The Battle of the Constitutional Rights: Florida's Right to Privacy involving medical and autopsy records and how it interacts with Florida's right to public records and public meetings

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I. Introduction

Florida's right to privacy, FLA. CONST. ART. I, § 23, and right to public records, FLA. CONST. ART. I, §. 24, are codified in the Florida Constitution's Declaration of Rights. While the two must coexist, the language of both indicates a counterintuitive conflict:[1] the right to privacy yields to the public's right of access to public records and meetings[2]; however, the right to public records and meetings is not absolute because the Legislature may make exempt certain records from the public domain.[3] When the Legislature does so, deference returns to the right of privacy.[4] Medical (and autopsy) records render the situation even more difficult: while many of those records are public, oftentimes the subject of those records (or their families) wishes to keep the information confidential and argue that the right of privacy should override any conflicting codified provisions.

This analysis considers the following scenarios: how medical and autopsy records interact with the right to public records, both in Florida and on the national level[5]; how the Florida Legislature directly responded to one of those issues when the (autopsy) records at issue were not exempt; and how public meetings and the right to privacy interact in Florida.

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[1] *Earnhardt v. Volusia* was a classic example of that very conflict. In order to resolve it, the Legislature had to directly respond by using their exemption powers under FLA. CONST. ART. I, § 24. *Earnhardt v. Volusia County*, 2001 WL 992068 (Fla. Cir. Ct.)

[2] "This section shall not be construed to limit the public's right of access to public records and meetings as provided by law." FLA. CONST., ART. I, § 23.

[3] There is a difference between making exempt public records from inspection and making records exempt and confidential. *See supra* footnotes 9 and 10.

[4] FLA. CONST. ART. I, § 24 states that: "The legislature…may provide by general law…for the exemption of records from the requirements of subsection (a) and the exemption of meetings from the requirements of subsection (b), provided that such law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law.

[5] The national "right to privacy" provision is codified in the U.S. CONST., 14TH AMEND.

II. FLA. CONST., ART. I, § 23-24.

The following are the relevant provisions at issue:

Every person has the right to be let alone and free from governmental intrusion into the person's private life except as provided herein. *This section shall not be construed to limit the* public's *right of access to public records and meetings as provided by law."* **FLA. CONST. ART. I, § 23 [emphasis added]; and**

"(a) Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, *except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution.* This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

(b) All meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public and meetings of the legislature shall be open and noticed as provided in Article III, Section 4(e), *except with respect to meetings exempted pursuant to this section or specifically closed by this Constitution.*

(c) This section shall be self-executing. The legislature, however, may provide by general law passed by a two-thirds vote of each house for the exemption of records from the requirements of subsection (a) and the exemption of meetings from the requirements of subsection (b), provided that ***such law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law****.*

Fla. Const. art. I, § 24, Florida Constitution [emphasis added]

A. History of FLA. CONST. ART I., § 23 AND 24

Florida' right to privacy was not formally recognized until 1980, when Jon Mills, Manning J. Bauer, Fred Goddard, successfully advanced it as an addition to Florida's Constitution.[6]

[6] State of Fla., Constitution Revision Commission Amendments, Election (1980), *available at*: http://www.law.Fla. Stat.u.edu/crc/

Florida's Public Records Law has more extensive history. Chapter 119 of the Florida Statutes, which today, inter alia[7], defines public records, was codified in 1909.[8] Under it, all government records were open to inspection and copying unless specifically made exempt.[9] This tradition of open access climaxed in the November 1992 election when Florida voters approved a constitutional amendment[10] that the elevated access to public records to constitutional status. Specifically, it made records made or received in connection with the official business of three branches of government of any departments created under them, per FLA.STAT. CH. 119, available to the public. Codified as FLA. CONST. ART. I, § 24, [11] the amendment stipulated that the Legislature may make exemptions to FLA. STAT. CH. 119, so long as those exemptions "state with specificity the public necessity justifying the exemption" and are "no broader than necessary to accomplish the stated purpose of the law." [12]

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[7] Latin for "among other things." *Black's Law Dictionary*, 2001 Edition.
[8] Barbara Peterson, CFP'93, FLA. JOINT COMMITTEE ON INFORMATION TECHNOLOGY RESOURCES, ACCESS VERSUS PRIVACY IN FLORIDA (1993); 1909 Laws of Florida, chapter 5942, sec. 1, stated: "All state, county, and municipal records shall at all times be open for a personal inspection of any citizen of Florida."
[9] *Id*. That section paralleled the soon-to-be FLA. CONST. ART. I, § 24. FLA. CONST. ART. I, § 24 provides that only the Legislature can create exemptions to Florida's Public Records Law.
[10] Appellees'Answer Brief at 17, *Campus v. Earnhardt*, 821 So.2d 388 (Fla. 5th DCA 2001). (No.5D01-2419)
"Attorney General Butterworth proposed the adoption of Sec. I, Article 24, as a constitutional amendment in response to the Supreme Court's initial opinion in *Locke v. Hawkes*, 1991 WL 231589 (Fla. 1991). Although the court subsequently agreed to hear the case, the initial opinion made clear that the only effective way to assure public access to all three branches of government was to secure this right in the Florida Constitution." *Id*.
[11] *Id*.
[12] *Id. citing* Gleason, Patricia and Wilson, Joslyn, "The Florida Constitution's Open Government Amendments: Article I, Section 24, and Article III, Section 4(e), - Let the Sunshine In!" 18 Nova Law Review, 973 (1994).

B. Florida's Right to Public Records

Along with those requirements, laws mandating FLA. STAT. CH. 119exemptions are subject to other requirements of FLA. CONST. ART. I, § 24.[13] For example, a law creating and exemption also 3) must relate to one subject; 4) must contain only exemptions to public records or meeting requirements; and 5) may contain provisions governing enforcement.[14] Therefore, unless materials are made exempt by the Legislature according to these standards, the records are open for public inspection, whether or not they are in final form.[15] Because there is a presumption in favor of open government, exemptions from disclosure are "to be narrowly construed so they are limited to their stated purpose."[16] In fact, Florida has one of the most liberal policies favoring disclosure of public records in the country.[17]

It is also important to note how FLA. STAT. CH. 119.07 (2004) and FLA. CONST. ART. I, § 24 interplay. While FLA. CONST. ART. I, § 24 gives the public the right to inspect public records, FLA. STAT. CH. 119.07(1) *requires* a custodian of a public record (not exempt from disclosure per the requirements of FLA. CONST. ART. I, § 24) to permit any person who so desires[18] to inspect it, (and copy it, for a reasonable fee), at any reasonable

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[13] STATE OF FLA., CRIMINAL JUSTICE COMM. SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT, SB 1356, 1ST SESSION, AT 4 (1994).
[14] ID. For the Earnhardt case, however, these factors are not especially relevant and are not discussed.
[15] *Id.*
[16] *Id. citing Krischer v. D'Amato*, 674 So.2d 909, 911 (Fla. 4th DCA 1996).
[17] Barbara Peterson, CFP'93, FLA. JOINT COMMITTEE ON INFORMATION TECHNOLOGY RESOURCES, ACCESS VERSUS PRIVACY IN FLORIDA (1993).
[18] FLA. STAT. CH. 119.12 (2004) creates a statutory entitlement to attorney's fees when the party seeking public records is unlawfully refused such request. FLA. STAT. CH. 119119.12(1)(2004).

time, under reasonable conditions, and under supervision by such custodian.[19] FLA. STAT. CH. 119.07 also sets forth the definition of public records, as well as certain (codified) exemptions of certain records.[20] (However, the Florida Supreme Court has interpreted their own definition of public records: "all materials made or received by an agency in connection with official business, which are used to perpetuate, communicate, or formalize knowledge.")[21]

Not all exemptions by FLA. CONST. ART. I, § 24 from FLA. STAT. CH. 119 are created equal, however: "exempt and confidential" records are those that the Legislature makes confidential, with no possibility for its release, by any "agency to anyone other than to the persons or entities in the statute."[22] On the other hand, records that the Legislature has made exempt from public inspection simply mean that "an agency is not prohibited from disclosing the record in all circumstances."[23] A disclosure requirement exemption, however, does not render a record privileged so as to supercede discovery under the Florida Rules of Civil Procedure.[24] Nevertheless, in the past, the Legislature has created an express privilege from discovery of a record; generally, records of medical

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[19] FLA. STAT. CH. 119.07(1)(a)(2004).

[20] The term "public records" has been defined by the Florida Legislature to include: "…all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." FLA. STAT. CH. 119.011(1) (2004)

[21] STATE OF FLA., CRIMINAL JUSTICE COMM. SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT, SB 1356, 1ST SESSION, AT 4 (1994) CITING *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

[22] *Id. citing* Attorney General Opinion 85-62.

[23] *Id. citing Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), rev. denied, 589 So.2d 289 (Fla. 1991).

[24] *Id. citing Department of Professional Regulation v. Spiva*, 478 So.2d 382 (Fla. 1st DCA 1985).

review committees are privileged from discovery.[25]

In 1995, the Legislature passed The Open Government Sunset Review Act, FLA. STAT. CH.119.15, which established a review and repeal process and even *more* carefully defined the requirements of an exemption:

> … an exemption may be created or maintained only if it serves an *identifiable public purpose.* An identifiable public purpose is served if the exemption 1) Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, the administration of which would be significantly impaired without the exemption; 2*) Protects information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals;* or 3) Protects information of a confidential nature concerning entities, including but not limited to, a formula, pattern, device, combination of devices, or compilation of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace.[26] [emphasis added][27]

It may be inferred, since this Act was passed in 1995 (after art. I, § 24), that an *identifiable public purpose* is a form of "public necessity" that requires more specificity and is more difficult to satisfy per the above requirements than was originally intended by the Legislature in 1992.

III. The Major Interaction of Florida's Right to Privacy Concerning Autopsy Records and How it Interplays with Florida's Right to Public Records

[25] *Id. citing Cruger v. Love*, 599 So.2d 111 (Fla. 1992).
[26] FLA. STAT. CH. 119.15 (2004)
[27] The italicized word are the provisions related to the *Earnhardt* case.

Probably the biggest clash of FLA. CONST. ART. I, § 23 - 24 occurred in late February 2001. It was then [28] when revered NASCAR driver Dale Earnhardt died in a car crash during the last lap of the Daytona 500.[29]

On February 19, the Volusia County medical examiner performed an autopsy, pursuant to FLA. STAT. CH. 406.11(2)(a) (2001), which requires autopsies to be performed when any person dies in the state by accident. Such statute states that a medical examiner

> …shall have the authority in any case coming under subsection (1) to perform, or have performed, whatever autopsies or laboratory examinations he or she deems necessary and in the public interest to determine the identification of or cause of manner of death of the deceased or to obtain evidence necessary for forensic examination.[30]

The Medical Examiner took 33 autopsy photographs which, according to the Medical Examiner, "were not of diagnostic quality and were taken solely as a back-up to the dictation system utilized by the medical examiner to record his findings…"[31] At this time,[32] any records, reports, photographs, and videos, made or received as part of a medical examiner performing autopsies as part of his statutory duty, were public records open to public inspection and able to be copied.[33]

On Thursday, February 22, 2001, Dale Earnhardt's wife, Teresa Earnhardt, and the estate of Dale Earnhardt, instituted an action seeking an injunction preventing the Volusia County medical examiner from releasing the Autopsy photographs taken of Mr.

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[28] Specifically, on February 18, 2001.
[29] *Campus Communications v. Earnhardt,* 821 So.2d 388 (Fla. 4th DCA 2002).
[30] FLA. STAT. CH. 406.11(2)(a) (2004).
[31] *Earnhardt*, 827 So.2d 388, 391.
[32] Prior to the enactment of Fla. Stat. §406.135 (2001).
[33] STATE OF FLA., CRIMINAL JUSTICE COMM. SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT, SB 1356, 1ST SESSION, AT 4 (1994)

Earnhardt to the public.[34] The Earnhardts sought relief based on the right of privacy arising under FLA. CONST. ART. I, § 23 and the U.S. CONST., 14TH AMEND.[35] The trial court entered said ex parte[36] injunction the following day.[37] The injunction prohibited the Medical Examiner from releasing the photographs to the public.[38] Since only the photographs, audio and video recordings were exempted, however, the Medical Examiner did[39] make available other information concerning Mr. Earnhardt's autopsy to the public: first, photographs of the wrecked car in which Earnhardt died and secondly, the written autopsy report which included: I) a sketch showing the markings on Earnhardt's body, II) a toxicology report, III) an extensive description of Earnhardt's injuries; IV) data about Earnhardt's physical condition.[40]

One day after the injunction issued, the Orlando Sentinel made a request for access to the Autopsy Photographs.[41] On February 23, 2001, Michael Uribe, a webmaster who specializes in websites that include autopsy photos, also made a request for the Autopsy Photographs.[42] Due to the injunction, the Medical Examiner denied both requests.[43] The Orlando Sentinel and Uribe were granted leave to intervene on March 2,

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[34] *Volusia*, 2001 WL 992068 (Fla. Cir. Ct.)
[35] *Id*. at p. 4.
[36] The definition of "ex parte" is: done or made at the instance and for the benefit of one party only, and without notice to, or argument by, any person adversely interested; of or relating to court action taken by one party without notice to the other, usually for temporary or emergency relief. *Black's Law Dictionary*, West Group 2001.
[37] *Volusia County*, 2001 WL 992068 (Fla. Cir. Ct.)
[38] *Id*.
[39] Pursuant to FLA. CONST. ART I, S. 24 and FLA. STAT. CH. 119.07(1) requirements
[40] Appellees'Answer Brief at 4, *Earnhardt*, (No.5D01-2419)
[41] *Volusia*, 2001 WL 992068 (Fla. Cir. Ct.)
[42] *Id*. at 392.
[43] *Id*.

2001.[44] Per a court-ordered mediation on March 16, the Orlando Sentinel and the Earnhardts reached a settlement whereby the mediator appointed an independent expert to review the autopsy photographs and audiotapes and report his findings.[45]

On March 16, 2001, Campus Communications (publisher of the Independent Florida Alligator), requested access to the photographs.[46] Again, the medical examiner denied their request, and on April 5, Campus' motion to intervene was also granted.[47]

A. The Family Protection Act, Fla. Stat. § 406.135

The Florida legislature also responded to the tragedy. On March 29, 2001, while the temporary injunction was still in effect (and before the *Campus v. Earnhardt* bench trial), the Florida legislature adopted the Family Protection Act[48], FLA. STAT. CH. 406.135, (2001), which states in relevant part:

> [1]406.135 **Autopsies; confidentiality of photographs and video and audio recordings.**-- (*1) A photograph or video or audio recording of an autopsy in the custody of a medical examiner is confidential and exempt from the requirements of s. 119.07(1) and s. 24(a), Art. I of the State Constitution, except that a surviving spouse may view and copy a photograph or video or listen to or copy an audio recording of the deceased spouse's autopsy.* If there is no surviving spouse, then the surviving parents shall have access to such records. If there is no surviving spouse or parent, then an adult child shall have access to such records. A local governmental entity, or a state or federal agency, in furtherance of its official duties, pursuant to a written request, may view or copy a photograph or video or may listen to or copy an audio recording of an autopsy, and unless

[44] Appellees' Answer Brief at 5, *Earnhardt*, (No.5D01-2419)
[45] The expert was Dr. Barry Myers of Duke University, recognized in the biomechanics field. Dr. Myers issued a detailed report of his findings, which included his assessment of the Earnhardt autopsy as it related to the cause of Earnhardt's death. This report was also available to the public. Thereafter, the photographs were permanently sealed. [45] Appellees' Answer Brief at 6, *Earnhardt*, (No.5D01-2419)
[46] *Id*. at 6.
[47] *Id*.
[48] The Act received bi-partisan support, was signed into law by the Governor that same day, March 29, 2001, and became effective that same day. *Id*.

> otherwise required in the performance of their duties, the identity of the deceased shall remain confidential and exempt. The custodian of the record, or his or her designee, may not permit any other person to view or copy such photograph or video recording or listen to or copy an audio recording without a court order
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> (2)(a) *The court, upon a showing of good cause, may issue an order authorizing any person to view or copy a photograph or video recording of an autopsy or to listen to or copy an audio recording of an autopsy and may prescribe any restrictions or stipulations that the court deems appropriate.* In determining good cause, the court shall consider whether such disclosure is necessary for the public evaluation of governmental performance; the seriousness of the intrusion into the family's right to privacy and whether such disclosure is the least intrusive means available; and the availability of similar information in other public records, regardless of form. In all cases, the viewing, copying, listening to or other handling of a photograph or video or audio recording of an autopsy must be under the direct supervision of the custodian of the record or his or her designee.
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> (b) A surviving spouse shall be given reasonable notice of a petition filed with the court to view or copy a photograph or video recording of an autopsy or a petition to listen to or copy an audio recording, a copy of such petition, and reasonable notice of the opportunity to be present and heard at any hearing on the matter. If there is no surviving spouse, then such notice must be given to the deceased's parents, and if the deceased has no living parent, then to the adult children of the deceased.
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> (4) This exemption shall be given retroactive application.
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> (5) The exemption in this section is subject to the Open Government Sunset Review Act of 1995 in accordance with s. 119.15, and shall stand repealed on October 2, 2006, unless reviewed and saved from repeal through reenactment by the Legislature.
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> [1]**Note.**--Section 3, ch. 2001-1, provides that "[t]his act shall take effect upon becoming a law, and shall apply to all photographs or video or audio recordings of an autopsy, regardless of whether the autopsy was performed before or after the effective date of the act." **[emphasis added]**

In summation, the Act makes photographs, video and audio recordings of autopsies in the possession of a medical examiner confidential and exempt from the inspection and copying requirements of FLA. STAT. CH. 119.07(1) and FLA. CONST. ART I, § 24(A).[49] A

[49] STATE OF FLA., CRIMINAL JUSTICE COMM. SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT, SB 1356, 1ST SESSION, AT 7 (1994).

surviving spouse, however, may view, listen to, and copy the autopsy records.[50] The statute authorizes a governmental entity, or state or federal agency in furtherance of its duties, upon written request, view, listen to, or copy such photographs or video or audio recordings.[51] Additionally, the court may issue an order authorizing any other person to view or copy a photograph or video of an autopsy (or listen to or copy an audio recording of the autopsy) upon a showing of good cause.[52] It is a felony of the 3rd degree for any custodian of a photo or video or audio recording of an autopsy to knowingly violate the provisions of that section.[53]

Upon the Act's passage, the Earnhardts amended their request to include permanent injunctive relief under the statute.[54]

B. Campus Challenges the Constitutionality of the Family Protection Act

Campus then filed a cross-claim against the medical examiner seeking an order under the Public Records Act requiring the medical examiner to allow inspection and copying of the photographs.[55] After a bench trial, the trial court rendered its decision that the Act was constitutional, remedial in nature and properly applied retroactively to the requests made by Campus and Uribe.[56] Further, Campus and Uribe had failed to meet

[50] In the absence of a surviving spouse, the parents of the deceased may. *Id*.
[51] *Id*.
[52] *Id*. "In determining good cause, the court must consider: whether such disclosure is necessary for the public evaluation of governmental performance; the seriousness of the intrusion into the family's right to privacy and whether such disclosure is the least intrusive means available; and the availability of similar information in other public records, regardless of form. *Id*.
[53] *Id*.
[54] *Earnhardt*, 821 So.2d 388, 392.
[55] *Id*.
[56] *Id*.

their burden of demonstrating good cause for an order permitting access to the photographs.[57]

IV. The Trial Court's Findings

A. The Legislature "stated with specificity the public necessity justifying the exemption" as described in the Family Protection Act

The trial court determined that the statute "easily met" the "constitutional specificity requirement" established in FLA. CONST. ART I, § 24 because the Act sets forth the Legislature's clear finding[58] that limited exemption of autopsy photographs from inspection is justified by public necessity.[59] The public necessity was concern over the widespread dissemination of autopsy photographs on the Internet and how it would cause emotional trauma to the family members of the deceased.[60] "The publication of a person's autopsy photographs constitutes a unique, serious, and extraordinarily intrusive invasion of the personal privacy of that person's surviving family members, particularly their children, parents, and spouse…[61]" Mrs. Earnhardt testified that permitting inspection of the photographs would be "the most painful intrusion that there could be. It

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[57] Uribe, 2001 WL 992068 (Fla. Cir. Ct.)
[58] This legislative finding is based upon information in the legislative history (about the numerous websites depicting autopsy and crime scene photos), and also "uncontroverted testimony of the medical examiner, the treating physician, and the families of persons whose autopsy photos had been publicly disseminated by Uribe." [58] Appellees'Answer Brief at 20, *Earnhardt*, (No.5D01-2419)
[59] *Id*. at 3.
[60] *Id*. "Staff of the Committee on Governmental Oversight and Productivity performed searches on the internet to determine the likelihood of publication of autopsy photographs on the world wide web. In the course of this research, staff found literally thousands of internet sites that are devoted exclusively to the posting of photographs of crime scenes and autopsy photos." STATE OF FLA., CRIMINAL JUSTICE COMM. SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT, SB 1356, 1ST SESSION, AT 7 (1994).
[61] *Id*.

would cause emotional distress not only to myself, but permanent emotional damage to my children and the rest of my family."[62] Based on her testimony and the testimony of another deceased racecar driver's spouse, the trial court found that knowledge alone that the autopsy photographs would be available to the public was the cause of distress and trauma to the survivors. Therefore, the photographs should not be available to the public.[63] While I agree with the trial court's analysis, the language of the Legislature's findings and the opinion of the trial court seem as if these two entities are driven very strongly by their deep sympathies for the Earnhardt family.[64] While, as discussed below, it seemed almost unquestionable that the Act passed constitutional muster, what *was* questionable was whether these sympathies that the two branches felt at all slanted their decision-making in the writing and evaluation of this legislation.[65]

On appeal, Campus argued that approval of the Act is contrary to that Circuit[66]'s decision in *Halifax Hospital Medical Center v. News-Journal Corp*. However, in *Halifax*, the Court rejected the justification for "public necessity" the legislature offered

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[62] *Id*.
[63] However, the Legislature noted that the public should have continued access to autopsy information, i.e. the autopsy report. Appellees'Answer Brief at 23, *Earnhardt*, (No.5D01-2419)The court recognized that the public did have this full access. *Volusia, 2001 WL 992068, Fla. Cir. Ct.*
[64] Note the language of both branches: If the photographs are "viewed…could result in trauma, sorrow, humiliation, or emotional injury to the immediate family of the deceased…" Section 2, Ch. 2001-1, The Act. Also, the trial court: "The court specifically finds that examination of these autopsy photographs by any means would be an indecent, outrageous, and intolerable invasion, and would cause deep and serious emotional pain, embarrassment, humiliation, and sadness to Dale Earnhardt's surviving family members." Volusia, 2001 WL 992068 at 3.
[65] Further evidence of this proposition lies in the length of the Act, which will expire on October 1, 2006, unless the Legislature re-enacts it. Appellees'Answer Brief at 23, *Earnhardt*, (No.5D01-2419)
[66] The 5th District Court of Appeal of Florida

because it was vague and indefinite.[67] Conversely, the trial court here found the public necessity justification in this case well-articulated and specific.[68] These cases are distinguishable. (The DCA did not address this argument.)

Campus also proffered that the public necessity justification was unfounded because there are circumstances in which the photographs would not cause emotional trauma to the family: if the photographs do not depict the deceased in an upsetting or disturbing way, or if the family members themselves are deceased.[69] (On appeal, the DCA did not address this argument either, because it stated Campus did not "forcefully challenge the Legislature's statement of public necessity.")

B. The Act is no broader than necessary to accomplish its stated purpose

Secondly, the trial court found that the Act is no broader than necessary to accomplish its stated purpose, and thus met the second requirement of FLA. CONST. ART. I, § 24.[70] (Affirming, the DCA added: the exemption is sufficiently narrow because it applies only to autopsy photographs and audio and video recordings of the autopsy.[71] The DCA also noted that the "good cause" exception is valid and contributes to the Act's constitutionality: it offers recognition that circumstances may exist which would justify

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[67] *Halifax Hospital Medical Center v. News-Journal Corp*, 701 So.2d 434, 436 (Fla. 5th DCA 1997).
[68] [68] *Volusia*, 2001 WL 992068 (Fla. Cir. Ct.), p. 5.
[69] I personally disagree: while researching this paper, I looked for autopsy photographs on the internet to determine if the photographs were indeed upsetting or if the Legislature's findings were just dicta to justify the Act. The photographs I found were of complete strangers, and, being graphic and gruesome, as the Legislature promised they would be, upset me for several days. I also thought: if autopsy findings are available in report form, why else would anyone want access to the photographs other than to sensationalize the deceased, which is the Legislature's point exactly.
[70] *Volusia*, 2001 WL 992068 (Fla. Cir. Ct.), p. 5.
[71] *Id.*

disclosure of the photographs.)[72]

Campus posited that the Act is overbroad because it could accomplish the Act's stated purpose by permitting inspection alone, without copying. The trial court disagreed and found that mere inspection would still result in trauma to the family.[73] (This argument was also rejected by the DCA.)[74]

On appeal, Campus argued that by using the words "may", "often," "could," in the Act, instead of "must", "always", "would," the Legislature expressly narrowed the public necessity for the Act, making it overbroad.[75] However, these standards would be impossible to meet: it's stating that unless the Legislature is positive that in all situations an exemption must apply, the exemption does not pass constitutional muster.[76] The DCA found that using these words was not evidence that the exemption was overly broad, but "rather a recognition that circumstances may exist which would justify disclosure of autopsy photographs and audio and video recordings upon a showing of good cause."[77]

C. Demonstration of "good cause" to view the photographs

Even though one may inspect records exempt under FLA. STAT. CH. 406.135 if good cause exists for their review (in the course of conducting legitimate scrutiny of the government), Campus failed to demonstrate such circumstances.[78] Campus did not

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[72] *Id*.
[73] Volusia, 2001 WL 992068, (Fla. Cir. Ct.) The DCA affirmed. *Earnhardt*, 821 So.2d 388.
[74] The DCA found it had so little merit, it didn't even address it. *Earnhardt*, 821 So.2d 388, 394.
[75] Appellees' Answer Brief at 22, *Earnhardt*, (No.5D01-2419)
[76] *Id*.
[77] *Earnhardt*, 821 So.2d 388, 394.
[78] *Volusia* at 5.

proffer sufficient reason, the trial court stated, that copying or inspecting the photographs was helpful "in any degree whatsoever" in evaluating the performance of the government.[79] (Campus stated that examination of the photos was necessary to evaluate the safety standards of NASCAR, (the National Association for Stock Car Auto Racing, Inc.) the court found there were no allegations of governmental impropriety in this case, i.e., that the Medical Examiner did not perform a proper autopsy.) Further, Campus' argument that the autopsy could assist in evaluating NASCAR racing safety was not valid because it did not implicate a governmental interest.[80]

D. The Act was remedial and could be applied retroactively

Finally, the trial court also held that the Act was remedial and could be applied retroactively to prevent the media's access to the autopsy photographs.[81] The court held that the Act complied with the 2-step permissible retroactivity test set forth in *Chase Federal*: 1) whether the Legislature intended to apply the enactment retroactively; and 2) whether there is any constitutional prohibition to retroactive application.[82] When the DCA affirmed, it stated that the statutes, in the absence of clear legislative intent to the

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[79] *Id*.
[80] This was noted by both the trial court and DCA.
In its Appellate Brief, Campus argued that that a government entity is implicated because NASCAR conducts races "only with the approval of the government. The Legislature certainly has the power to stop races that regularly result in the deaths of drivers or to condition their continuance on the organizer taking safety precautions. The photographs that were sought in this case could help to confirm that Dale Earnhardt's death could have been prevented had certain safety equipment been required by NASCAR. That might lead to legislation to make racing safer." Initial Brief, Appellant, *Campus v. Earnhardt*, 821 So.2d 388 (Fla. 5th DCA 2002), Case No. 5D01-2419
[81] *Volusia*, 2001 WL 992068 (Fla. Cir. Ct.)
[82] *Metropolitan Dade County v. Chase Fed. Hous. Corp.*, 737 So.2d 494 (Fla. 1999)

contrary, should apply prospectively.[83] "Legislative intent must be determined primarily from the language of the statute…in the instant case, the Legislature was clear in its intent, twice expressly stating that FLA. STAT. CH. 406.135 was to be applied retroactively."[84]

Based on the above rationale, therefore, the trial court found FLA. STAT. CH. 406.135 was constitutional and retroactively applicable to the request made by Campus to view and copy the autopsy photographs of Dale Earnhardt.[85]

E. The 5th DCA decision

After the decision of the trial court, Campus, as noted above, appealed to the 5th DCA.[86] The 5th DCA affirmed the trial court's opinion court's decision in its entirety, adding, "One of the primary purposes of enacting remedial legislation is to correct or remedy a problem or redress an injury.[87]" It noted that new exemptions to Florida's Public Records Act have been treated as remedial.[88] The DCA also held that, contrary to Campus' argument, there was never a vested right to see the photographs.[89] The right was not vested because: first, the right to inspect and copy public records is subject to divestment and enactment of statutory exemptions by the Legislature; and 2) the rights provided under the Public Records Act are public rights.[90] (The US Supreme Court has

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[83] *Earnhardt*, 821 So.2d 388, 396.
[84] *Id*.
[85] *Id*.
[86] *Id*.
[87] *Id*.
[88] See *City of Orlando v. Desjardins*, 493 So.2d 1027 (Fla. 1986).
[89] *Id*. at 399.
[90] *Id*.

formerly held that only public, and not private, rights become vested.[91])

Campus then filed a petition seeking discretionary review of the DCA's judgment by the Florida Supreme Court on July 22, 2002.[92] The Court declined to exercise discretionary jurisdiction, denying Campus' petition on July 1, 2003.[93] Campus filed another petition seeking review of the DCA judgment by the U.S. Supreme Court pursuant to 28 U.S.C. § 1257(a), federal law claims. The U.S. Supreme Court denied certiorari on December 13, 2003.[94]

F. **<u>Earnhardt in a National Context</u>**

After the Court denied cert on December 13, 2003, the saga was not yet over. On April 12, 2004, *The Orlando Sentinel* and *The South Florida Sun-Sentinel* dropped their (new) challenge the Family Protection Act, citing *National Archives and Records Administration v. Favish*, a recent unanimous U.S. Supreme Court decision that could very well be the federal equivalent of *Earnhardt*.[95] There, the Court used language very similar to that used in the *Earnhardt* decisions[96]: it held that the government did not have to release 11-year old photographs of a Clinton staffer that committed suicide because it would cause his family pain and intrude on their privacy.[97] Attorney Alan Favish had

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[91] *Id. citing Hodges v. Snyder*, 261 U.S. 600 (1923).
[92] Brief of Appellee in Response to Petition for Writ of Certiorari at 5, *Campus v. Earnhardt*,124 S.Ct. 821 (2003), (No.03-484).
[93] *Id*. p.3.
[94] *Campus Communications v. Earnhardt*, 124 S.Ct. 821 (2003).
[95] ESPN News, *Florida Papers Voluntarily Dismiss Case* (April 12, 2004), *available at* http://proxy.espn.go.com/rpm/wireless/html/news?series=rpm&story=1781061&dvc=1.
[96] It is interesting to note that Mrs. Earnhardt herself moved in the U.S. Supreme Court to have these autopsy photographs sealed. Associated Press, Supreme Court Won't Release Vince Foster Photographs (March 30, 2004), available at http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=37810.
[97] *National Archives and Records Administration v. Favish*, 124 S.Ct. 1570 (2004).

sought the photos based on the Freedom of Information Act[98], which authorizes the release of non-classified U.S. government documents that ordinarily are not made public (but, like FLA. CONST. ART. I, § 24 allows for certain exemptions[99], such as an unwarranted invasion of personal privacy.)[100] The Justices, again using familiar language, noted that the privacy rights of survivors must be balanced against the public's right to information; here, the family's privacy rights outweighed the public's access to information.[101] Ultimately, the decision makes it more difficult to access federal law enforcement records from autopsies and death scenes. [102] Justice Kennedy, who authored the opinion, noted that this decision means that child molesters and murderers cannot use the Freedom of Information Act to make a "gruesome request" to get access to photographs of their victims.[103] While the Court did not specifically mention the *Earnhardt* case in its opinion, the similar language the Court used coupled with Mrs. Earnhardt's involvement (see supra footnote 91) suggests that the *Earnhardt* decision's impact goes beyond the contours of the great Sunshine State.

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[98] U.S.C. § 552

[99] Direction, in Freedom of Information Act (FOIA) exemption for "records or information compiled for law enforcement purposes," that information not be released if invasion of personal privacy could reasonably be expected to be unwarranted, requires courts to balance competing interests in privacy and disclosure; to effect this balance and to give practical meaning to the exemption, the usual rule that citizen need not offer a reason for requesting the information must be inapplicable. 5 U.S.C.A. § 552(b)(7)(C).

[100] *Id*.

[101] Freedom of Information Act (FOIA) exemption for "records or information compiled for law enforcement purposes" recognizes surviving family members' right to personal privacy with respect to their close relative's death-scene images; Congress' use of term "personal privacy" showed its intent to permit family members to assert their own privacy rights against public intrusions long deemed impermissible under common law and cultural traditions. 5 U.S.C.A. § 552(b)(7)(C)

[102] *Favish*, 124 S. Ct. 1570.

[103] *Id. at* 1579.

V. Right to Privacy involving other Medical Records and how that interacts with Florida's Public Records Act

Having exhausted Florida's right to privacy regarding autopsy records and how that interacts with Florida's Public Records Act, we now turn to Florida's right to privacy regarding other medical records and how that interacts with Florida's Public Records Act. The following (medical) records are also exempt (not open for public access) under FLA. CONST. ART. I, § 24 and FLA. STAT. CH. 119.

A. Hospital[104] and Patient Records[105]

Patient records from a hospital are exempt from the disclosure requirements of FLA. CONST. ART. I, § 24, and FLA. STAT. CH. 119.07, pursuant to FLA. STAT. CH. 395.3025(4)(a) (2004): "patient records are confidential and must not be disclosed without the consent of those to whom they pertain, but appropriate disclosure may be made without such consent if…"[106] (Eleven situations are provided as appropriate to disclose the records without the patient's consent.)[107] At first glance, the language under 4(a) seems to indicate that these records are exempt from public inspection, but are not exempt and confidential (see footnotes 22 and 23). However, subsection (7)(a) under that

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[104] Certain other hospital records and meetings records are also exempt from FLA. CONST. ART. I, § 24 and FLA. STAT. CH. 119 (2004), per FLA. STAT. CH. 395.3035 (2004).

[105] Though not addressed in this analysis, medical records and certain information regarding a foster parent applicant's spouse, child, and other adult household members are also exempt from Fla. Const. art. I, § 24, per FLA. STAT. CH. 409.175(16) (2004).

[106] FLA. STAT. CH. 395.3025(4)(a) (2004).

[107] *See* FLA. STAT. CH. 395.3025(4)(a)-(k) (2004).

statute clarifies that misconception: if such patient treatment disclosures are made under one of those above exceptions, "the recipient of the information shall ensure that the information is used only for the purpose provided and may not further disclose any information to any other person or entity, unless expressly permitted by the written consent of the patient. A general authorization for the release of medical information is not sufficient for this purpose. ***The content of such patient treatment record is confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution."*** [emphasis added]

Wherever a right to privacy (such the ones in FLA. STAT. CH. 395.3025) attaches, the state may encroach on that right if it demonstrates that the "intrusion is justified by a compelling state interest and that the state has used the least intrusive means to accomplish its goal."[108] *State v. Rutherford*, however, established that even a compelling state interest may not justify an intrusion on the defendant's privacy if procedural requirements of statutes justifying the intrusion[109] (i.e. FLA. STAT. CH. 395.3025(4)(d)) are not met.[110] In *Rutherford*, the defendant was involved in a high-speed car crash that resulted in a death.[111] After taking the defendant to the hospital, investigators requested that a blood alcohol test be taken from him pursuant to FLA. STAT. CH. 316.1932(1) or FLA. STAT. CH. 316.1933.[112] Investigators believed that there were hospital records or

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[108] *State v. Rutherford*, 707 So.2d 1129 (Fla. 4th DCA 1997) *citing Shaktman v. State*, 553 So.2d 148, 151-52 (Fla. 1989).
[109] It has since been disapproved that the exclusionary rule should apply *every* time the state failed to comply with the statute, regardless of the state's good faith efforts to comply. *State v. Cashner*, 819 So.2d 227 (Fla. 4th DCA 2002). But here, there was no good faith effort. *Rutherford*, 707 So.2d 1129, 1131.
[110] *Id*. at 1132.
[111] *Rutherford*, 707 So.2d 1129, 1131.
[112] *Id*. at 1130.

reports made shortly after Rutherford's arrival that may have indicated he was under the influence of alcohol.[113] Consequently, the prosecutor requested from the hospital all of the hospital's medical records regarding the defendant.[114] However, the state did not give either the defendant or his lawyer notice of the subpoena, in violation of the notice provision of subsection FLA. STAT. CH. 395.3025(4)(d) (1995)[115]. The court held that while a compelling governmental interest here did justify an intrusion, by not complying with the procedural requirements of FLA. STAT. CH. 395.3025(4)(d), the state "did not use the least intrusive means necessary" in that intrusion.[116] Therefore, the trial court properly excluded those records.[117] "By depriving the defendant the opportunity to object to the subpoena, the State violates the defendant's right to privacy, and that state's actions do not constitute a good faith effort to provide proper and meaningful notice."[118]

Measures may be taken, however, to *prevent* otherwise privacy-invading tactics from being constitutionally infirm. For example, in certain situations, patient records can also be subpoeaned as discovery requests if certain confidential information is redacted.[119] In *Amente v. Newman*, a morbidly obese patient sued her obstetrician for medical malpractice, alleging that her child's injury (to whom she gave birth under

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[113] *Id*.
[114] *Id*.
[115] The provision reads: (4) Patient records are confidential and must not be disclosed without the consent of the person to whom they pertain, but appropriate disclosure may be made without such consent to:
(d) In any civil or criminal action, unless otherwise prohibited by law, **upon the issuance of a subpoena from a court of competent jurisdiction and *proper notice by the party seeking such records to the patient or his or her legal representative.***
[emphasis added] FLA. STAT. CH. 395.3025(4)(d)(1995).
[116] *Rutherford*, 707 So.2d 1129, 1131.
[117] *Id*. at 1132.
[118] *Cashner*, 819 So.2d 227, 229.
[119] *See Amente v. Newman*, 653 So.2d 1030 (Fla., 1995).

doctor's care) resulted from physician's negligent obstetrical care and treatment.[120] Patient sought the medical records for all of physician's morbidly obese patients during a two-year period.[121] The physician predictably objected, arguing that would invade these patients' right to privacy.[122] The court held that the patient's right of privacy was not violated[123] because the trial judge required that all identifying information from the records be redacted.[124] Inspecting the records, the Court reasoned, served an important purpose of either establishing a pattern of negligence or non-negligence on the doctor's behalf.[125]

Conversely, the court will not order discovery orders that implicate privacy interests if the confidential information can't be redacted and if there is not a compelling need for so doing. In *Cedars v. Freeman*, a psychiatric patient brought a negligence action against hospital, alleging that she had been physically and sexually assaulted by male patients.[126] Patient claimed she needed access to all of the patients' files during

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[120] *Id*. at 1031.
[121] *Id*.
[122] *Id*.
[123] The court found that FLA. STAT. CH. 455.241(2), Renumbered as FLA. STAT. CH. 456.057 (2004) was not violated because all identifying information from the records was redacted. FLA. STAT. CH. 456.057 (2004) provides that "any health care practitioner…who makes a physical or mental examination of, or administers treatment or dispenses legend drugs to, any person …shall not be furnished to…any person other than the patient or patient's legal representative, except upon written authorization of the patient…such records may be furnished in any civil or criminal action, unless otherwise prohibited by law, *upon the issuance of a subpoena from a court of competent jurisdiction and proper notice to the patient or his legal representative by the party seeking such records.*" FLA. STAT. CH. 456.057(4)-(5)(a) (2004) [emphasis added]; *Newman*, 632 So.2d 1030, 1032.
[124] *Id*. at 1032.
[125] *Id*.
[126] *Cedars v. Freeman*, 829 So.2d 390 (Fla. DCA 2002)

that period to access their photographs to identify the assailants.[127] The Court held that the order impinged on the privacy rights of non-party patients and threatened to violate the patient/psychotherapist privilege codified in FLA. STAT. CH. 90.503(2) as well as FLA. STAT. CH. 394.4615,[128] and was distinguishable from *Amente*:[129] in this case, the Plaintiff did not demonstrate a compelling need for the discovery that outweighs constitutional privacy rights of these non-party psychiatric patients.[130]

1. Substance abuse services

Substance abuse services records are also exempt from the ambit of FLA. CONST., ART. I, § 24 and FLA. STAT. CH. Chapter 119 (2004). FLA. STAT. CH. 397.501 (2004) provides that rights of clients undergoing substance abuse services are "guaranteed the rights provided under this section, unless otherwise expressly provided, and services providers must ensure the protection of such rights." Among those rights include a right to personal dignity and the right to confidentiality of client records.[131] The statute does

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[127] *Id*.
[128] FLA. STAT. CH. 394.4615 (2004) involves confidentiality of clinical records of a mental health clinic. None of the exemptions permitted for releasing confidential information without the client's consent, (such as if the patient has expressed a desire to harm other persons), was applicable to any of these patients. FLA. STAT. CH. 394.4615 (2004), *Freeman*, 829 So.2d 390.
[129] "In the instant case, we conclude that the photos at issue are exactly the type of identifying information that *Amente* concluded would not be subject to discovery." *Freeman*, 829 So.2d at 390.
[130] The court alluded that there might be a situation where a plaintiff's need for information in a discovery request may outweigh patients' privacy rights; that was simply not the situation in this case.
[131] FLA. STAT. CH. 397.501(7)(a) (2004) states "The records of service providers which pertain to the identity, diagnosis, and prognosis of and service provision to any individual client are confidential in accordance with this chapter and with applicable federal confidentiality regulations and are exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution. Such records may not be disclosed without

provide an exception (for disclosure of confidential records without the written consent of the client) upon a showing of "good cause." The good cause showing utilizes a balancing test similar to the one implicated in the Family Protection Act.[132]

The State must have compelling public policy reasons for keeping these records confidential. Perhaps the State wants to encourage those who have substance abuse problems to get professional help and realizes that these persons otherwise might not do so for fear of exposing their problem. By providing this confidentiality, the State could prevent numerous deaths or hardships –of the substance abusers and of those the substance abusers could harm. Further, it could help improve the abuser or his family's quality of life to make a more productive citizen for the state.

2. HIV testing and test results

HIV testing and test results are also exempt from FLA. CONST. ART. I, § 24, per FLA. STAT. CH. 381.004 (subject to exceptions.): "*Except as provided in this section*, the identity of any person upon whom a test has been performed and test results are confidential and exempt from the provisions of s. 119.07(1)." [emphasis added]

Under this statute, the State's compelling public interest is to encourage HIV

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the written consent of the client to whom they pertain except that appropriate disclosure may be made without such consent:…"

[132] FLA. STAT. CH. 397.501(7)(a)(5.) (2004) describes good cause: "Upon court order based on application showing good cause for disclosure. In determining whether there is good cause for disclosure, the court shall examine whether the public interest and the need for disclosure outweigh the potential injury to the client, to the service provider-client relationship, and to the service provider itself.

testing to help prevent the onset of AIDS in Florida.[133] Certainly the prevention of death and disease is a valid governmental interest.

3. Portions of Death Certificates Specifying the Cause of Death

Finally, portions of death certificates that contain a medical certification of cause of death, unless applicant has 'direct and tangible interest in cause of death,' are exempt from FLA. CONST. ART. I, § 24 and FLA. STAT. CH. 119 (2004). One court explained that the purpose of making 'cause of death' information confidential was to avoid public embarrassment to the deceased's family.[134] Because this case was decided 17 years before *Earnhardt*, it is interesting to note the court's interest in post-mortem protection of the deceased's family's privacy were not *created* by *Earnhardt*, but just exacerbated by it.

4. Doctor-patient privilege

Surprisingly, Florida does not recognize a separate doctor-patient privilege.[135] However, when a physician is engaged in the diagnosis or treatment of a mental or physical condition, FLA. STAT. CH. 90.503 (2004) psychotherapist-patient privilege may

[133] In fact, under FLA. STAT. CH. 381.004(1) (2004), "Legislative intent", it states: "The Legislature finds that the use of tests designed to reveal a condition indicative of human immunodeficiency virus infection can be a valuable tool in protecting the public health…the Legislature finds that the public health will be served by facilitating informed, voluntary, and confidential use of tests designed to detect human immunodeficiency virus infection."

[134] *Yeste v. Miami Herald Pub. Co.,. a div. Of Knight-Ridder Newspapers, Inc.*, 451 So.2d 491 (Fla. 3d DCA, 1984); Fla. Stat. § 382.35(4).

[135] "The Evidence Code does not recognize a separate doctor-patient privilege, nor was this privilege recognized in Florida prior to the Code's adoption." EHRNHARDT, CHARLES W. EVIDENCE § 503.7 (2003 ED. 2003).

protect the communications of the patient.[136] FLA. STAT. CH. 456.057(5) (2004) again, also provides an additional privacy safeguard.[137]

B. Situations where compelling governmental interests justify more intrusive privacy measures than usual

1. Criminal Behavior

As noted above, compelling governmental interests that justify the state's encroachment on one's constitutional right to privacy are established by showing that police had reasonable, founded suspicion that the protected materials contain information relevant to ongoing criminal investigation and have used the least intrusive means to accomplish that goal.[138] The language of the following statute, however, indicates that the state may satisfy a *lower* burden to justify a privacy intrusion when activities that commonly are at risk for criminal behavior are implicated. For example, FLA. STAT. CH. 327.352(1)(c) (2004) states:

> any person who ***accepts the privilege*** extended by the laws of this state of ***operating a vessel within this state is, by operating such vessel, deemed to have given his or her consent to submit to an approved blood test for the purpose of determining the alcoholic content of the blood or a blood test for the purpose of determining the presence of chemical substances***…as provided in this section if there is ***reasonable cause to believe the person was operating a vessel while under the influence of alcoholic beverages***…any person who is incapable of refusal by reason of unconsciousness or other mental or physical condition is deemed not to have withdrawn his or her consent to such test.[139]

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[136] *Id*.
[137] See supra note 115.
[138] *Rutherford*, 707 So.2d 1129, 1131 *citing* FLA. CONST. ART. I, § 23.
[139] FLA. STAT. CH. 327.352(1)(c) (2004)

This statute indicates that the state is allowed to require and have access to a blood test if there is *reasonable cause* to believe one operating a vessel is intoxicated. This could be utilized if a police officer simply thought he smelled alcohol on one's breath. Although both this statute and the rule mandated in *Rutherford* both use the word "reasonable" to evaluate the officer's suspicion of criminal behavior, this statute mandates much easier methods to acquire a blood test than medical records requested in *Rutherford* because it does not require obtaining any court-ordered affidavits or that the defendant be given opportunity to object.[140]

FLA. STAT. CH. 327.352(1)(c) (2004) was exemplified in *Cameron v. State*. There, a sample of defendant's blood was drawn at hospital following a fatal boating accident before a police request (to obtain the blood) was obtainable under the implied consent law and without notice to the defendant.[141] "FLA. STAT. CH. 327.352(3) allows the police and prosecutor to have blood alcohol samples merely upon asking, so long as the request is 'in connection with an alleged violation of FLA. STAT. CH. 327.35.'"[142] No notice to a defendant of a police request under section 327.352(3) was required because the defendant already consented to it[143], and the police clearly had probable cause at the time of the request to arrest and charge the defendant with a section 327.35 violation. Indeed, this is a stark contrast to the requirements of notice mandated in FLA. STAT. CH. 395.3025.

Another situation in which criminal behavior implicates a more lax right to

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[140] See requirements for disclosure of medical records under FLA. STAT. 395.3025, FLA. STAT. 456.057, FLA. STAT. 394.4615.
[141] *Cameron v. State*, 804 So.2d 338 (Fla. 4th DCA 2001).
[142] *Id*. at 342.
[143] The defendant had impliedly consented to it, per FLA. STAT. 327.35

privacy is if one is deemed a "sexually violent predator." **The Jimmy Ryce Act**, FLA. STAT. CH. 394.921 (2004) provides the following justification:

> **In order to protect the public, relevant information and records that are otherwise confidential or privileged shall be released to the agency with jurisdiction, a multidisciplinary team, or to the state attorney for the purpose of meeting the notice requirements of this part and determining whether a person is or continues to be a sexually violent predator.** A person, agency, or entity receiving information under this section which is confidential and exempt from the provisions of Section 119.07(1) must maintain the confidentiality of that information. Such information does not lose its confidential status due to its release under this section.

"Although a patient's medical records enjoy a confidential status by virtue of the right to privacy contained in the Florida Constitution, the state has a compelling interest in the 'long-term control, care, and treatment' of sexually violent predators, and accomplishes its goal through the least intrusive means.[144]

Both FLA. STAT. CH. 327.352 and the Jimmy Ryce Act indicate that there is a continuum of "compelling governmental interests" that can justify intrusion into privacy. Obviously, the more compelling the interest, the more justification the state has for more invasive intrusion.

2. The Practice of Law

Determining who is fit to practice law is another situation where compelling governmental interests may justify an invasion of constitutional privacy rights. In *Florida Board of Bar Examiners Re: Applicant*, an applicant to the Florida Bar sought

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[144] *Jackson v. State*, 833 So.2d 243 (Fla. 4th DCA 2002).

review of a ruling by the Board of Bar Examiners refusing to process his application until he answered item 28(b) of the applicant's questionnaire, which read:

> Have you ever received REGULAR treatment for amnesia, or any form of insanity, emotional disturbance, nervous or mental disorder? If yes, please state the names and addresses of the psychologists, psychiatrists, or other medical practitioners who treated you. (Regular treatment shall mean consultation with any such person more than two times within any 12 month period.) [145]

The applicant asserted that this question violated his constitutional right of privacy.[146] The court stated:

> He [the applicant] has chosen to seek admission into the Florida Bar. He has no constitutional right to be admitted to the Bar. In this case, the applicant's right of privacy is *circumscribed and limited by the circumstances in which he asserts his right.* By making application to the Bar, he has assumed the burden of demonstrating his fitness for admission into the Bar. Fla.Sup.Ct. Bar Admiss. Rule, art. III, § 2. This encompasses mental and emotional fitness as well as character and educational fitness.[147]

The court went on to state that the compelling state interest standard imposes a tough burden on the state to demonstrate an important societal need and the use of the least intrusive means to accomplish that goal.[148] In this case, however, the court found that completion of the questionnaire for admission to the Bar was the least intrusive means to accomplish their goal: "Inquiry into an applicant's past history of regular treatment for emotional disturbance or nervous or mental disorder requested by item 28(b) furthers the legitimate state interest since mental fitness and emotional stability are essential to the practice of law in a manner not injurious to the public."[149]

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[145] *Florida Board of Bar Examiners Re: Applicant*, 443 So.2d 71, 73 (Fla., 1984).
[146] *Id*.
[147] *Id.*at 74.
[148] *Id*.
[149] *Id*. at 75.

In these different scenarios, the State's "compelling interests" refer to public safety and ensuring governmental accountability and responsibility, both in the government's actions as a whole and in individual officials of the state [150]. Certain activities in which one chooses to engage may invite more governmental scrutiny and invasion into their private affairs. Citizens should be aware of this possibility before they engage in the particular activity. (The "activity" could range from criminal behavior to the practice of law (or both, in some cases!))

C. The Right to Privacy Concerning Medical Records and Right to Public Records Paradigm in the National Context

1. Caselaw

Reconciling right to privacy with the right to public records is also a hot issue nationwide and has been one for many years. In *Whalen v. Roe*, for example, a group of physicians and patients brought an action challenging the constitutionality of New York statutes which required that the State be provided with a copy of every prescription for certain (Schedule II) drugs which was retained in the State's computer system for five years but which also provided security measures for that information.[151] The Court held: the statutes were a valid exercise of the state's broad police power; that the State had not

[150] The United States Supreme Court has noted that "[t]he interests of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the court.' " *The Florida Bar Re: Amendments to Rules Regulating The*, 624 So.2d 720 (Fla. 1993 citing *In re Primus,* 436 U.S. 412, 422, 98 S.Ct. 1893, 1899, 56 L.Ed.2d 417 (1978), *quoting Goldfarb v. Virginia **State** Bar,* 421 U.S. 773, 792, 95 S.Ct. 2004, 2016, 44 L.Ed.2d 572 (1975).
[151] *Whalen v. Roe*, 429 U.S. 589 (1977).

shown necessity for the requirement was insufficient basis for holding the statutes unconstitutional; there was no basis for assuming that the state security provisions would be improperly administered; that remote possibility of inadequate judicial supervision of evidentiary use of particular items of stored information was not sufficient basis for invalidating entire program; that there was no showing that the statutes would deprive the public of access to drugs by inducing the public to refuse needed medication; and that the statutes did not impair physicians' right to practice medicine free from unwarranted state interference.[152] The overall justification that seemed to emanate from the Court's opinion was that the physician-patient evidentiary privilege is unknown to the common law and in states where it exists by legislative enactment, it is subject to many exceptions and to waiver for many reasons.[153] The Court implied that these patient's right to privacy were not violated because the patients still retained the choice of their physician and whether or not to take these drugs in the first place; the Court alluded that it was not going to expand the right of privacy beyond its already sufficient contours of the 14th Amendment.[154]

2. Governmental Measures

Additionally, in 1999, the HHS[155] issued a "Privacy Rule" to implement Health Insurance Portability Insurance Portability and Accountability Act of 1996 ("HIPPA"), to assure that individuals' health information is properly protected while allowing the flow

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[152] *Id*.
[153] *Id*. at 601.
[154] *Id*. at 606.
[155] The U.S. Department of Health and Human Services

of health information needed to provide and promote high quality health care.[156] This Privacy Rule applies to health plans, health care clearinghouses, and to any health care provider who transmits health information in electronic form in connection with transactions for which the Secretary of HHS has adopted standards under HIPAA.[157] The Privacy Rule protects all "individually identifiable health information" held or transmitted by a covered entity or its business associate, in any form or media, whether electronic, paper, or oral.[158] A major purpose of the Privacy Rule is to "define and limit the circumstances in which an individual's protected health information may be used or disclosed by covered entities."[159] Like most of the Florida statutes that exempt certain records from the Public Records Act but also include exceptions to the exemption, HIPAA also allows for situations in which the entity is required or permitted[160] to disclose the information.[161]

While *Whalen* seemed to narrow the scope of nationally recognized privacy rights in favor of medical records disclosure, HIPAA perhaps helps better balance that dichotomy by providing further protection of medical records. *Whalen*, the Jimmy Ryce Act, *Cameron v. State,* and *Florida Board of Bar Examiners Re: Applicant* all seem to imply that as long as the State makes a good faith effort to comply with the required

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[156] Summary of the HIPAA Privacy Rule, 2003, Pub. L. 104-191, and 65 FR 82462, *available at* http://www.hhs.gov/ocr/privacysummary.pdf.
[157] *Id*.
[158] The Privacy Rule calls this information "protected health information (PHI)."
[159] *Id*.
[160] Entities are permitted to disclose confidential information: 1) To the Individual (unless required for access or accounting of disclosures); 2) treatment, payment, and health care operations; 3) opportunity to agree or object; 4) Incident to an otherwise permitted use and disclosure; 5) Public Interest and Benefit Activities; and 6) Limited Data Set for the purposes of research, public health or health care operations.
[161] *Id*.

procedural formalities, the State can justify an intrusion into privacy for compelling governmental interests that the state defines.

These cases provide even further support for the 5th DCA's *Earnhardt* opinion because they demonstrate circumstances in which the state demonstrated good cause for gaining access to the information. If Campus could have proven "good cause" within the provisions of the statute, they could have likewise gained informational access. The above cases demonstrate that while compelling governmental interests can outweigh individuals' privacy, when those interests cannot be shown, the state will not allow persons to intrude upon the privacy rights of citizens for their own personal or financial gain (or for no reason at all).

VI. The Public Meetings Exception to Art. I, Section 24, Fla. Const.

Finally, we address the public meetings exception of Article I, Section 24 and how it interacts with right to privacy. Obviously, it seems impossible to think of public meetings and how it interacts with the right to privacy of medical records. However, Fla. Const. art. I, § 23 and art. I, § 24 do clash yet again when privacy rights are claimed to shield the contents of a seemingly public meeting.[162]

In *Woods v. Marston*, local news media interests filed a complaint against the President of the University of Florida and against the chairman of a search-and-screen committee appointed by the president to solicit and screen applications for the deanship of the university law school. The plaintiff sought a declaratory judgment and a temporary and permanent injunction prohibiting the president and the chairman from

[162] *See generally Woods v. Marston*, 442 So.2d 934 (Fla., 1983).

excluding the press or the public from meetings of the committee.[163] The court held that the university was a "state agency" not exempted from provisions of the sunshine law[164] by any legislative enactment, and 2) search-and-screen committee was "board of commission," within provisions of Law, whose meetings were improperly closed to the public.[165] "The Sunshine Law was enacted in the public interest to protect the public from 'closed door' politics and, as such, the law must be broadly construed to effect its remedial and protective purpose."[166] Following the same rationale in a somewhat reverse fact pattern (because here the public is trying to gain access to a meeting that has previously been declared private, rather than the other way around), the court found that there were no compelling reasons why the public's right to meetings should be infringed; consequently the meeting was open to the public.

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[163] *Wood v. Marston*, 442 So.2d 934 (Fla., 1983).
[164] "The Sunshine Law" is FLA. STAT. CH. 286.011 (1983). Although not Article I, Sec. 24, its wording is substantially the same and can be analogized to Section 24. It states: "(1) all meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting." FLA. STAT. CH. 286.011. In 1983, at the time of this case, exemptions could be made to this statute per FLA. STAT. CH. 119. "Thus, in the Public Records Law, the coverage is expressed generally; exemptions are identified explicitly." *Marston*, 442 So.2d 934 (Fla, 1983).
Compare to FLA. CONST. ART. I, § 24, (b) All meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at *which public business of such body is to be transacted or discussed*, shall be open and *noticed to the public and meetings of the legislature shall be open and noticed as* provided in Article III, Section 4(e), *except with respect to meetings exempted pursuant to this section or specifically closed by this Constitution.[italicized parts are different from* FLA. STAT. CH.. *286.011]*
[165] *Marston*, 442 So.2d 934, 941.
[166] *Id*. at 939.

VII. Conclusion

FLA. CONST. ART I, § 23 AND § 24 have been, and will probably continue to be, in constant conflict due to their paradoxical language. However, as more cases like *Earnhardt* come through the docket, the courts will have an opportunity to resolve additional queries involving privacy rights of medical records and their volatile relationship with the right to public records. If the courts continue to employ the "compelling governmental interests" standard to determine who will benefit or be hurt by receiving access to the records or meetings, consistent results should yield. The results already seem to be pretty consistent: even the Supreme Court seems to assert that in the absence of exigent circumstances justifying invading one's constitutional right to privacy, the Court will defer to the privacy interests. As technology continues to advance and people desire more and more money, there might be need to further broader privacy rights (however, due to terrorism, this is unlikely to happen). In the meantime, we'll have to make do with how far we've come.