurisdiction to permit entry of a final order.

Randall Reder *is a sole practitioner in Tampa. He provides a weekly email service summarizing Florida appellate decisions called Reder's Digest. For more information visit his website at* www.redersdigest.com.

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Section To Prepare Pro Se Handbook

The mass of pro se litigation is finding its way from the trial courts into the appellate courts, and the Appellate Practice Section is responding by preparing a handbook to help pro se litigants understand what they need to do to obtain appellate review of a trial court decision. At the Section's meeting in Boca Raton, the Executive Council approved the recommendation of Supreme Court Clerk and council member Tom Hall to tackle the issue, and formed a committee to create such a handbook.

"Florida's courts are overwhelmed with pro se litigants and it has now reached the appellate courts," Hall said. "I thought this section could put together a handbook that the clerks could mail to these people to help them with their appeals. I don't think this is going to take work away from appellate attorneys because, candidly, these people don't want an appellate attorney or they can't afford one."

Noting that the project was going to take a lot of work, and expressing a hope that the Florida Bar Foundation might fund the project, Hall pointed out that several other states had prepared similar handbooks, with Missouri providing an example of a good guide.

Following the creation of the committee, Dorothy Easley did extensive research into other jurisdictions' approaches to the situation, and provided the committee with an exhaustive compilation of such resources that is proving to be of enormous value in approaching the task.

At the September 2002 section meetings in Tampa, the committee discussed various approaches to the creation of such a handbook, and the best means to get the information to potential pro se appellate litigants. It was tentatively decided that the committee would seek to create one version of the handbook available on the Internet and another in printed form to be made available at trial court clerk's offices. The committee also discussed how to structure the handbook to make it readily understandable and to address the most common issues pro se appellate litigants face. Since September the members have been working on a preliminary draft of the handbook, which will be discussed at the mid-year meeting in Miami in January 2003.

In Remembrance of Judge Jerry R. Parker

by Tracy Leduc, staff attorney to Judge Jerry R. Parker

On January 11, 2003, Judge Jerry Parker lost his 18-month long battle with cancer. With his death, the State lost a dedicated judge; the courts lost a great legal mind; and those of us who knew him lost a friend.

Judge Parker was born in Oilton, Oklahoma, an oil company town that no longer exists. His mother raised him and his two siblings to respect the value of education and to understand the value of hard work. Judge Parker worked to put himself through college and law school. Upon his graduation from law school in 1966, he joined the FBI, where he was immediately assigned to handle civil rights issues in Mississippi. In 1973, he came to Clearwater to join the State Attorney's Office. He was elected to the Pinellas County court bench in 1973. Thereafter, he was appointed to the Sixth Judicial Circuit Court in 1976, and to the Second District Court of Appeal in 1988.

At Judge Parker's memorial service, Judges John Blue and Chris Altenbernd spoke of their years serving with Judge Parker at the Second District. Tracy Leduc, one of Judge Parker's staff attorneys, shared her experience of working for him. Several of Judge Parker's life-long friends told stories of his law school days, his service in the FBI, and his years as an assistant state attorney. Colonel William Eleazer paid tribute to Judge Parker's dedicated work with Stetson students in the trial advocacy courses and on the mock trial teams. He also praised Judge Parker for authoring the trial problems used for the past thirteen years at the National Trial Competition.

Most of the attorneys who practiced before Judge Parker saw only the gruff and intimidating exterior that he showed in public. Those who worked with him, however, knew a man who truly cared about his family, the court, and his staff. In a letter Judge Parker wrote to be read at his memorial service, he told his family and close friends how much they had meant to him. He thanked his staff for their hard work and friendship. And he encouraged all in attendance to let their families and friends know every day how much they mean to them.

The Second District will miss Judge Parker's leadership and guidance. All who knew him will miss his sharp legal mind and his keen sense of commitment and duty.

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This Is Dedicated to the Palm I Love

byValeria Hendricks, Co-Editor

It was a perfectly cool and sunny day (not a dark and stormy night) when the Third District Court of Appeal dedicated the Judge James R. Jorgenson Gardens at it headquarters in Miami on January 16, 2003. The Judge Jorgenson Gardens, which are landscaped in native and rare trees, shrubs, and plants, are the product of a community vision to provide a green space for reflection and to propagate plant species that are in danger of extinction. The design for the gardens was based upon ancient Chinese "philosopher gardens" used by great minds such as Lao Tse, the founder of Taoism, for reflection and meditation. It features twelve squares, each containing different species of palms, including the rare and beautiful petticoat palm. One can stroll through paths to shady or sunny sitting areas. It even has a picnic table to enjoy lunch while contemplating the many cases that the court decides each year.

Judge Jorgensen poses with a mounted plaque at the entrance to the palm gardens.

Chief Judge Schwartz paid tribute to his colleague, Judge Jorgenson, who first conceived the idea for the gardens more than ten years ago. Judge Jorgenson collaborated with the Miami-Dade Parks and Recreation Department, Fairchild Tropical Garden, and Florida International University to design and implement the project. Bruce Greer, of the Fairchild Tropical Garden Board of Trustees, also praised Judge Jorgenson and the Third District for their vision in creating the gardens. In attendance at the dedication were many members of the community, Judge Jorgenson's family, the Third District (past and present), the other district courts of appeal, including Judge Winifred Sharp of the Fifth District, and the Appellate Practice Section, including our president Angela Flowers, who formerly clerked for Chief Judge Schwartz.

The palm gardens– landscaped in native and rare trees, shrubs, and plants– is the product of a community vision to provide a green space and to propagate plant species that are in danger of extinction.

Members of the Court pose with the plaque.

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