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IN THE SUPREME COURT OF FLORIDA

MICHAEL ANDRE' FUNCHESS,

Petitioner,

v. CASE NO. 79,963

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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IN THE SUPREME COURT OF FLORIDA

MICHAEL ANDRE' FUNCHESS,

Petitioner,

v. CASE NO. 79,963

STATE OF FLORIDA,

Respondent.

BRIEF OF PETITIONER ON THE MERITS

PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court, and w 11 be referred to as petitioner in this brief. A one volume record on appeal will be referred to as "R" followed by the appropriate page number in parentheses. A one volume transcript will be referred to as "T." Attached hereto as an appendix is the decision of the lower tribunal.

STATEMENT OF THE CASE AND FACTS

By information filed July 9, 1991, petitioner was charged with possession of a firearm by a convicted felon, the prior felony being robbery (R 7). The cause proceeded to jury trial on September 5, 1991, and at the conclusion thereof petitioner was found guilty as charged (R 18).

At trial, Sergeant Mark Stephen Boseman testified that on June 21, 1991, at 4:00 a.m., he saw petitioner running on West Seventh Street across Pearl Street. Petitioner then began walking North on Pearl and tossed a shiny object over a fence into a front yard of a house. He stopped petitioner and officer Calvey detained him while Boseman returned to the yard and found a chrome Raven .25 caliber pistol. The grass was wet from the dew, but the gun was dry (T 21-27). He did not process the gun for fingerprints (T 31-33).

Officer Freddie A. Calvey testified that he detained petitioner while Boseman located the gun, and it was entered into evidence over objection. Petitioner told the officer that "everyone in Springfield needs to have a gun" (T 34-42).

The state then proved through his fingerprints that petitioner had a prior Duval County conviction, on October 22, 1987 (R 22-25), for unarmed robbery (T 44-55).

The state had filed a notice of intent to prosecute petitioner as an habitual violent offender, and had alleged a prior robbery conviction on March 30, 1986 (R 6). At sentencing, the state explained that that was the date petitioner was placed an probation, but his probation was

revoked and he was adjudicated guilty of robbery on October 22, 1987, and amended its notice accordingly (T 119-20).

The state relied solely on the judgment for unarmed robbery that had been entered into evidence at trial (R 22-25) as the necessary predicate offense (T 119-20). The court found petitioner qualified as an habitual violent offender based upon that offense (T 127).

The sentencing guidelines scoresheet called for a recommended range of 12 to 30 months (R 30). Petitioner was adjudicated guilty and sentenced as an habitual violent offender to 20 years in prison, with a 10 year mandatory minimum (R 26-31),

On September 23, 1991, a timely notice of appeal was filed (R 34). On October 21, 1991, the Public Defender of the Second Judicial Circuit was designated to represent petitioner.

On appeal, petitioner argued that he could not receive an habitual violent offender sentence for a non-violent crime. In the alternative, petitioner argued it was cruel or unusual punishment to impose a 20 year sentence without parole and with a 10 year minimum mandatory. The lower tribunal held that petitioner could receive an habitual violent offender sentence for a non-violent crime, but certified the same two questions it had previously certified in Tillman v. State, 586 So.2d 1269 (Fla. 1st DCA 1991), review pending, case no. 78,715:

1. DOES IT VIOLATE A DEFENDANT'S SUBSTANTIVE DUE PROCESS RIGHTS WHEN HE IS CLASSIFIED AS A VIOLENT FELONY OFFENDER PURSUANT TO SECTION 775.084, AND THEREBY SUBJECTED TO AN EXTENDED TERM OF IMPRISONMENT, IF HE HAS BEEN CONVICTED OF AN ENUMERATED FELONY WITHIN THE PREVIOUS FIVE YEARS, EVEN THOUGH HIS PRESENT OFFENSE IS A NONVIOLENT FELONY?

2. DOES SECTION 775.084(1)(B) VIOLATE THE CONSTITUTIONAL PROTECTION AGAINST DOUBLE JEOPARDY BY INCREASING A DEFENDANT'S PUNISHMENT DUE TO THE NATURE OF A PRIOR OFFENSE?

On June 1, 1992, a timely notice of discretionary review was filed, On June 18, 1992, this Court entered its briefing schedule order.

SUMMARY OF THE ARGUMENT

Principles of statutory construction require that an offense for which the state seeks an enhanced punishment **as** a habitual violent felony offender must be an enumerated, violent felony. The title evinces a legislative intent to require that the instant felony be a violent crime, so that it comports with the term "habitual violent felony offender." The phrase, "The felony for which the defendant is to be sentenced" should be construed together with the act's title to read "The [violent enumerated] felony. . . ." This construction is consistent with the plain meaning of the word habitual, and achieves the evident legislative intent to punish habitual violent crime more severely. Additionally, this reading of the statute is required to avoid the constitutional defects explored below,

If the Court rejects this interpretation and reaches the two certified questions, both should be answered in the affirmative. Thus interpreted, the statute bears no substantial and reasonable relationship to its objective of punishing repetition of violent crime. It permits imposition of an enhanced sentence as a habitual violent felon upon one who has committed but a single violent felony, The fixation on the prior offense, for which an offender has already been punished, also renders the enhanced sentence **a** violation of constitutional prohibitions against double jeopardy.

In the alternative, petitioner will also argue that the sentence he received constitutes cruel <u>or</u> unusual punishment under the Florida Constitution. This is not the same as cruel

and unusual punishment under the federal constitution. The test is different, and focuses upon the penalties for similar crimes in Florida.

The proper remedy under either of these arguments is to vacate the sentence and remand for resentencing under the sentencing guidelines.

ARGUMENT

ISSUE I

THE HABITUAL VIOLENT FELONY PROVISIONS OF SECTION 775.084, FLORIDA STATUTES, MUST BE CONSTRUED TO REQUIRE THAT THE OFFENSE FOR WHICH A SENTENCE UNDER THOSE PROVISIONS IS IMPOSED BE A VIOLENT, ENUMERATED FELONY; A CONTRARY CONSTRUCTION RENDERS THAT STATUTE VIOLATIVE OF CONSTITUTIONAL DUE PROCESS AND DOUBLE JEOPARDY PROVISIONS.

A. INTRODUCTION

In 1988, the legislature amended Section 775.084, Florida Statutes, creating among other changes a new classification, habitual violent felony offender. Ch. 88-131, 56, Laws of Florida. Section 775.084(1)(b), Florida Statutes, now defines a habitual violent felony offender as one who has committed one of 11 violent felonies within the past five years, or been released from a prison sentence for one of these crimes within the past five years, and then commits a new felony. Section 775.084(4)(b) provides enhanced penalties for those who qualify, including mandatory minimum terms.

The First District Court of Appeal has certified two questions, asking whether a sentencing scheme that permits enhancement of a sentence for a habitual violent felon violates constitutional Due Process and Double Jeopardy clauses when the offense for which the sentence is imposed is nonviolent. Petitioner addresses those questions below, First, however, this Court should determine whether an alternative construction which avoids these potential constitutional defects is possible.

B. STATUTORY CONSTRUCTION

The habitual violent felony provisions suffer internal conflict. The statute's title invokes the term "habitual violent felony offenders." The term is repeated in Section 775.084(1)(b). The word habitual denotes an act of custom or habit, something that is constantly repeated or continued. Oxford American Dictionary (1980 ed.). This Court has held that unambiguous statutory language must be accorded its plain meaning. Carson v. Miller, 370 So.2d 10 (Fla. 1979).

However, Section 775.084(4)(b) defines a habitual violent felony offender as one who commits a felony within five years of a prior, enumerated violent felony. The statute may thus be construed as permitting habitual violent felon enhancement for an unenumerated, nonviolent instant offense, as it was here. That construction permits a habitual violent felony offender sentence for a single, prior crime of violence.

Courts have a duty to reconcile conflicts within a statute. In Re Natl. Auto Underwriters Assoc., 184 So.2d 901 (Fla. 1st DCA 1966); Vocelle v. Knight Bros. Paper Co., 118 So.2d 664 (Fla. 1st DCA 1960). A court may resolve such conflict by considering the title of the act and legislative intent underlying it, and by reading different sections of the law in pari materia. See Parker v. State, 406 So.2d 1089 (Fla. 1981) (legislative intent); State v. Webb, 398 So.2d 820 (Fla. 1981) (title of the act); Speights v. State, 414 So.2d 574 (Fla. 1st DCA 1982) (in pari materia). If doubt over the meaning of the law remains, the court must apply a strict scrutiny standard and resolve the

ambiguity in favor of the defendant. State v. Wershow, 343 So.2d 605 (Fla. 1977). This result is consistent with the rule of lenity, a creature of statute in Florida. Section 775.021(1), Florida Statutes. The rule, which requires the construction most favorable to the accused when different constructions are plausible, **extends** to the entire criminal code, sentencing provisions included. Cf. Bifulco v. United States, 447 U.S. 381, 387 (1980) (federal rule of lenity applies to interpretation of penalties imposed by criminal prohibitions).

Applying these principles, this Court should find that the instant offense must be a violent felony, as enumerated in Section **775.084(4)(b)1,** to subject the offender to habitual violent felony sentence enhancement. The statute is certainly susceptible of different constructions on this point. See Canales v. State, 571 So.2d 87, 89 (Fla. 5th DCA 1990) (in dicta, court states that when requirement of prior violent felony is met, legislature intended offender be eligible for enhanced penalty "for a subsequent Florida violent felony.") The title evinces a legislative intent to require that the instant felony be a violent crime, so that it comports with the term "habitual violent felony offender." The phrase, "The felony for which the defendant is to be sentenced" in Section **775.084(1)(b)2,** should be construed together with the act's title to read "The [violent enumerated] felony. . . ." This construction is consistent with the plain meaning of the word habitual, achieves the evident legislative intent to punish habitual violent crime more severely, and comports with the **rule** of lenity. Additionally, this

reading of the statute is required to avoid the constitutional defects explored below. **See** Schultz v. State, 361 So.2d 416, 418 (Fla. 1978) (when reasonably possible, a statute should be construed so as to avoid conflict with the Constitution).

Adoption by the Court of this interpretation does not require reconsideration of the statute as a whole, or review of sentences imposed under the nonviolent provisions. Presumably, only a small portion of sentences imposed under the habitual violent felony offender provisions are for commission of nonviolent instant offenses. These provisions would remain fully viable, although available in more limited circumstances.

Since petitioner present crime is non-violent, he should not have been eligible to receive a violent habitual sentence.

C. CONSTITUTIONALITY

1. Due Process

If a construction of the statute which does not require the instant offense to be an enumerated violent felony is approved, the habitual violent felony provisions fail the due process test of "a reasonable and substantial relationship to the objects sought to be obtained." See State v. Saiez, 489 So.2d 1125 (Fla. 1986); State v. Barquet, 262 So.2d 431 (Fla. 1972). This defect goes to the first of the two certified questions. As noted above, the label "habitual violent felony offender" purports to enhance the punishment of those who habitually commit violent felonies. Section 775.084(1)(b), Florida Statutes. This is the object the statute seeks to attain. However, as applied by the trial court, the statute does not require the current offense to

be an enumerated violent felony. Here, the state established only one prior violent felony, unarmed robbery, plus the instant, nonviolent, felony. On this record, there is no evidence of a habit of violent crime.

In the sentencing guidelines arena, this Court has held that one prior crime (second degree murder), followed by a subsequent crime (another second degree murder), does not constitute a continued or persistent pattern of criminality. State v. Dodd, 594 So.2d 263 (Fla, 1992). Petitioner asks: if persistent means the same thing as habitual, and if a defendant who commits two murders is not persistent, how can a defendant who commits a robbery followed by possession of a firearm be habitual or habitual violent?

The statute permits an even greater absurdity: A defendant may be convicted of attempted aggravated assault -- a misdemeanor -- in 1986, then be sentenced to 30 years with a 10-year mandatory minimum term in 1991 as a habitual violent offender for dealing in stolen property. Thus, despite its objective as expressed four times in the statute's use of the term "habitual violent felony offender," the only habit this construction of the statute punishes is crime, not necessarily felonious crime and certainly not habitual violent felonious crime.

The First District Court of Appeal rejected a similar due process argument in Ross v. State, 579 So.2d 877 (Fla, 1st DCA 1991), approved, 17 FLW S367 (Fla. June 18, 1992), rehearing

pending.[1] The court held that, "[i]n our view, just as the state is justified in punishing a recidivist more severely than it punishes a first offender, its even more severe treatment of a recidivist who has exhibited a propensity toward violence is also reasonable." Id. at *878.* Petitioner has no quarrel with this proposition, except that the court's use of the word "propensity" does not reflect the showing required for habitual violent felon enhancement, Propensity connotes tendency or inclination. If the habitual violent provisions required that the state establish commission of two prior violent felonies, a propensity would be shown. However, a single, perhaps random act of violence does not fit within the common understanding of the word. In a guideline departure case, Judge Cowart of the Fifth District Court of Appeal has noted:

> If the term "pattern" is not carefully defined by reference to objective criteria, looking for a "pattern" in a defendant's criminal record is like looking for a pattern or figure in the moon, or in the clouds or in the Rorschach test or in tea leaves or in sheep entrails--the process is highly subjective and the result is in the eye of the beholder. One sees largely what one wants to see. Those who do not like guideline sentencing can always say, "I spy a pattern and two offenses show continuous and persistent conduct "

Lipscomb v. State, 573 So.2d **429**, 436 (Fla. 5th DCA) (Cowart, J., dissenting), review dismissed, 581 So.2d 1309 (Fla. 1991). The

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[1]Petitioner is not arguing the statute is unconstitutional because the legislature failed to include aggravated battery in 1988 **as** one of the enumerated prior violent felonies.

manner in which the Ross court puts the word "propensity" to use sparks the same concern. By any objective measure, one violent offense does not establish a propensity. Moreover, as noted above, the expressed legislative intent is to punish habitual violent conduct, not merely a loosely defined propensity. The failure of the contested provisions to reasonably and substantially relate to this purpose renders its application a violation of due process of law.

2. Double Jeopardy

The state and federal constitutions both forbid twice placing a defendant in jeopardy for the same offense. U.S. Const., amend. V, XIV.; Fla. Const., art. 1, §9. The First District Court of Appeal has noted that the violent felony provisions of the amended habitual offender statute implicate constitutional protections. Henderson v. State, 569 So.2d 925, 927 (Fla. 1st DCA 1990).[2] The fixation of the habitual violent felony provisions on prior offenses renders application of this statute to petitioner a violation of these constitutional protections. This goes to the second of the certified questions.

To punish a defendant as a habitual violent felony offender, the state need only show that he has one prior offense within the past five years for a violent felony enumerated within the statute. The current offense need meet no criteria, other than

[2] The court labeled the undersigned's argument as "perfunctory." Id. at 927.

that it be a felony committed within five years of commission, conviction or conclusion of punishment for the prior "violent" offense. Analysis of the construction of this statute and its potential uses leads to an inescapable conclusion: that the enhanced punishment is not for the new offense, to which the statute pays little heed, but instead for the prior, violent felony. The almost exclusive focus on this prior offense renders use of the statute a second punishment for that offense, violating state and federal double jeopardy prohibitions. When that prior offense also occurred before enactment of the amended habitual offender statute -- not the case here -- the statute's use also violates prohibitions against ex post facto laws.

Habitual offender and enhancement statutes have been upheld against challenges similar to the one made here, as long ago as 1948, on the grounds that the enhanced sentence was based not on the prior offenses but on the offense pending for sentencing. See, e.g., Gryger v. Burke, 334 U.S. 728 (1948). There the Court explained:

> The sentence as a fourth offender or habitual criminal is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.

Id. at 728. Using the same reasoning, Florida's courts have also rejected challenges based on double jeopardy arguments. See generally, Reynolds v. Cochran, 138 So.2d 500 (Fla. 1962); Washington v. Mayo, 91 So.2d 621 (Fla. 1956); Cross v. State, 96 Fla. 768, 119 So, 380 (1928). If the provisions in question were

more concerned with repetition, the inquiry might end here. The only repetition on which this portion of the statute dwells, however, is the repetition of crime, not the repetition of violent crime. Its focus on the character of the prior crime, without regard to the nature of the current offense, distinguishes Florida's habitual violent felony offender sentencing scheme from other enhanced sentencing provisions. ***See*** Hall **v.** State, ***588*** So.2d 1089 (Fla. 1st **DCA** 1991) (Zehmer, J., concurring), questions certified by unpublished order dated Dec. 12, 1991, review pending, case no. **79,237:**

> I view the imposition of the extent of punishment for the instant [non-violent] criminal offense based on the nature of the prior conviction as effectively imposing a second punishment on defendant solely based on the nature of his prior offense, a practice I had thought was prohibited by the Florida and United States Constitutions. This new statutory procedure is entirely different from the former concept of enhancing sentences of habitual offenders having prior offenses without regard to the nature of the prior felony, which has been upheld in this state **and** other jurisdictions,

This distinction is the point at which the amended statute runs afoul of constitutional double jeopardy clauses, as this Court correctly noted in Ross, supra, 17 FLW at **S368:**

> The entire focus of the statute is not on the present offense, but on the criminal offender's prior record.

The First District Court of Appeal did not meaningfully address this distinction in Tillman or Ross, supra, or in Perkins v. State, **583** So.2d 1103 (Fla. 1st DCA 1991), review pending, case no. **78,613.** In Perkins, the Court rejected the same

arguments made here, on the authority of Washington, Cross and Reynolds, concluding that "the reasoning of these cases is equally applicable to this enactment." Id. at 1104. Perkins thus left unaddressed the constitutional implications identified by Judge Zehmer in Hall, supra.

The Florida provisions at issue focus not on any specific offense pending for sentencing, but on the character of a prior offense for classification purposes. Consequently, an offender subjected to the operation of Section 775.084(4)(b), Florida Statutes, is being punished more for the prior offense than for the current one. In effect, as noted by Judge Zehmer in Hall, this then is a second punishment for the prior offense, barred by the state and federal constitutions.

D. CONCLUSION

For these reasons, petitioner's sentence must be vacated and the case remanded for resentencing without resort to the habitual violent felon provisions of Section 775.084. Either the statute must be construed to require that the sentence for which the sentence is imposed be an enumerated felony, or the statute violates constitutional due process and double jeopardy provisions. In such case, the certified questions should be answered in the affirmative. As either result applies only to those sentenced as habitual violent felons for commission of a nonviolent felony, retroactive application would require resentencing of a relatively small portion of those sentenced as habitual offenders since the 1988 amendment.

ISSUE II
THE IMPOSITION OF 50 YEARS OF HABITUAL VIOLENT OFFENDER SENTENCE WITH NO PAROLE FOR 20 YEARS CONSTITUTES CRUEL OR UNUSUAL PUNISHMENT UNDER ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION.

A. INTRODUCTION

The sentence of 20 years without parole for 10 years for the instant offense of possession of a firearm violates the prohibition of cruel or unusual punishments contained in article I, section 17 of the Florida Constitution. No claim is made here that the sentence violates the Eighth Amendment to the U.S. Constitution, and the argument that follows turns in large part on the distinction between the Florida Constitution, which contains the disjunctive "or," and the federal constitutional provision, which, phrased in the conjunctive, prohibits cruel and unusual punishments.

The Bill of Rights, or first 10 amendments to the United States Constitution, was adopted in 1791. Florida adopted its first constitution when it attained statehood in 1838. Significantly, only 47 years after its federal counterpart, the Declaration of Rights contained in the 1838 constitution prohibited "cruel r unusual punishments," and the phrase has survived several major constitutional revisions, including the mast recent in 1968. Art. I, §17, Fla. Const.

A cursory reading of the first state constitution shows that the framers used the federal Bill of Rights and English common law as a guide for the Declaration of Rights, yet they chose to include the disjunctive "or" and not the conjunctive "and" in prohibiting excessive punishments. Although petitioner has been

unable to find an express statement of legislative intent in the archival evidence available from the 1838, 1885 and 1968 conventions, one must assume from the available evidence that the phrasing of the Florida provision is no accident. Thus, courts should give effect to the difference in the phrasing. This Court recently noted the disjunctive "or" in article I, section 17, and observed that it indicates that alternatives were intended. Tillman v. State, 591 So.2d 167, 169, n.2 (Fla, 1991).

This Court has the duty to evaluate the constitutionality of the habitual violent offender statute and petitioner's resulting sentence:

> The separation of powers doctrine requires that the judiciary bear the responsibility of determining the constitutionality of legislation. Simply yielding to legislative discretion is tantamount to **a** breach of this judicial duty. Accordingly, judicial review has been recognized as necessary to resolve issues concerning the proportionality of sentencing legislation, **As** one member of the Supreme Court stated: "[J]udicial enforcement of the [cruel and unusual punishments] clause **...** cannot be evaded by invoking the obvious truth that legislatures have the power to prescribe punishment for crimes." Furman v Georgia, **408** U.S. 238, 269 **(1972)** (Brennan, J., concurring).

Casenote, **17** U. Balt. **L.** Rev. **572 (1988),** discussing State v. Davis, 530 A.2d 1223 (Md. Ct. **App.** 1987).

B. FEDERAL VERSUS STATE CONSTITUTIONS

In a section of his opinion in Harmelin **v.** Michigan, 501 **U.S. ___ ,** 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (on which he was joined only by the Chief Justice), Justice Scalia suggested that state constitutional provisions forbidding "cruel or unusual

punishment," like those forbidding "cruel and unusual punishment," were not interpreted in the 19th century to prohibit disproportionate punishments. However, a plurality of four justices adhered to at least a semblance of proportionality analysis under the Eighth Amendment in Harmelin. Too, constitutional interpretation is not frozen in time, either by the divined intent of the drafters or early judicial opinion, The genius of a well-drafted constitution is in its ability to evolve. Cf. Katz v. United States, 389 U.S. 347, 353 (1967) (electronic device used to record telephone conversations need not physically penetrate a wall to constitute a search and seizure). Finally, a state bill of rights becomes a repository for empty platitudes if its provisions are interpreted in lockstep precision with a correlating provision of the federal Bill of Rights.

Via constitutional amendment, Florida has surrendered its courts' power to provide an interpretation of article I, section 12 of the state constitution independently of U.S. Supreme Court interpretation of the Fourth Amendment, State v. Jimeno, 588 So.2d 233 (Fla. 1991). In the absence of a constitutional amendment restricting the remaining provisions of the Declaration of Rights to the prevailing Supreme Court interpretation of the Bill of Rights, these provisions remain independently viable. Augmenting these principles is the fact, explored above, that section 17 is worded differently from the Eighth Amendment in terms giving greater protection to individuals. This Court should hew to that wording.

Moreover, this Court has indicated that our Declaration of Rights operates independently of the federal Bill of Rights and may provide our citizens with greater protection. Traylor v. State, 17 FLW **S42** (Fla. Jan. 16, 1992).

"Cruel or unusual punishment" differs from "cruel and unusual punishment." Justice Scalia noted the distinction in Harmelin, 115 L.Ed.2d at **864** ("Severe mandatory penalties may be cruel, but they are not unusual in the constitutional sense **... .")** Justice Scalia also noted an 1892 South Dakota decision interpreting a provision of that state's constitution which forbade merely cruel punishments as authorizing proportionality review. In Florida, the constitution forbids punishments that are either cruel or unusual.

As stated in Rubin, The Law of Criminal Correction at 423 (2d ed. 1973) (footnotes omitted):

> **The** prohibitions contained in the Eighth Amendment of the United States Constitution are found in one form or another -- sometimes elaborate, most often terse **--** in the Bill of Rights or Declaration of Rights of all the state constitutions, except in Illinois, Vermont, and Connecticut. Nineteen states proscribe cruel "or" unusual punishment. Twenty-two states prohibit cruel "and" unusual punishment. Six states prohibit only "cruel punishment, making no mention of "unusual." In Illinois, the constitution provides that "all penalties shall be proportional to the nature of the offense;" Vermont has no constitutional provision on the matter but the state Supreme Court **has** said that the English Bill of Rights **is** a part of the common law and **as** such is applicable; Connecticut has no constitutional provision and no case directly in point, but in a **case** in which the constitutionality of a statute enhancing the penalty for a second offense was an issue, the highest court in

the state quoted with approval the statement: "Nor can it be maintained that cruel and unusual punishment has been inflicted."

The task remains to give flesh to these words to determine the type of review appropriate under the state constitution. Standard dictionaries provide little assistance. The Oxford American Dictionary (1980 ed.) defines **"cruel"** as "feeling pleasure in another's suffering" and "causing pain or suffering." The first definition is obviously inapposite; as to the second, all punishments of substance cause pain or suffering. The definition of "usual" is marginally more helpful: "not usual, exceptional, remarkable.'' **As** noted in Solem v. Helm, 463 U.S. 277, ***285*** (1983), Blackstone used "cruel" to mean severe or excessive,

The opinion in Robinson v. California, 370 U.S. 660 **(1962),** suggests that an unusual punishment is defined not by type -- flogging versus incarceration -- but by degree: "To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract, Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." Id. at **667.**

Therefore, a cruel or unusual punishment under the Florida Constitution is one which is severe or excessive under the circumstances, and exceptional in the context of the overall scheme of criminal sanctions. Pertinent considerations include the gravity of the conduct underlying the offense and, in the **case** of an enhanced recidivist punishment, the gravity and volume

of offenses contained in a prior record. In short, some sort of proportionality review is required.

Solem v. Helm, 463 U.S. 277 (1983), created a three-part proportionality test under the Eighth Amendment. First, a court should look to the gravity of the offense and the harshness of the penalty. Id. at 291-292. Second, a comparison of sentences imposed on other criminals in the same jurisdiction may be helpful. The Court observed that if more serious crimes are subject to the same penalty or less serious penalties, that is some indication that the punishment at issue may be excessive. Id. at 292. Third, Solem instructs that it may be useful to compare the sentences imposed for commission of the same crime in other jurisdictions.

C. THE TEST UNDER THE FLORIDA CONSTITUTION

1. The law from other states

A proportionality analysis under article I, section 17 of the Florida Constitution should encompass the first two parts of the Solem test. Part three is a function of federalism, the operation of 50 independent criminal justice systems within the framework of a federal constitution. As Florida's criminal justice system operates under one unified set of statutes and rules, comparisons to other states are not helpful in determining whether the operation of Florida law violates the Florida Constitution. This observation is also consistent with the wording of article I, section 17, which -- because it is phrased in the disjunctive -- offers greater protection to individual than the Eighth Amendment, under which the Solem test was erected.

However, a look to other states with similar state constitutional provisions will help evaluate petitioner's claim. In Workman v. Commonwealth, 429 S.W.2d 374 (Ky. Ct. App. 1968), the defendants, both 14-year-old juveniles, challenged their life sentences without parole for rape as cruel punishment. The state constitution at the time prohibited only cruel, but not unusual, punishment:

> [E]xcessive bail shall not be required, nor excessive fines imposed, nor cruel punishment inflicted.

Ky. Const., §17.

The court first noted that it never had before declared a statutory punishment to be excessive. The court then noted that it, much like Florida appellate courts, had held that the maximum penalty for crimes was within the discretion of the legislature and not subject to judicial review. However, having said both of those things, the acknowledged that it had the power to strike down excessive punishments:

> [T]here nevertheless can be sentences so disproportionate to the offense committed as to shock the moral sense of the community. When this occurs the punishment would seem to fall within the prohibition of section 17 of the Constitution of Kentucky.

429 S.W.2d at 377.

The court proceeded to set forth the following proportionality test for "cruel" punishment under its constitution:

> The first approach is to determine whether in view of all of the circumstances the punishment in question is of such character as to shock the general conscience and to

> violate the principles of fundamental fairness. This approach should always be made in light of developing concepts of elemental decency. This resolves itself into a matter of conscience and the principles to be applied to the individual case without a lot of attention to ancient authorities. ...
>
> The next approach is likewise one of conscience but the test pits the offense against the punishment and if they are found to be greatly disproportionate, then the punishment becomes cruel and unusual. ...
>
> The third test is, does the punishment go beyond what is necessary to achieve the aim of the public intent as expressed by the legislative act?

429 S.W.2d at 378; citations omitted.

The court applied this test and found that life without parole for juveniles convicted of rape constituted cruel punishment in violation of the Kentucky constitution. The court left the life sentences intact but ordered that they be eligible for parole.

In State v. Mims, 550 So.2d 760 (La. Ct. App. 1989), the defendant sold $20 worth of marijuana to the police, and a search of his home revealed 1.7 pounds of the illegal substance. He was convicted of sale and possession with intent to distribute, and received consecutive nine year sentences, for a total of 18 years, under that state's habitual offender statute. The court wondered whether such a sentence was excessive under its state constitution:

> A sentence is unconstitutionally excessive in violation of La. Const. 1974 Art. 1, § 20 if the sentence is grossly out of proportion to the severity of the offense or nothing more than the needless and purposeless imposition of pain and suffering.

> ... A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it is so disproportionate as to shock the sense of justice.

550 So.2d at 763. While not directly passing on the constitutional argument, the court remanded for the judge to reconsider his sentence in accord with the habitual offender statute, which required the judge to particularly justify his sentence and tailor it to the particular defendant.

The California courts have been most active in examining excessive sentences under that state's constitution. In In re Grant, 553 P.2d 590 (Cal. 1976), the defendant was sentenced as a repeat drug offender to life without parole for 10 years for selling marijuana. He had a prior conviction for possession of marijuana and a prior conviction for sale of restricted dangerous drugs. The court addressed the argument only under the state constitution, which was in the disjunctive and remarkably similar to Florida's:

> At the time of petitioner's conviction and sentencing the cruel or unusual punishment provision was contained in article I, section 6, of the Constitution which provided in pertinent part: "... nor shall cruel or unusual punishments be inflicted." In November 1974, article I, section 6, was repealed and present section 17 was added. Insofar as is herein pertinent section 17 contains essentially the same language as former section 6: "Cruel or unusual punishment may not be inflicted ... ." Our conclusions herein are equally applicable to the prohibition of cruel or unusual punishment contained in either former section 6 or present section 17, and to sentences imposed while either section was or is in effect. ...

> Petitioner also claims that the provision precluding parole consideration for a minimum of 10 years violates the cruel and unusual punishment clause of the Eighth Amendment of the United States Constitution. We do not reach **this** federal issue and rest our resolution on the distinct provisions of the California Constitution.

553 P.2d at 592, note 2; citations omitted; emphasis added.

The court first noted that while it was the function of the legislature to define crimes and their punishments, the courts had the power to examine the constitutionality of the repeat drug offender statute:

> Such legislative authority is ultimately circumscribed inter alia by the constitutional prohibition against cruel or unusual punishment ... and it is the responsibility of the judiciary "to condemn any violation of that prohibition."

553 P.2d at 593; citations omitted.

The court had previously held in In re Foss, 519 P.2d 1073 (Cal. 1974), that the 10 year mandatory minimum for a second offender, and the 15 year mandatory minimum for a third offender, were both unconstitutional. The court proceeded to declare the various mandatory minimum portions of the entire repeat drug offender statute unconstitutional in violation of its state constitutional provision against cruel or unusual punishment. The court ordered that such defendants be eligible for parole. The court used the following tests from In re Foss and In re Lynch, 503 P.2d 921 (Cal. 1972):

> The first such technique involves an examination of the nature of the offense and/or **the** offender, with particular regard to the degree of danger both present to society. ... Relevant to this inquiry are

> ... the nonviolent nature of the offense, and whether there are rational sradations of culpability that can be made on the basis of the injury to the victim and to society in general. ... Also relevant is **a** consideration of the penological purposes of the proscribed punishment. ...
>
> To further this inquiry courts have relied on the facts of the crime in question, as well as the circumstances of the particular offender in order to illustrate the triviality of the offense and to demonstrate that the challenged punishment does not fit the criminal. ...
>
> The second technique set forth in Lynch and Foss involves a comparison of the questioned punishment with punishments imposed within ... California for offenses which may be deemed more serious than that for which the questioned punishment is imposed. ... The assumption underlying this test appears to be that although isolated excessive penalties may occasionally be enacted, **e.g.,** through honest zeal ... generated in response to transitory public emotion ... the vast majority of punishments set forth in our statutes ... may ... be deemed illustrative of constitutionally permissible degrees of severity; and if among them are found more serious crimes punished less severely than the offense in question, the challenged penalty is to that extent suspect.

553 P.2d at 593; citations omitted: emphasis added.

In State v. Broadhead, 814 P.2d 401 (Idaho 1991), the court explained its role in reviewing sentences to determine if they were cruel and unusual under art. I, ***56,*** Idaho Const. It overruled previous cases which held that a sentence within the statutory maximum is per se not cruel and unusual, and adopted a proportionality test:

> The fact that the sentence imposed is within the limits allowed by the applicable statute does not, however, resolve the issue

> of cruel and unusual punishment. The decisions of both this Court and the United States Supreme Court require that **we** conduct a further analysis to determine whether the sentence is cruel and unusual. If the sentence imposed by the trial court is within the statutory limit, both this Court and **the** United States Supreme Court have ruled that we must engage in **a** proportionality analysis **to** determine the constitutionality of the sentence.
>
> In exploring the dimensions of the protections afforded by the cruel and unusual punishments clause of art. I, §6 of our state constitution, this court has said:
>
> > Cruel and unusual punishments were originally regarded **as** referring to such barbarous impositions **as** pillory, burning at the stake, breaking on the wheel, drawing and quartering, and the like. But now it is generally recognized that imprisonment for such a length of time as to be out of all proportion to the gravity of the offense committed, and such as to shock the conscience of reasonable [people], is cruel and unusual within the meaning of the constitution.
>
> State v. Evans, 73 Idaho 50, **57-58**, 245 P.2d **788**, 792 (1952) (emphasis added).

814 P.2d at 408. The court found that a 15 year sentence imposed on a juvenile for the second degree murder of his father was proportional to similar crimes in **Idaho,** did not shock its conscience, and thus did not offend the state's constitution.

In Naovarath v. State, 779 P.2d **944** (Nev. 1989), a juvenile was sentenced to life without parole for a plea of guilty to murder, and argued his sentence was cruel or unusual under the Nevada constitution. The court adopted a "humanitarian instincts" test:

Former Unites States Supreme Court Justice Frank Murphy, in an unpublished draft opinion, put the matter very well:

> More than any other provision in the Constitution the prohibition of cruel and unusual punishment depends largely, if not entirely, upon the humanitarian instincts of the judiciary. We have nothing to guide us in defining what is cruel and unusual apart from our consciences. A punishment which is considered fair today may be considered cruel tomorrow. And so we are not dealing here with a set of absolutes. Our decision must necessarily spring from the mosaic of our beliefs, our backgrounds and the degrees of our faith in the dignity of the human personality,

*   *   *

Guided by the "humanitarian instincts" mentioned by Justice Murphy, we conclude that the kind of penalty imposed in this case is cruel and unusual punishment .... .

779 P.2d at 947, 948-49; footnote omitted. The court ordered the life sentence to be with parole eligibility.

Closer to home, and more on point, the supreme court of Mississippi has struggled with the problem of defining what is a proportional sentence for an habitual offender. In Clowers v. State, 522 So.2d 762 (Miss. 1988), the defendant was convicted of uttering a $250 forged check. The trial court found him to be an habitual offender because of his prior crimes of burglary, larceny, and forgery. But instead of sentencing him to 15 years without parole, as required by the habitual offender statute, the trial court sentenced him to five years without parole. The state predictably appealed the sentence.

The Mississippi supreme court quoted at length the trial court's reasons for imposing a lesser sentence, and they bear repeating here, because everything the trial judge said about Mississippi's habitual offender statute is true with regard to our statute:

> And I say that I want to emphasize that I'm aware that the Legislature in passing that habitual criminal statute were [sic] concerned with the sentencing by the courts of this state on those individuals who are repeatedly before the court and are a repeated thorn in the side of our society. ... [T]he Mississippi Supreme Court is pointing out to the Legislature that they also have the duty to see that the -- the maximum sentences are not disproportionate, not only as to the crime involved and the previous -- the types of the previous convictions, but also with the maximum sentences to be applied to the other crimes in the State of Mississippi and also with the constitutional standards by comparing it with other jurisdictions in the United States. In my opinion, the Legislature has failed to do this.
>
> *　　　　*　　　　*
>
> As I say, 1 find as a fact that the maximum sentence for forgery, as applied under the circumstances of this case would be disproportionate to sentences for other crimes set out in this jurisdiction ... .

522 So.2d at 763-64.

The Mississippi Supreme Court had previously held in Burt v. State, 493 So.2d 1325 (Miss. 1986) that once habitual status was proven, the judge had no discretion and must impose the maximum. Nevertheless, the court approved Clowers' reduced sentence on constitutional proportionality grounds:

> Here, by virtue of Burt and Miss. Code Ann. Section 99-19-81 (Supp. 1987), the trial court, **as** a matter of state statutory law, had no sentencing discretion. This does not end the discussion, however. The fact that the trial judge lacks sentencing discretion does not necessarily mean the prescribed sentence meets federal constitutional proportionality requirements. Notwithstanding §99-19-81, the trial court has authority to review **a** particular sentence in light of constitutional principles of proportionality **... .**

522 So.2d at 764-65.

The same court applied Clowers in Ashley v. State, 538 **So.2d** 1181 (Miss, 1989). The defendant there **was** convicted of burglary of a dwelling and sentenced to life in prison without parole as an habitual offender under Miss Code Ann. §99-19-83 (Supp. 1988), which provides:

> Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to and served separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, and where any one (1) of such felonies shall have been a crime of violence shall be sentenced to life imprisonment, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation. (emphasis added).

Ashley had prior convictions for several burglaries, and one attempted unarmed robbery, which the court **held** was a crime of violence under Mississippi law. The court also vacated his life sentence without parole, on authority of Clowers, and remanded for resentencing, because:

> Our law is not susceptible of mechanical operation, nor are our courts robots.

2. The law applied to petitioner

Petitioner's offense is possession of **a** firearm by a convicted felon. While the Legislature has the power to promote its interest in a gun-free state by enhancing the penalty when a prior violent felony is proved (but See Issue I, supra), the resulting punishment should be scrutinized to determine its proportionality to the particular evil inflicted. Petitioner simply possessed a firearm, because everyone in his neighborhood does (T **42).** There is nothing in the record to suggest that petitioner was intending to commit any particular crime with the gun. Compare, Harmelin v. Michigan, supra (defendant received mandatory life sentence for possession of 672 grams of cocaine). There is nothing in the record to suggest that petitioner had the intent to cause the incident to escalate into a violent one. Not to belittle the crime, but much more grave offenses abound under Florida law.

Petitioner's record of prior offenses, listed in the sentencing guidelines scoresheet (R 30), **may** be divided into three categories: the prior robbery, two felony drug Offenses, and one misdemeanor prowling.

While not stellar, petitioner's prior record is not as bad as some we see for 23 year old **black** males. **A** 20 year sentence with no parole for 10 years is disproportionately excessive to the gravity of the offense and prior record.

The framers of the sentencing guidelines, with their elaborate categories of offenses, paint assessments, and recommended and permitted ranges, have determined that petitioner's crimes, after taking into account his prior record, deserve only at most a recommended sentence of 12 to 30 months, and at most a permitted sentence of 3 1/2 years (R 30).

The second consideration is a comparison of penalties imposed on other crimes under Florida law. If petitioner had used the illegal gun to commit another robbery, his category 3 scoresheet would call for only a 9 to 12 year sentence. If petitioner had used the gun to commit a second degree murder, he could have received a 20 year sentence under the category 1 scoresheet, but with only a 3 year, as opposed to a 10 year, minimum mandatory.

However, had petitioner used the gun to commit a kidnapping, he could have received only a 12-17 year sentence under the category 9 scoresheet, again with only a 3 year, as opposed to a 10 year, minimum mandatory. Finally, had petitioner used the gun to shoot someone and thus to commit an aggravated battery, with severe injury, he could have received only a 4 1/2 to 5 1/2 year sentence under the category 4 scoresheet, again with only a 3 year, as opposed to a 10 year, minimum mandatory.

Obviously, under part two of the Solem test, and under the test from In re Grant, as applied under the Florida Constitution, more serious crimes are subject to less serious penalties. This Court, just like the Kentucky court of appeals in Workman v. Commonwealth, has the power to strike down disproportionate

punishments. Using, the Kentucky test, it is clear that petitioner's 20 year sentence without parole for 10 years "violates the principles of fundamental fairness."

Likewise, petitioner's habitual offender sentence would be unconstitutional under the test formulated by the Louisiana court of appeals in State v. Mims, because it is "grossly out of proportion to the severity of the offense," and also unconstitutional under the test in Idaho's State v. Broadhead, because it is "out of all proportion to the gravity of the offense committed, and shocks the conscience of reasonable people." It is also contrary to the "humanitarian instincts" discussed by the Nevada supreme court in Naovarath.

The result must be the same under the analysis of the Mississippi supreme court in Clowers and Ashley, because petitioner has demonstrated that our habitual violent offender statute, like that of Mississippi, leads to extremely disparate sentences, and it is up to this Court, since it is not **a** robot, to correct the constitutional violation.

The experience of the Arizona supreme court is most instructive. In State v. Bartlett, 792 P.2d 692 (Ariz. 1990), the court held that **a** 40 year sentence without parole for two counts of consensual intercourse with 14 year old girls was cruel and unusual punishment under the federal constitution. The state sought review, and was successful in having the United States Supreme Court vacate that decision in light of Harmelin. Arizona v. Bartlett, 501 **U.S.** ___, 111 S.Ct. 2880, 115 L.Ed.2d 1047 (1991). On remand, the Arizona Supreme Court held that

proportionality review of non death sentences survived Harmelin, if the sentence is grossly disproportionate to the crime. The court held that the nonviolent nature of Bartlett's crimes made his **40** year sentence without parole grossly disproportionate to his crimes, and therefore cruel and unusual under the federal constitution. State v. Bartlett, P.2d ___, 51 Crim. Law. **Rptr.** 1191 (Ariz. May *8,* 1992).

The same is true with regard to petitioner's 20 year sentence without parole for 10 years for his nonviolent crime.

D. CONCLUSION

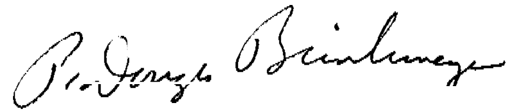
For these reasons, petitioner's sentence of 20 years without possibility of parole for 10 years is disproportionate to the gravity of the offense and to sentences for other, more serious crimes. It constitutes cruel or unusual punishment in violation of article I, section 17 of the Florida Constitution. **The** sentence must therefore be vacated and the case remanded for resentencing under the guidelines.

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, petitioner requests that this Honorable Court vacate his sentence and remand for resentencing with appropriate directions.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



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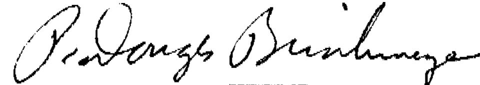
CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon Sara D. Baggett, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32399, and a copy has been mailed to petitioner, #289378, P.O. Box 628, Lake Butler, Florida 32054, on this 25th day of June, 1992.



P. DOUGLAS BRINKMEYER
ASSISTANT PUBLIC DEFENDER

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

MICHAEL ANDRE' FUNCHESS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO.: 91-3154

Opinion filed May 27, 1992.

An Appeal from the Circuit Court for Duval County.
John Southwood, Judge.

Nancy A. Daniels, Public Defender; P. Douglas Brinkmeyer, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; Sara D. Baggett, Assistant Attorney General, Tallahassee, for Appellee.

SMITH, J.

Appellant's constitutional challenge of his habitual violent felony offender sentence is AFFIRMED. However pursuant to Fla. R. App. P. 9.030(a)(2)(v), we certify the following questions to be of great public importance:

> 1. DOES IT VIOLATE A DEFENDANT'S SUBSTANTIVE DUE PROCESS RIGHTS WHEN HE IS

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PUBLIC DEFENDER
2nd JUDICIAL CIRCUIT

CLASSIFIED AS A VIOLENT FELONY OFFENDER PURSUANT TO SECTION 775.084, FLORIDA STATUTES (1989), AND THEREBY SUBJECTED TO AN EXTENDED TERM OF IMPRISONMENT, IF HE HAS BEEN CONVICTED OF AN ENUMERATED VIOLENT FELONY WITHIN THE PREVIOUS FIVE YEARS, EVEN THOUGH HIS PRESENT OFFENSE IS A NONVIOLENT FELONY?

2. DOES SECTION 775.084(1)(b), FLORIDA STATUTES (1989), VIOLATE THE CONSTITUTIONAL PROTECTION AGAINST DOUBLE JEOPARDY BY INCREASING A DEFENDANT'S PUNISHMENT DUE TO THE NATURE OF A PRIOR OFFENSE?

See Hall v. State, 588 So.2d 1089 (Fla. 1st DCA 1991), pet. for rev. pending, no. 79,237; Tillman v. State, 586 So.2d 1269 (Fla. 1st DCA 1991), pet. for rev. pending, no. 78,715; Perkins v. State, 583 So.2d 1103 (Fla. 1st DCA 1991), pet. for rev. pending, no. 78,613.

AFFIRMED.

ZEHMER AND WEBSTER, JJ., CONCUR.