IN THE SUPREME COURT OF FLORIDA

JAMES A. MORGAN, Appellant/Cross-Appellee, vs. STATE OF FLORIDA, Appellee/Cross-Appellant.	CASE NO. 76,676

BRIEF OF AMICUS CURIAE VOLUNTEER LAWYERS' RESOURCE CENTER IN SUPPORT OF APPELLANT JAMES MORGAN

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IN THE SUPREME COURT OF FLORIDA

JAMES A. MORGAN,

Appellant/Cross-Appellee,

vs.

STATE OF FLORIDA,

Appellee/Cross-Appellant.

CASE NO. 76,676

BRIEF OF AMICUS CURIAE
VOLUNTEER LAWYERS' RESOURCE CENTER
IN SUPPORT OF APPELLANT
JAMES MORGAN

STATEMENT OF INTEREST

Volunteer Lawyers' Resource Center of Florida, Inc. (VLRC) is a foundation and a federally funded resource program which provides support and assistance to volunteer counsel representing death-sentenced individuals in collateral post-conviction proceedings. VLRC was established in November 1988, and has provided assistance to counsel representing death-sentenced individuals since that time. VLRC has an obvious interest in significant legal issues affecting those on Florida's death row.

One of the questions raised in this cause is whether it violates Article I, § 17 of the Florida Constitution to execute a person for a capital offense committed when he was 16. Resolution of this question is likely to require this Court to define the meaning of the Florida Constitution's prohibition of cruel or unusual punishment, and to discuss the relationship of

this provision to the United States Constitution's prohibition on cruel and unusual punishment. These questions have taken on increased significance given this Court's recent state constitutional law jurisprudence, see, for example, Traylor v. State, 596 So.2d 957 (Fla. 1992), and Tillman v. State, 591 So.2d 167 (Fla. 1991). Their resolution is of obvious importance to VLRC, the counsel it assists and the death-sentenced individuals such counsel represent.

INTRODUCTION

This amicus brief is submitted in the belief that it will assist this Court in determining whether the Florida Constitution's prohibition of cruel or unusual punishment, as set out in Article I, § 17 of that document, precludes the execution of one under the age of 18 at the time of his offense.[1] In addressing

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[1]Since appellant was under the age of 17 at the time of the commission of the capital offense, it is not strictly necessary to determine whether it would violate Article I, § 17 for the State to execute one who was between the ages of 17 and 18 at the time of the commission of the capital offense. However, amicus has framed the issue in terms of the constitutional propriety of executing one under the age of 18 years, since it is amicus' belief that the same rationale which compels the conclusion that it would be violative of the Florida Constitution to execute one under the age of 17 is equally applicable to one between the ages of 17 and 18 at the time the capital offense is committed. LeCroy v. State, 533 So.2d 750 (Fla. 1988), is not to the contrary. The conclusion of the LeCroy majority that it would not be unconstitutional to execute one who committed a capital offense at age 17 was solely in the context of whether it would be "cruel and unusual punishment" to do so, LeCroy, supra, at 756. There is nothing in the LeCroy majority opinion which suggests that the Court considered the constitutionality of the punishment at issue in light of the distinct provisions of Article I, § 17 of the Florida Constitution. Rather, as alluded to above, the Court in identifying the issues presented said:

(continued...)

this question, it is important to emphasize at the outset that unlike the United States Constitution's Eighth Amendment prohibition against cruel and unusual punishment, Article I, § 17 of the Florida Constitution prohibits both cruel or unusual punishments. In Tillman v. State, 591 So.2d 167, 169 n.2 (Fla. 1991), this Court specifically referenced that difference, noting that "the use of the word or (in Article I, § 17) indicates that alternatives were intended." Given Tillman, in determining whether the execution of an individual under the age of 18 at the time of his offense is violative of the Florida Constitution, this Court must determine whether such a punishment would be either cruel or unusual.

Amicus agrees with appellant's contention that it would be unusual within the meaning of Article I, § 17, if appellant was executed. As appellant correctly points out, if this court were to affirm his death sentence not only would it be unusual, as that term is commonly understood, but it would also, in some respects, be unique since post the United States Supreme Court decision in Furman v. Georgia, 408 U.S. 238 (1972), this Court

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[1](...continued)
"Appellant's final argument is that imposition of the death penalty is cruel and unusual punishment for a seventeen-year-old," LeCroy, supra, at 756. Further, in rejecting the claim, the majority referenced and distinguished the United States Supreme Court decision in Thompson v. Oklahoma, 108 S.Ct. 2687 (1988), which decision by definition only addressed the federal constitutional Eighth Amendment claim. Finally, even if it can be said that the LeCroy majority implicitly, although silently, addressed appellant's Article I, § 17 claim, the rationale of Tillman, supra, (see discussion, infra), mandates that this Court revisit that issue.

has never affirmed a death sentence for one of appellant's age at the time of the commission of the capital offense. Further, as appellant convincingly points out by referencing other Florida[2] statistical data on the number of juvenile death sentences imposed at the trial level and the number of executions of those of appellant's age at the time of the offense, the execution of appellant would clearly be unusual as that term is commonly understood.[3]

In this brief, however, it is not amicus' intent to address the question of whether appellant's execution would be unusual. Rather, its focus will be on why the execution of appellant or anyone under the age of 18 at the time of the commission of a capital offense would be "cruel" and thereby prohibited by

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[2]In addressing the question of whether the execution of appellant would be "unusual" within the meaning of Article I, § 17, by definition, the focus must be on the Florida experience since it is clear that the framers of the Florida Constitution would not have intended to permit a punishment never imposed in Florida simply because it may have been imposed in another state. Principles of federalism dictate that the Florida Constitution be interpreted and construed in light of the values and experience of Floridians, see Traylor v. State, 596 So.2d 957, 962 (Fla. 1992) ("Accordingly, when called upon to construe their bill of rights, state courts should focus primarily on factors that inhere in their own unique state experience. . . .")

[3]To the extent that appellee might argue that the execution of one under the age of 17 at the time of the commission of the capital offense is not unusual, no matter how infrequent, if given a weighing of the aggravating and mitigating circumstances, the execution is allegedly warranted, appellee misconstrues Article I, § 17. Such an interpretation would of course render the prohibition of "unusual" punishments irrelevant since it would merge the Article I, § 17 question with the question of the legal propriety of the death sentence. This Court should not construe a constitutional provision in such a way so as to render it irrelevant.

Article I, § 17 of the Florida Constitution. In demonstrating this to be the case, this brief will begin by discussing why this Court must first address the question of whether appellant's execution would violate Article I, § 17 of the Florida Constitution. Next, because of the similarity in language between Article I, § 17 and its Bill of Rights counterpart, the Eighth Amendment of the United States Constitution, it will address the relationship between those provisions. It will then discuss what constitutes a "cruel" punishment within the meaning of the Florida Constitution's prohibition on "cruel" punishments. Finally, amicus will demonstrate why the execution of one under the age of 18 at the time of the commission of a capital offense is "cruel" and thus prohibited by the Florida Constitution.

THIS COURT'S OBLIGATION TO FIRST ADDRESS THE MEANING OF THE FLORIDA CONSTITUTION'S PROHIBITION OF CRUEL OR UNUSUAL PUNISHMENT

In Traylor v. State, 596 So.2d 957 (Fla. 1992), this Court made clear that federalist principles require it to first address the propriety of a practice under this state's constitution before considering whether that practice is proscribed by federal law. This obligation follows from the primacy that must be afforded the Florida Constitution in resolving "matters of

fundamental rights," Traylor, supra, at 962.[4] The primacy principle affirmed in Traylor mandates this Court to initially address the question of whether the execution of one under the age of 18 at the time of the commission of a capital offense violates the Florida Constitution before turning to an analysis of whether federal law would preclude such an execution. Absent

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[4]As Justice Kogan wrote in Traylor:

> I fully concur in Parts II and III of the majority opinion, and especially its statement regarding the primacy of the Florida Constitution in state courts. Majority op. at 962. Clearly, state constitutional issues must be considered first whenever fundamental rights are at stake. Far too often, both bench and bar fail even to consider the possibility that some principle of the Florida Constitution may be dispositive of the issue. This practice clearly is contrary to the two central policies upon which the doctrine of primacy rests.
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> First, primacy promotes judicial economy. As is obvious to all, lawyers and courts need address federal claims only if no violation is found under the Florida Constitution. If the state constitution provides greater rights than the federal, then there is no need for litigants to waste further time and resources in appeals or other challenges mounted in the federal courts. Second and most importantly, primacy gives the state Constitution, the respect and effect its framers manifestly intended it to have. The Florida Constitution is not a nullity to be ignored. Its words are not meaningless. When the state Constitution creates a fundamental right, that right must be respected, even if no similar right is recognized by the federal courts.

Traylor, supra, at 982-83 (J. Kogan, concurring in part and dissenting in part).

some indication that the framers of the Florida Constitution intended for Article I, § 17 to be interpreted in the same way as the Eighth Amendment[5], this means that this Court cannot simply defer to federal precedent interpreting the Eighth Amendment, notwithstanding any similarity between the language of the Eighth Amendment and Article I, § 17, cf., LeCroy, supra. Rather, it must make an independent determination of whether Article I, § 17's prohibition of cruel or unusual punishment provides the same, lesser, or greater constraints on governmental action affecting individual liberty and freedom than those imposed by its federal counterpart.[6] If this Court fails to do so by simply referring to federal Eighth Amendment precedent to resolve the Florida Constitutional question presented herein, this Court will have rendered the Florida Constitution a nullity, an action not only inconsistent with basic federalist principles but also contrary to the historical fact and practice that "state courts and constitutions have traditionally served as the prime

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[5]It is instructive to note that unlike the case with the Florida Constitution's prohibition on unreasonable searches and seizures, see Article I, § 12, there is no analogous language requiring Article I, § 17 to be interpreted in the same manner as the Eighth Amendment.

[6]As the Court noted in Traylor, there are a number of reasons why state constitutional provisions may provide greater protections than their federal counterparts even when the language of the provisions may be virtually identical, Traylor, supra, at 961-62. "In any given state, the federal Constitution thus represents the floor for basic freedoms; the state constitution, the ceiling," Traylor, supra, at 962; see also discussion infra.

protector of their citizens' basic freedoms." Traylor, supra, at 961.

THE RELATIONSHIP BETWEEN ARTICLE I, SECTION 17, OF THE FLORIDA CONSTITUTION, AND THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION

Although the antecedent to the present Article I, § 17 was enacted subsequent to the passage of the Eighth Amendment, there is nothing in its legislative history to suggest whether its framers intended for this constitutional prohibition to provide the same, lesser or greater constraints against state action as the Eighth Amendment provided against federal action[7], see Blanton, "The State Constitution's Cruel or Unusual Punishment Clause: The Basis For Future Death Penalty Jurisprudence in Florida," 20 Fla. St. U.L. Rev. 229, 245 (1992). In fact, there is no legislative history which explicitly sheds any light on what the framers of this constitutional provision meant by the prohibition against cruel or unusual punishment. Blanton, supra, at 245 (1992). Nevertheless, there are compelling reasons why this provision should provide greater protections than its federal counterpart. First, as this Court implicitly recognized in Tillman, supra, it would have been strange for the framers of the Florida Constitution, given their use of the word "or" in

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[7]Of course, at the time of the enactment of Article I, § 17, in 1838, the federal Bill of Rights was not applicable to the states, see generally Duncan v. Louisiana, 391 U.S. 145 (1988); see also Traylor, supra, at 983 (J. Kogan, concurring and dissenting): "Few now remember -- but it nonetheless is true -- that the federal Bill of Rights was not deemed binding on the states for roughly the first 150 years of the American republic."

Article I, § 17, to have intended the same constraints on state action as those imposed by the Eighth Amendment on federal action. The framers' use of the disjunctive suggests that Article I, § 17 was intended not only to prohibit cruel and unusual punishments but also to independently proscribe cruel punishments as well as unusual ones. Assuming that the prohibition against cruel punishments and unusual punishments are not co-extensive but impose independent constraints, the language of Article I, § 17 suggests that its protections were intended to be more extensive than those guaranteed by its federal Bill of Rights counterpart.[8]

More fundamentally, as Traylor emphasizes, there are compelling federalism considerations which suggest that state constitutional provisions and their Bill of Rights counterparts are not intended to be co-extensive. This is the case because it is axiomatic that today the constraints imposed by Bill of Rights provisions are necessarily binding on all the states, notwithstanding the differences in state traditions, customs, values and experience. It would be unrealistic to assume that this diversity of state traditions was not meant to be relevant in

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[8]See People v. Anderson, 493 P.2d 880, 885 (Cal. 1972) (The California state constitutional prohibition on cruel or unusual punishment "reflected a concern on the part of (the) drafters not only that cruel punishments be prohibited, but that disproportionate and unusual punishments also be independently proscribed.")

assessing the meaning of the Eighth Amendment.[9] On the other hand, by definition, the breadth and scope of state constitutional provisions are not so limited. Rather, their content is likely to be designed to fully reflect state tradition, values and history. Moreover, in assessing and contrasting the protections provided by such state constitutional provisions and their federal counterparts, it bears repeating that "under our federalist system, many important decisions concerning basic freedoms have traditionally inhered in the states . . . (and) unlike their federal counterparts, state courts and constitutions have traditionally served as the prime protectors of their citizens' basic freedoms." Traylor, supra, at 961.

The language of Article I, § 17, federalist principles, and the primary role played by the states in protecting the basic freedoms of their citizens all suggest that the guarantees of Article I, § 17 are more extensive than its federal Bill of Rights counterpart.

WHAT CONSTITUTES A "CRUEL" PUNISHMENT WITHIN THE MEANING OF ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION

Absent any guidance from the framers of Article I, § 17, amicus recognizes the difficulty of defining what constitutes a

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[9]This is not to say that United States Supreme Court rulings construing Bill of Rights provisions may not generously construe those guarantees, but only that federalist considerations suggest that the reach of these guarantees may be limited when contrasted with their state constitutional counterparts.

"cruel" punishment. Nevertheless, this Court's responsibility to construe the state constitution requires it to do so.[10] It would be inconsistent with our constitutional scheme of government for the Court to simply defer to an implicit legislative judgment sanctioning the execution of one under the age of 18 at the time of the commission of a capital offense. As the United States Supreme Court has said:

> [T]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

West Virginia Board of Education v. Barnette, 319 U.S. 624, 638 (1943).

Although clearly separation of powers concerns mandate that this Court think carefully before finding any legislative action to be violative of Article I, § 17, it can not simply defer to a legislative judgment without abdicating its responsibility in our system of government. The framers of our state constitution were undoubtedly well aware of the possibilities of abuse of legislative power. It was for this reason that they mandated that certain rights be guaranteed and authorized the judicial

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[10]"Our duty to confront and resolve constitutional questions, regardless of their difficulty or magnitude, is at the very core of our judicial responsibility. It is a mandate of the most imperative nature." People v. Anderson, 493 P.2d 880, 887 (Cal. 1972).

branch to ensure that these rights were always protected. Although the fact that they used words like "cruel", "due process", or "equal protection" in defining what rights were guaranteed may seemingly make the judicial task more difficult, it does not relieve the courts of their responsibility to define what those rights are. In fact, the use of arguably imprecise words like "cruel" suggest a confidence in the judicial branch, a confidence that it will enforce the Declaration of Rights guarantees in a manner consistent with the societal emphasis that has always been placed on safeguarding individual liberty and freedom.

How then should this Court define "cruel" for the purpose of Article I, § 17? Amicus believes that a "cruel" punishment is one that is "nothing more than the purposeless and needless imposition of pain and suffering." Coker v. Georgia, 433 U.S. 584, 592 (1977). It is one "so totally without penological justification that it results in the gratuitous infliction of suffering." Gregg v. Georgia, 428 U.S. 153, 183 (1976) (joint opinion of Stewart, Powell and Stevens, JJ.) A cruel punishment then is one that inflicts pain for no legitimate reasons. It is simply a gratuitous and unnecessary punishment, reflecting an indifference to the reasons sought to justify it.

Amicus recognizes that appellee may criticize the definition set forth above for implicitly requiring the Court to make what the appellee undoubtedly will believe to be more properly a legislative judgment. However, as alluded to previously, amicus

respectfully contends that such an argument begs the question since the rationale for the state Constitution's Declaration of Rights was precisely to empower the judiciary to review legislative judgments.[11]

THE EXECUTION OF AN INDIVIDUAL UNDER THE AGE OF 18 AT THE TIME OF HIS COMMISSION OF A CAPITAL OFFENSE IS A "CRUEL" PUNISHMENT PROSCRIBED BY ARTICLE I, § 17 OF THE FLORIDA CONSTITUTION

Any assessment of whether the execution of appellant would be "nothing more than the purposeless and needless imposition of pain and suffering," Coker v. Georgia, 433 U.S. 584, 592 (1977), i.e., cruel within the meaning of Article I, § 17, must begin with a discussion of the reasons for capital punishment. The punishment of execution is generally thought to further two legitimate state penological interests, retribution and deterrence.[12] Unless it can be said then that the punishment of execution when applied to individuals for offenses committed when they are under the age of 18, measurably contributes to either of these goals, Article I, § 17 prohibits this punishment.

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[11]As the California Supreme Court put it in words that are equally applicable in this context, "It is the function of the court to examine legislative acts in light of such constitutional mandates to ensure that the promise of the Declaration of Rights is a reality to the individual . . . . Were it otherwise, the Legislature would ever be the sole judge of the permissible means and extent of punishment and the . . . Constitution would be superfluous." People v. Anderson, 493 P.2d 880, 888 (Cal. 1972).

[12]The two "principal social purposes" of capital punishment are said to be "retribution and the deterrence of capital crimes by prospective offenders." Gregg v. Georgia, 428 U.S. 153, 183 (1976) (joint opinion of Stewart, Powell and Stevens, JJ.); see also Enmund v. Florida, 458 U.S. 782, 798 (1982).

There are three reasons why the execution of individuals for offenses committed when they are under the age of 18 does not measurably further the goal of deterrence. First, the deterrence rationale contemplates a rational individual who carefully calculates the costs and benefits of any action before going forward.[13] But, as a plurality of the United States Supreme Court emphasized "the likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent." Thompson v. Oklahoma, 108 S.Ct. 2687, 2700 (1988). This is the case because since juveniles "are more vulnerable, more impulsive, and less self-disciplined than adults,"[14] they are not likely to be able to meaningfully assess the consequences of their actions.[15] Moreover, this inability is heightened by

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[13]The deterrent value of the death penalty is premised "on the assumption that we are rational beings who always think before we act, and then base our actions on a careful calculation of the gains and losses involved." Gardiner, "The Purposes of Criminal Punishment," 21 Mod. L. Rev. 117, 122 (1958).

[14]Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders (1978), quoted in Eddings v. Oklahoma, 455 U.S. 104, 115 (1982).

[15] Because of an adolescent's limited experience and lack of ability to assess future consequences, he or she is unable to conceptualize realistically the potential negative outcomes of certain actions . . . . In light of what is known today about adolescent development generally and the development of adolescents who commit homicide in particular, adolescents are unlikely to engage

(continued...)

the juvenile's preoccupation with the present[16] and the likelihood that he does not comprehend fully the possibility and finality of death.[17] Finally, although it is true that juveniles may be capable of rational decision-making in some areas with the help, support and assistance of their parents and other loved ones, such a rational thought process is likely to be absent when

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[15](...continued)

> in a meaningful 'cold calculus that precedes the decision' to commit a capital offense in which the 'possible penalty of death' enters into their decision-making process.

Amicus Curiae Brief of the American Society for Adolescent Psychiatry and the American Orthopsychiatric Association in Support of the Petitioner in Thompson v. Oklahoma, U.S. Supreme Court Case No. 86-6169, at p. 5, 21. The American Society for Adolescent Psychiatry (ASAP) was founded in 1967 and at the time of the filing of the amicus brief had approximately 1400 members. One-half of its members are child psychiatrists while the remaining members are general psychiatrists and psychoanalysts who maintain an active professional interest in adolescents. The American Orthopsychiatric Association (ORTHO) was established in 1924 and is comprised of more than 10,000 members representing a variety of mental health related professions, Amicus Curiae Brief at p. 1.

[16]See Kastenbaum, "Time and Death in Adolescence" in The Meaning of Death 99, 104 (H. Feifel ed. 1959) "The adolescent lives in an intense present; 'now' is so real to him that past and future seem pallid by comparison. Everything that is important and valuable in life lies either in the immediate life situation or in the rather close future." Thompson v. Oklahoma, 108 S.Ct. 2687, 2699 n.43 (1988).

[17]"Researchers . . . have documented that adolescents tend not to appreciate fully the possibility and finality of death. If they consider death at all, it is viewed as something that happens to elderly people, not teenagers." ASAP and ORTHO Amicus Brief, ibid., at p. 6.

they are placed under highly stressful circumstances which is likely to be the case when a murder is committed.[18]

Second, even if one assumes that a juvenile is capable of and likely to make the kind of cost-benefit analysis upon which the deterrence rationale for capital punishment is premised, given the number of executions of juveniles in this state, it makes little sense to believe that the existence of death as a possible sanction would be likely to have any effect on a juvenile's behavior.

Third, and finally, the deterrence question is not simply whether the possibility of a death sentence is likely to deter a juvenile but rather whether it deters in any significant sense more than any alternative sanction which is likely to be imposed. In this state, that alternative sentence is likely to be, at a minimum, a mandatory sentence of 25 years in prison.[19] Again, it is simply nonsensical to believe that a juvenile contemplating committing a first degree murder would not be deterred by the likely prospect of spending the rest of his life in prison, but would be deterred if the death penalty was available as a possible sanction.

Nor would the retributive goal of capital punishment be measurably furthered by the execution of individuals for offenses committed when they were under the age of 18. As the United States Supreme Court has remarked "retribution as a justification

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[18]ASAP and ORTHO Amicus Brief, ibid., at p. 21.

[19]§ 775.082(1), Florida Statutes.

for executing (offenders) very much depends on the degree of (their) culpability." Enmund v. Florida, 458 U.S. 782, 800 (1982). Yet the very existence of a separate juvenile justice system, whose aim is treatment and not punishment, see Chapter 39, Florida Statutes, suggests that there is a general consensus in this state that as a class juveniles are less mature, responsible and blameworthy than adults and as such less culpable. As the United States Supreme Court has put it:

> [Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults.

Bellotti v. Baird, 443 U.S. 622, 635 (1979) (emphasis added). Put simply, juveniles "lack the capacity for mature, principled judgment which is characteristic of normal adult thought." ASAP and ORTHO Amicus Brief, ibid., at p. 8. It is for this reason that they are not trusted with many of the privileges and responsibilities of an adult.[20] It also explains why their conduct is not perceived as morally reprehensible as that of an adult and why as such the goal of retribution is not measurably

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[20]For a listing of some of those privileges and responsibilities of an adult, see LeCroy v. State, 533 So.2d 750, 759 (Fla. 1988) (J. Barkett, concurring in part, dissenting in part).

furthered by putting to death an individual for an offense committed when he was under the age of 18.

The State will undoubtedly argue that notwithstanding what generally might be said about the deterrent effect of the death penalty on juveniles and whether the execution of a juvenile would further the goal of retribution, that there are clearly cases where the execution of a juvenile would further one or both of these purposes.[21] Put another way, the State is likely to suggest that as long as the age of the offender is considered in determining whether death is the appropriate sanction, there should be no categorical prohibition against executing someone who was below a certain age at the time of his offense. This position should be rejected for two reasons.

First, unless the State is contending that there is no age limit which sets a floor on an offender's eligibility for execution, a line must be drawn at some point. Given the practice of this state of generally bestowing the privileges and responsibilities of adulthood at age 18,[22] it is appropriate to

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[21]Assuming arguendo that this might be the case, at a minimum then, this Court, to determine whether an execution of a juvenile would be "cruel" must make a de novo determination of whether given the offender and offense, execution would measurably further either of the penological purposes of capital punishment. Such an independent determination would differ from the proportionality determination which is now constitutionally required, see Tillman, supra.

[22]See note 20, supra.

draw the line at that point.[23] More fundamentally, assuming arguendo that at least theoretically some juveniles might be deserving of the death penalty or be deterred by it does not mean that the Court should not opt for the prophylactic rule suggested by amicus. Rather, the Court must balance the merits of the approach suggested by amicus against the merits of the approach suggested by the State, keeping in mind its role as the primary protector of individual freedom and liberty. For example, in Traylor, supra, this Court recently adopted the United States Supreme Court decision in Miranda v. Arizona,[24] and its progeny as a matter of state constitutional law.[25] Yet, it is clear that the Miranda holding results in the exclusion of statements that are not compelled.[26] Nevertheless, in Miranda, the United States Supreme Court opted for a series of prophylactic rules believing that a case by case determination of voluntariness/ compulsion of a statement was unworkable and not likely to result in the protection of the guarantee of self-incrimination. In Traylor, this Court concurred in that approach in construing the

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[23]"It would be ironic if these assumptions that we so readily make about children as a class about their inherent difference from adults in their capacity as agents, as choosers, as shapers of their own lives -- were suddenly unavailable in determining whether it is cruel and unusual to treat children the same as adults for purposes of inflicting capital punishment." Thompson v. Oklahoma, 108 S.Ct. 2687, 2693 n.23 (1988).

[24]384 U.S. 436 (1984).

[25]Traylor v. State, 596 So.2d 957, 965-6 (Fla. 1992).

[26]See New York v. Quarles, 467 U.S. 649 (1984); Michigan v. Tucker, 417 U.S. 433 (1974); Harris v. New York, 401 U.S. 222 (1971).

Florida Constitution's prohibition on compulsory self-incrimination. To be faithful to the state constitutional guarantee against "cruel" punishments, it should do the same here.[27]

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[27]Amicus recognizes that in Stanford v. Kentucky, 109 S.Ct. 2969 (1989), the United States Supreme Court, by a 5-4 margin, concluded that the Eighth Amendment prohibition on cruel and unusual punishment did not preclude the execution of an individual for an offense committed when the offender was 16 or 17. Stanford is not controlling here however for a number of reasons. First, in Stanford, supra, the court was construing the federal Bill of Rights preclusion of cruel and unusual punishments. For this reason, four members of the five-person majority did not deem it necessary to determine whether the death penalty "fails to serve the legitimate goals of penalogy," Stanford, supra, at 2979. They did not engage in the analysis that amicus believes is mandated by Article I, § 17. Rather emphasizing the word unusual, these four members of the court looked exclusively to state practices in determining whether the execution of one 16 or 17 at the time of the offense would be contrary to evolving standards of decency and thus cruel and unusual. Second, as noted supra, federalist considerations suggest that U.S. Supreme Court decisions construing Bill of Rights provisions should not be dispositive as to the meaning of state constitutional provisions even when the provisions are similar in language. Third, and finally, in assessing the significance of Stanford to the resolution of the question presented here, the words of U.S. Supreme Court Justice Robert Jackson in Brown v. Allen, 344 U.S. 443 (1953), bear repeating. In Brown, in commenting on the U.S. Supreme Court, Justice Jackson wrote: "We are not final because we are infallible, but we are infallible only because we are final," at 540. Regarding the state constitutional law question presented here, the U.S. Supreme Court is by definition neither final nor infallible.

CONCLUSION

For the foregoing reasons, amicus believes that this Court should find that the execution of an individual who was under the age of 18[28] at the time he committed an offense is a "cruel" punishment prohibited by Article I, § 17 of the Florida Constitution.

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[28]The arguments demonstrating that it would be "cruel" to execute one between the ages of 17 and 18 at the time of the commission of his capital offense are even more compelling when dealing with 16-year-olds such as appellant. It stands to reason that the younger the offender the more likely it is that the goals of deterrence and retribution will not measurably be furthered by the offenders' execution assuming there is some minimum age below which the death penalty may not be imposed, see LeCroy, supra, at 758 ("We do not consider this to be a definitive resolution of whether there is some irreducible minimum age below which the death penalty may never be imposed.").

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail, first class, postage prepaid, to Richard B. Greene, Counsel for James Morgan, Office of the Public Defender, 15th Judicial Circuit, 421 Third Street, 6th Floor, West Palm Beach, FL 33401, and Celia Terenzio, Assistant Attorney General, 111 Georgia Avenue #204, West Palm Beach, FL 33401, this 16th day of November, 1992.

Steven Goldstein
Attorney

Supreme Court of Florida

THURSDAY, NOVEMBER 19, 1992

JAMES A. MORGAN,	*	
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Appellant/Cross-Appellee,	*	
	*	
v.	*	CASE NO. 75,676
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STATE OF FLORIDA,	*	
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Appellee/Cross-Appellant.	*	
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The Motion to File Amicus Curiae Brief and Request for Extension of Time to File Said Brief filed in the above cause by Volunteer Lawyers' Resource Center of Florida, Inc. (VLRC) is hereby granted. Amicus Curiae Brief of Volunteer Lawyers' Resource Center of Florida, Inc. (VLRC) was received by this Court on November 16, 1992.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

TC
cc: Richard B. Greene, Esquire
Celia Terenzio, Esquire
Steven M. Goldstein, Esquire

IN THE SUPREME COURT OF FLORIDA

JAMES A. MORGAN,

Appellant/Cross-Appellee,

vs.

STATE OF FLORIDA,

Appellee/Cross-Appellant.

CASE NO. 75,676

MOTION TO FILE AMICUS CURIAE BRIEF
AND
REQUEST FOR EXTENSION OF TIME TO
FILE SAID BRIEF

Volunteer Lawyers' Resource Center of Florida, Inc. (VLRC), pursuant to Rule 9.370, Florida Rules of Appellate Procedure, respectfully requests that this Court enter an order permitting it to file an amicus curiae brief in this cause, giving it until Monday, November 16, 1992, to file said brief, and as a basis therefore says:

1. VLRC is a foundation and a federally-funded resource center which provides support and assistance to volunteer counsel representing death-sentenced individuals in collateral post-conviction proceedings. VLRC was established in November 1988, and has provided assistance to counsel representing death-sentenced individuals since that time. VLRC has an obvious interest in significant legal issues affecting those on Florida's death row.

2. One of the questions raised in the above-captioned cause is whether it violates Article I, Sections 9 and 17 of the Florida Constitution to execute a person who was 16 at the time of the criminal offense. Specifically, the instant case raises the question of the meaning of the Florida Constitution's prohibition on cruel or unusual punishment, and its relationship to the United States Constitution's prohibition on cruel and unusual punishment. This question has taken an increased significance given this Court's recent state constitutional jurisprudence, see, for example, Traylor v. State, 596 So.2d 957 (Fla. 1992), and Tillman v. State, 591 So.2d 167 (Fla. 1991). The issue is obviously one of importance to VLRC, the counsel it assists and the death-sentenced individuals such counsel represent.

3. VLRC would like to file an amicus curiae brief in support of the proposition that it would violate the Florida Constitution's prohibition on cruel or unusual punishment and guarantee of due process to execute a person who was 16 at the time of the offense. The brief would support the position of the appellant/cross-appellee James A. Morgan. His brief is due in this Court on November 9, 1992.

4. Rule 9.370, Florida Rules of Appellate Procedure, requires that "unless stipulated by the parties or otherwise ordered by the court, an amicus curiae brief shall be served within the time prescribed for briefs of the party whose position is supported." Undersigned counsel for amicus curiae has

contacted both counsel for the state and counsel for Mr. Morgan about consenting to the filing by VLRC of an amicus brief and to its request to have until Monday, November 16, 1992, to file same. Counsel for Mr. Morgan has no objection to these requests. Counsel for the state, however, has indicated that she objects to any amicus briefs being filed in this cause. She has also stated, however, that if this Court agrees to allow VLRC to file an amicus brief, she has no objection to the Court giving amicus until November 16, 1992 to file said brief.

5. At the risk of appearing presumptuous, amicus believes its brief will add to the fair resolution of this cause. It is amicus' understanding that Mr. Morgan plans on raising more than 20 issues relating to the propriety of his first-degree murder conviction and death sentence. As a result, page limitations may preclude him from fully exploring the question which amicus wishes to address.

WHEREFORE, the movant respectfully requests that this Court enter an order granting its request to file an amicus curiae brief in this cause and permitting it until Monday, November 16, 1992, to file said brief.

STEVEN M. GOLDSTEIN
Florida Bar #151312
Special Counsel
VOLUNTEER LAWYERS' RESOURCE CENTER
OF FLORIDA, INC.
805 North Gadsden Street
Tallahassee, Florida 32303-6313

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail, first class, postage prepaid, on Richard B. Greene, Counsel for James Morgan, Office of the Public Defender, 15th Judicial Circuit, 421 Third Street, 6th Floor, West Palm Beach, FL 33401, and Celia Terenzio, Assistant Attorney General, 111 Georgia Avenue #204, West Palm Beach, FL 33401, this 9th day of November, 1992.

Steven M. Goldstein
Attorney