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IN THE SUPREME COURT OF FLORIDA

MICHAEL ANDRE FUNCHESS,

Petitioner

v.

CASE NO.: *79,963*

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

For convenience, the State is following Petitioner's format. However, the State's response for each issue will first address jurisdictional considerations.

STATEMENT OF THE CASE AND FACTS

The State accepts Petitioner's statement with the following:

1. The opinion below did not consider Petitioner's second issue, whether his 20 year sentence (with a 10 year minimum) violates the Florida constitutional ban against cruel or unusual punishment. Neither certified question addresses that issue.

2. (a) At sentencing, the trial court gave its reasons for treating Petitioner as an habitual, violent felon after determining that he met the statutory requirements. Those reasons include Petitioner's total disregard for the law, as demonstrated by his failure to comply with most of his probation conditions, his admitted occupation as a drug dealer, and his failure to pay court-ordered child support. (T 123-6).

(b) As to the statutory requisites, the State notes that Petitioner's past offense was robbery (R 22-3). His present offense is possession of a firearm by a convicted felon. (R 18).

SUMMARY OF ARGUMENT

Issue I: Constitutionality of Habitual Violent Felon Statute

Both questions certified in this case are no longer of great public importance in light of Ross v. State, 17 F.L.W. S367 (Fla. June 18, 1992). Consequently, the basis for this court's jurisdiction has been removed. Further review is improvident.

Petitioner's substantive due process claim, grounded upon the fact that his present crime is not one deemed violent, was expressly rejected by this court in Ross. That case also recognized that the habitual felon statute enhances only the current offense, thereby refuting Petitioner's double jeopardy claim. The answer to both certified questions is "NO."

Issue 11: Petitioner's Sentence as Cruel or Unusual Punishment.

This issue is outside the scope of the questions establishing jurisdiction, and should not be answered. Otherwise, Petitioner's sentence is not excessive or disproportionate in light of his criminal record.

Since Petitioner's sentence is not disproportionate or excessive under the facts, it is not necessary for this Court to address whether Florida's constitutional ban of "cruel or

unusual" punishment is substantively different from the U.S. Constitution's prohibition of punishment that is "cruel and unusual."

Petitioner provides no historic or legal justification for interpreting the Florida and federal language differently. Even if his interpretation -- that the Florida provision affords greater protection to repeat, violent felons -- is correct, Petitioner cannot reasonably argue that his sentence of 20 years (with a 10-year minimum) is so severe as to shock the conscience.

ARGUMENT

ISSUE I

WHETHER THE HABITUAL VIOLENT FELON STATUTE IS CONSTITUTIONAL.

A. Introduction and Jurisdictional Considerations

Petitioner's observations require no response. While the State agrees this Court should adopt a constitutional interpretation of the habitual violent felon statute, the State hastens to add that the caurt has recently done so. See Ross v. State, 17 F.L.W. S367 (Fla. June 18, 1992) (upholding the 1988 version against vagueness, equal protection and due process challenges).

Ross is the basis for the State's next point. That case expressly rejected a due process attack on the 1988 version of the habitual felon statute. Such attack was grounded solely on the fact that the statute does not require a defendant's present felony be violent, so long as at least one past felony is among those deemed violent by the statute. As this Court said: "There is nothing irrational about this process.'' Id. at S368. Additionally, Ross noted that the statute is "entirely justified in enhancing an offender's present penalty for a nonviolent crime based on an extensive or violent criminal history." Id.

For purposes of the certified question, there is no significant difference between the 1988 and 1989 versions of the habitual, violent felon statute. Ross has effectively answered both questions certified in this case, and answered them in the negative.

Therefore, the instant certified questions are no longer of great public importance. The basis upon which this Court accepted jurisdiction has been removed by Ross. Moreover, Petitioner's second issue was not addressed by the opinion below, and is outside the scope of the certified questions. The State suggests that further review would be improvident.

B. Statutory Construction

Imagining "internal conflict" (pet. brief, p. 8) in the habitual violent felon statute, Petitioner first advances a statutory construction argument relying on the dictionary definition of "habitual". The flaws in this approach are numerous.

First, the habitual violent felon statute is precise. See Ross, supra at S368 ("[T]his statute is highly specific in the requirements that must be met before habitualization can occur."). Since the statute is "highly specific", there is no need to resort to principles of statutory construction. State v. Egar, 287 So.2d 1 (Fla. 1973); Bewick v. State, 501 So.2d 72 (Fla. 5th DCA 1987). Notably, even Petitioner implicitly concedes the statute is precise, as his due process argument is based on the correct reading of §775.084(1)(b); which defines "habitual violent felony offender" as a defendant convicted of a violent Florida felony within the last five years, and whose present conviction is also a felony. Petitioner is able to read the definition and correctly learn that his present offense need not be violent.

Otherwise Petitioner's observation that the statute suffers internal conflict through it3 definition of "habitual" is self-defeating. Since the statute provides the definition, the common

usage or definition of "habitual" is not applicable. *See*, Southeastern Fisheries Assoc., Inc. v. Dept. of Natural Resources, 453 So.2d 1351, 1353 (Fla. 1984) (when statute does not define words of common usage, plain meaning is ascribed). Deprived of its central premise, Petitioner's argument collapses.

C. Constitutionality

1. Due Process

The bud of Petitioner's argument has been nipped by Ross. That case upheld the 1988 version of the habitual violent felon statute against the exact challenge now made by Petitioner. That Petitioner was sentenced under the 1989 version is immaterial, as the 1989 changes merely added aggravated battery to the list of violent felonies that could substantiate such classification. See § 1, ch. 89-280, Laws of Florida.

Petitioner's substantive due process challenge turns on whether the statutory classification (i.e., the definition of "habitual violent felony offender") bears a reasonable relationship to the purpose sought. State v. Saiez, 489 So.2d 1125 (Fla. 1986). For substantive due process purposes:

> It need only be shown that the challenged legislative activity is not arbitrary or unreasonable. . . . Courts will not be concerned with whether the particular legislation in question is the most prudent choice. . . . [I]f

> the legislation is a reasonably means to achieve the intended end, it will be upheld.

S ~~ieer~~, 489 So.2d at 1129 (Barkett, J.) ***quoting with approval,*** State v. Walker, 444 So.2d 1137, 1138-9 (Fla. 2d **DCA** 1984)(Grimes, J.), ***affirmed and lower court opinion adopted,*** 461 So.2d 108 (Fla. 1984).

The obvious intent and purpose of the habitual felon statute is to punish recidivists more harshly than first-time felons; and to punish violent felons more harshly still. See, Barfield v. State, 17 F.L.W. S32 (Fla. Jan. 9, 1992)("Moreover, Florida's habitual offender statute provides a statutory means of dealing with persistent criminal conduct."); and Eutsey v. State, **383** So.2d 219, 223 (Fla. 1980)(noting purpose of earlier version of habitual offender statute). The entire statute does just that.

It takes only one prior felony conviction -- if "violent" -- to qualify as a violent **repeat** felon; as opposed to **two** prior convictions for nonviolent habitual felons. The current offense need not be violent. Minimum mandatory sentences are imposed, whereas there are no minimum sentences for nonviolent habitual felons.[1]

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[1] Perhaps as a balancing factor, classification as a violent habitual felon must be based on Florida convictions, since the definition of habitual, violent felony offender does not include the phrase "qualified offense."

A person whose criminal conduct includes past commission of a violent felony plus another felony in the present is subject to a lengthier sentence with a mandatory minimum. The question becomes whether such a sentence is a reasonable means to protect society. The question answers itself. A repeat felon strongly demonstrates a lack of rehabilitation, and presents a continuing threat to the public. Violent past crimes raise the possibility of violent future crimes.[2] Simply because the present crime need not be violent does not render the statute unconstitutional. *See*, Ross v. State, supra at 368:

> Ross contends that due process also is offended . . . , We disagree. . . . The State is entirely justified in enhancing an offender's present penalty for nonviolent crime based on an extensive or violent criminal history.

Petitioner committed robbery in the past. His present offense is possession of a firearm by a convicted felon, a crime often associated with other violent felonies. There is no reason to believe he would not commit violent crime again. Society, through the Legislature, need not wait for him to combine his two prior felonies into the single offense of robbery with a firearm -- and perhaps shoot a convenience store clerk -- before

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[2] This possibility is heightened in Petitioner's case. As noted by the trial court at sentencing, Petitioner refused to obey probation conditions and refused to pay court-ordered child support (T 123-6); both of which indicate a propensity to disregard the law.

deciding that lengthier imprisonment with a mandatory minimum is the appropriate penalty. Petitioner's criminal history refutes his lame due process argument. This Court must deny relief on that ground.

2. Double Jeopardy

Although relied upon above in response to a due process claim, Ross sounds the death knell for Petitioner's double jeopardy[3] argument. While acknowledging that the habitual felon statute focuses on the criminal offender's prior record, Ross also declared that the State was "entirely justified in enhancing an offender's present penalty." [e.s.] (Id. at S368).

As this Court just recognized, the habitual violent felon statute enhances only the present felony. Consequently, it is simply impossible for such a felon to be punished twice for the past offense. There is no need to *go* further to **deny** relief.

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[3] Petitioner begins his argument by noting that the "state and federal constitutions both forbid twice placing a defendant in jeopardy for the same offense." [e.s.] (initial brief, p. 13). However, Petitioner's argument does not substantively distinguish the two constitutions. It could not, as both provisions are interpreted the same. See, Carawan v. State, 515 So.2d 161, 164 (Fla. 1987) ("[The] double jeopardy clause in article I, section 9, Florida Constitution . . . was intended to mirror . . . the double jeopardy clause of the Fifth amendment."). There are no independent state constitutional grounds upon which to answer the certified question. Petitioner does not suggest any.

Nevertheless, Petitioner's argument is based on the third protection provided by the double jeopardy clause, the prohibition against multiple punishments for the same offense. *See*, e.g., United States v. Di Francesco, 449 U.S. **117, 101** S.Ct. **426, 66** L.Ed.2d 328 **(1980).** It is obvious that Petitioner's current offense, and his earlier robbery, are separate because they are separate in time. Hence, the double jeopardy clause would be violated here only if the current punishment was imposed for the **1987** robbery, rather than for Petitioner's current firearm possession conviction. The record is clear, however, that Petitioner was sentenced by the trial court in the instant case for the **1991** firearm possession **(R** 26-30, T 126-7), and that his prior punishment for the 1989 offense was not altered in any way. Consequently, no double jeopardy violation exists.[4]

If this Court were to give credence to Petitioner's claim, it would have to reject all cases which denote the scope of the double jeopardy clause. Moreover, this Court would be

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[4] Petitioner relies heavily (initial brief, **p. 15)** on the **concurring** opinion of Judge Zehmer in Hall v. State, 588 So.2d **1089** (Fla. **1st DCA 1991).** That concurrence finds constitutional significance in the fact that a felon may be declared habitual and violent when at least one of several "violent" felonies have been committed in the recent past, even though the current offense need not be violent. The concurrence is specious: if the Legislature can declare a felon "habitual" merely for the commission of *any* prior felony, it is absurd to think an enhanced sentence is not possible when the past felony is violent. The concurring opinion represents no more than personal disagreement with the wisdom of the statute.

required to invalidate the sentencing guidelines and the capital sentencing procedures, both of which aggravate a defendant's current sentence based on the nature and seriousness of prior offenses.

Such radical action is not necessary. As this Court aptly stated in Cross v. State, 96 Fla. 768, **119 So. 380, 386** (Fla. 1928):

> "The propriety of inflicting severer punishment upon old offenders has long been recognized in this County and in England. They are not punished the second time for the earlier offense, but the repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted." As was said in People v. Stanley, 47 Cal. 113, 17 Am.Rep. 401: "The punishment for the second [offense] is increased, because by his persistence in the perpetration of crime he [the defendant] has evinced a depravity, which merits a greater punishment, and needs to be restrained by severer penalties than if it were his first offense." And as was said by Chief Justice Parker in Ross' Case, 2 Pick. (Mass.) 165: "The punishment is for the last offense committed, and it is rendered more severe in consequence of the situation into which the party had previously brought himself." The statute does not make it an offense or crime for one to have been convicted more than once. The law simply prescribes a longer sentence for a second or subsequent offense for the reason that the prior convictions taken in connection with the subsequent offense demonstrates the incorrigible and dangerous character of accused thereby establishing the necessity for enhanced restraint. The imposition of such enhanced punishment is not a prosecution of or punishment for the farmer convictions. The Constitution forbids such action. The enhanced punishment is

> an incident to the last offense alone. But for that offense it would not be imposed.

Id. at **386** (quoting Graham v. West Virginia, 224 U.S. 616 (1912)(citation omitted). *See also,* Washington v. Mayo, **91** So.2d **621,** 623 (Fla. **1956);** Reynolds v. Cochran, **138** So.2d 500 (Fla. 1962); Conley v. State, case no. 90-1745 (Fla. 1st DCA Jan. 2, **1992);** and Barber v. State, 564 So.2d **1169** (Fla. 1st DCA 1990)(again rejecting the same argument raised here by petitioner).

As is evident from the above sampling of cases:

> [Recidivist] statutes are neither new to Florida nor to modern jurisprudence. Recidivist legislation . . . has repeatedly withstood attacks that it violates constitutional rights against **ex** post facto laws, constitutes cruel and unusual punishment, denies defendants equal protection of the law, violates due process or involves double jeopardy.

Reynolds, **138** So.2d at 502-3.

Petitioner's argument ignores other significant facts relating to habitual offender sentencing in Florida. For example, the **1988** changes to the habitual offender statute actually reduced[5] the pool of defendants who could be classified

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[5] The pool of defendants is smaller, as a defendant must now have two prior felony convictions, or one conviction for a felony deemed "violent". One conviction for **a** "nonviolent" felony is no longer sufficient.

as habitual offenders. Under the statutory scheme approved in Reynolds and in effect until October of 1988, any defendant with one prior felony of *any* type was subject to habitualization. Since this Court has previously determined that the Legislature may constitutionally enhance the sentences of all defendants based on the commission of one prior felony of any kind, the Court must likewise hold that the Legislature has the authority to enhance the sentences of defendants who commit the most serious offenses based on the commission of one prior violent felony. Further, because the Legislature can, without violating the double jeopardy clause, distinguish between the nature of an offense (felony vs. misdemeanor) in determining the number of offenses required to habitualize, it certainly can distinguish between violent and nonviolent felons in determining how may prior offenses will subject a defendant to habitualization. Accordingly, §775.084(1)(b), Florida Statutes (1989), does not violate the canstitutional prohibition against double jeopardy, and Petitioner's argument to the contrary must fail.

D. Conclusion

Both certified questions have been answered in the negative by Ross. Consequently, neither question is still of great public importance. The State respectfully suggests that further review would be improvident, and that this case should be

returned to the First District for reconsideration in light of Ross.

Otherwise, the answer to both certified questions is still "NO". Petitioner's sentence must be affirmed.

ISSUE II

WHETHER PETITIONER'S SENTENCE IS CRUEL OR UNUSUAL UNDER THE FLORIDA CONSTITUTION ONLY.

A. Introduction

Unnecessarily belaboring the point Petitioner contends his 20-year sentence[6] (with a 10 year minimum) is cruel or unusual, and thus violative of Art. I, § 17 of the Florida Constitution. The dispositive question is not whether, in the abstract, Florida's constitutional provision offers greater protection than the federal, but whether the former would offer Petitioner any relief, if interpreted as he suggests.

There is no need for this court to address the abstract constitutional issue: whether the disjunctive "or" in Article I, § 17 is broader than the conjunctive "and" of the Eighth

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[6] Petitioner's statement of Issue II (initial brief, p. 17) contains a typographical error describing his sentence as fifty years, when 20 is the correct number.

Amendment.[7] Assuming that Florida's Constitution prohibits sentences that are cruel or unusual -- rather than only those sentences which are both -- does not help Petitioner. He does not and cannot urge any authority that bans a 20 year sentence for a felon properly deemed to be both habitual and violent. Petitioner does not separately challenge the 10 year minimum sentence. He simply claims his sentence cruel; that is, too lengthy. He is simply wrong.

It is long and well established that courts do not decide constitutional issues unnecessarily. State v. Tsavaris, 394 So.2d 418, 421 (Fla. 1981) ("[T]he Court will not pass upon a Constitutional issue if the case can be decided on other grounds.").

Therefore, the State suggests that this Court assume -- but expressly without deciding -- that Art. I, § 17 bans sentences that are so lengthy as to amount to cruel' under the facts.

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[7] On page 17 of his initial brief, Petitioner expressly disavows any claim based on the U.S. Constitution. Should this Court address the merits of the issue, the State requests that Petitioner's disavowance be noted.

[8] Curiously and significantly, Petitioner does not challenge his sentence as merely "excessive" which, if his argument had merit, would be a sufficient ground for relief. Petitioner never explains why he finds it necessary to claim his sentence is "cruel". Obviously, he cannot reasonably contend an enhanced sentenced for habitual, violent felons is "unusual."

For the reasons set forth later in this brief, the state does

Then, this Court would simply find that Petitioner's sentence is not cruel. See Reynolds, supra, 138 So.2d at 503 (rejecting, among others, an attack upon recidivist legislation as imposing cruel and unusual punishment), and Cross, supra, 119 So. at 386 ("It is neither cruel nor unusual to say that an habitual criminal shall receive a punishment based upon his established proclivities to commit crimes." [e.s.]).

Closely related is the converse observation. If Petitioner's 20-year sentence is not so shocking as to be "cruel", his tacit premise that the habitual felon statute potentially authorizes cruel sentence is, in effect, an improper attack based on that statute's application to others. Petitioner cannot bring such a challenge. State v. Burch, 545 So.2d 279, 283 (Fla. 4th DCA 1989), approved with opinion, 558 So.2d 1 (Fla. 1990).

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not concede the phrase "cruel or unusual" applies to statutorily authorized sentences, but to the statute itself.

B. Federal Versus State Constitutions

On one hand, the Cross language quoted above declares that enhanced sentences for habitual felons are neither cruel nor unusual. This implies that the two possibilities were considered separately. On the other hand, Petitioner cites no decisions from this Court indicating that the Florida phrase "cruel or unusual" is substantively different the federal phrase "cruel and unusual." While the use of "or" instead of "and" is obvious, there is no historic basis for ascribing substantive difference to the two.

That a state constitution may extend greater rights to individuals than the U.S. Constitution is not questioned here. The real issue is whether the literal difference between the two constitutions carries the burden urged by Petitioner: that every non-death sentence must be independently reviewed for excessive length under the facts.

The only way to do such would be to compare the sentence at issue with sentences imposed in other cases involving similar facts. In essence, Petitioner seeks proportionality review of every non-death sentence imposed upon an habitual, violent felon. This Court has repeatedly and recently confined proportionality review to the death penalty. See Tillman v. State, 391 So.2d 167, 169 (Fla. 1991) (proportionality review of

death cases based on fact that death is a unique punishment, "requiring a more intensive level of judicial scrutiny or process than would less penalties"). ~~See also Harmelin~~ v. Michigan, 501 U.S. ___, 111 S.Ct. 2680, 115 L.Ed.2d 836, 864-5 (1992) (expressly declining to extend proportionality review to non-death cases).

Ironically, Petitioner -- while basing his claim on the express difference between the U.S. and Florida Constitutions -- relies on the three part test in Solem v. Helm, 463 U.S. 277, 291-2 (1985). Such reliance is self-defeating, as Solem rests solely on the Eighth Amendment.[9] Since Petitioner expressly disavows any federally-based claim, the State will not respond to his federal cases. The State will note that Solem invalidated, as significantly disproportionate to the crime, a life sentence for his most recent incidence of passing a bad check. This is far, far cry from Petitioner's 20 year sentence

[9] Even Petitioner's own brief defeats his reliance on Solem. At p. 18-20, Petitioner relies heavily on that part of Justice Scalia's opinion in Harmelin v. Michigan, 501 U.S. ___, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) which was joined by only one other justice. The opinion of the court (Part IV of Scalia's opinion) upheld Harmelin's sentence of life without parole for possessing more than 650 grams of cocaine. Harmelin had no prior felony convictions (115 L.Ed.2d at 864); and argued, essentially, that proportionality review of his non-death sentence was required under the Eighth Amendment. In rejecting his claim, the opinion of the court firmly and clearly drew the "line of individualized sentencing at capitol cases" (id. at 865), and ended the persuasiveness of Solem.

as a recidivist felon who committed the violent crime of robbery in the past, before his instant offense of firearm possession by a convicted felon.

C. The Test Under The Florida Constitution

1. The law from other states

Having rejected any federal basis for relief, Petitioner first relies on the first two prongs of the test in Solem, itself no longer good law. Nevertheless, Petitioner then cites to Wordman v. Commonwealth, 429 S.W. 2d 374 (Ky. Ct. App. 1968), which held that sentences of life without parole imposed on two juveniles for rape was "cruel" punishment banned under Kentucky's constitution. Also a far cry from Petitioner's punishment, the life sentences were allowed to stand. The Kentucky court ordered only that the juveniles be eligible for parole. Here, Petitioner is eligible for release -- through gaintime -- at some point after 10 years. State v. Mims, 550 So.2d 760 (La.Ct. App. 1989) his no persuasiveness at all. The Louisanna court simply remanded the sentence without deciding whether it violated Art. I, § 20 of that state's constitution.

Petitioner next relies on three California cases, but primarily on In Re Grant, 553 P.2d 590 (Cal. 1976). That case declared a sentence of life with a 10 year minimum to violate

California's constitutional ban of punishment that is cruel or unusual. The State will again note the obvious: In re Grant involves a life sentence for repeated nonviolent felonies of drug possession or sale. Here, Petitioner's past includes the violent felony of robbery. Equally important, his sentence is far less severe; 20 years instead of life.

What can be said of the California cases is true for all of Petitioner's authority from other states. Either the sentences were upheld, as in State v. Broadhead, 814 P.2d 401 (Idaho 1991) (15 year sentence for juvenile's second degree murder of father); or were reduced in severity (usually, only by ordering eligibility for parole) upon significantly different facts. See Naovarath v. State, 779 P.2d 944 (Nev. 1989) (upholding juvenile's life sentence upon a plea to murder, but ordering that he be eligible for parole).

Petitioner's next case is Clowers v. Mississippi, 522 So.2d 762 (Miss. 1988). There, the defendant's sentence of 5 years without parole was upheld after a state appeal, despite the statutory requirement of a 15 year sentence. However, the defendant's past and present offenses were nonviolent. In Ashley v. State, 538 So.2d 1181 (Miss. 1989), the defendant's sentence of life without parole was vacated, despite the defendant's status a repeat felon with at least one violent felony.

All of the other state cases Petitioner cites have one of two characteristics: the sentences (usually, life without parole) were far more harsh, or the defendant's crimes were much less serious and nonviolent. In short, Petitioner has not been able to produce a single case which would, if followed, entitle him **to relief.**

2. The law as applied to Petitioner

At this point, Petitioner finally reveals the true nature of his claim. Despite his broad constitutional argument, he is inherently challenging the habitual violent felon statute as applied to him; that is, the sentence imposed in light of his unique criminal record. Petitioner cannot reasonably maintain the statute facially mandates cruel punishment.

The constitutionality of the habitual violent felon statute as applied **was** not raised **before** the trial court. Nothing said at sentencing (T 114-29) even intimates such. Therefore, review of this court is precluded. Trushin v. State, 425 So.2d 1126, **1129-30** (Fla. **1983)** ("The constitutional application of a statute to a particular set of facts is another matter and must be raised at the trial level."). See Randi v. State, **182** So.2d **632** (Fla. 1st **DCA** 1966) (appellant's contention that rape statute authorized cruel and unusual punishment under the Eighth Amendment not raised before, or passed upon by trial court;

therefore the issue could not be raised for the first time on appeal).[10]

Petitioner's observation that he "simply possessed a firearm" is a lame attempt to mislead the court. Petitioner committed a violent crime -- armed robbery -- in the past. By possessing a firearm in a neighborhood where everyone did (T 42), Petitioner placed himself in a position to engage in gunfire or commit violent crime. Either way, innocent persons could be harmed. Moreover, Petitioner's disregard for the law and admitted drug dealing, as found by the trial court (T 123-

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[10] The need for preservation here is obvious. Assuming Petitioner has a right to a "proportional" sentence as an habitual violent felon, the trial court would have to consider other sentences at Petition's sentencing. The appellate record would reflect such, which it obviously does not.

To prevail, Petitioner would have to introduce evidence showing that other defendants of similar character, under similar circumstances, and with an analogous criminal record received a less severe sentence. The State, of course, in rebuttal would then introduce evidence showing that other defendants similarly situated received the same sentence as Mr. Harris, or possibly even a more severe sentence. No doubt this task would be difficult, if not impossible, on both sides, since criminal cases, except for death-penalty cases, are not developed for the purpose of comparing aggravating and mitigating factors. Indeed, most criminal cases are disposed of even without a trial. Williams v. State, 316 So.2d 267, 270 (Fla. 1975) (approximately 90% of felony cases disposed of by guilty pleas). In addition, cansidering the number of criminal convictions obtained in this state on a weekly basis and the practice of disposing of criminal cases on appeal without a written opinion, an evidentiary hearing held to conduct such a comparative analysis would last quite a while.

6), raise the distinct possibility that he would use his firearm.

Petitioner's next useless point is a comparison of the uuidelines sentences he could receive if he committed other crimes. (initial brief, p. 33). His sentence is based on his classification as an habitual, violent felon. If he had committed second degree murder with a gun, Petitioner's guidelines sentence may well have been the 20 years he suggests. (initial brief, p. 33). However, Petitioner obviously would have been sentenced as a first degree habitual felon, and faced a life sentence with a 15 year minimum. To suggest that he would have received a lesser sentence for the more serious offense of murder is silly.

Most glaring is Petitioner's failure to address Florida law. This failure is deliberate, as his argument has repeatedly been rejected by the courts in Florida. Brown v. State, 13 So.2d 458 (Fla. 1943); Chaviqny v. State, 112 So.2d 910 (Fla. 2d DCA 1959); O'Donnell v. State, 326 So.2d 4 (Fla. 1975); and McArthur v. State, 351 So.2d 972 (Fla. 1977). The constitutional provision interpreted in these cases was Article I, section 8, of the 1885 Florida Constitution, as amended, which provided:

> Excessive bail, fines, etc.; cruel punishment.--Excessive bail shall not be required, nor excessive fines be imposed, nor cruel or unusual punishment or indefinite imprisonment be allowed, nor shall witnesses be unreasonably detained.

(e.s.).

In Brown, the defendant was found in possession of illicit whiskey, for which he was convicted and sentenced to prison for four years. The statutory penalty for his offense was a fine up to $5,000 or imprisonment not less than one year or more than five years. On appeal, he raised the issue, "Does the judgment and sentence for the term of four years in the state prison for the offense charged violate Section 8 of the Declaration of Rights of the Constitution of Florida?" Id. at 460. This court answered the question negatively, stating:

> The law appears to be well settled, as stated in 15 American Jurisprudence 174, Sec. 526, as follows: "As a general rule, in cases where the objection is to be particular sentence, and not to the statute under which it has been imposed, a sentence which is within the limit fixed by statute is not cruel and unusual and is therefore valid, no matter how harsh and severe it may appear to be in particular case, because the constitutional prohibition has reference to the statute fixing the punishment, and not to the punishment assessed by the jury or court within the limits fixed by statute. If the statute is not in violation of the Constitution, then any punishment assessed by a court or jury within the limits fixed thereby cannat be adjudged excessive, for

> the reason that the power to declare what punishment may be assessed against those convicted of crime is not a judicial power, but a legislative power, controlled only by the provisions of the Constitution."

Id. at 461.

The Brown court then proceeded to apply the above principles to resolve the issue before it, expressly holding:

> [T]he legislature has by statute fixed the maximum punishment which may be imposed for violation of the provisions of the statutes, and, therefore, it is within the province of the trial court to fix by sentence the punishment within the limits prescribed by statute. If in any particular case the sentence and punishment imposed thereunder appears to be excessive, that is a matter which should be presented to the State Board of Pardons for the exercise of its power of commutation and is not a matter for review and remedy by the appellate court.

Id. at 461-462.

In Chaviqny v. State, **112 So.2d 910 (Fla.** 2d **DCA 1959),** the Second District Court of Appeal interpreted Brown. The defendant in Chaviqny was convicted of second-degree murder of a husband and wife, for which he received two consecutive life sentences, the maximum penalty authorized by statute. On appeal, the defendant asserted that "the two life sentences as imposed by the court to run consecutively were excessive and

constituted cruel and inhuman punishment." Id. at 915. In rejecting the defendant's argument, the court stated:

> The appropriate rule is enunciated in the case of Brown v. State. The Florida Supreme Court points out that where the objection is to the particular sentence and not to the statute under which it was imposed, a sentence is not cruel nor unusual if such sentence is in conformity to the limit fixed by the statute and is therefore valid, notwithstanding its apparent harshness or severity, The rationale of this rule is that the constitutional prohibition, F.S.A. Const. Declaration of Rights, 88, refers to the statute fixing the punishment and not to the punishment set by the court within the limits enunciated in such statute; that if the statute does not violate the Constitution, then any punishment set in conformity to it cannot be adjudged excessive for the reason that it is not within judicial but legislative power, controlled only by the constitutional provisions, to declare what punishment may be assessed against those convicted of crime. [citations omitted]

Id. at 915.

More recently, in O'Donnell v. State, 326 So.2d 4 (Fla. 1975), this Court had occasion to reaffirm its decision in Brown. The defendant in O'Donnell was convicted of kidnapping, for which he received thirty years' imprisonment, the minimum sentence authorized by statute. He argued at sentencing that his "relative, passive culpability" did not warrant imposition of the mandatory minimum sentence of thirty years, particularly

where the co-defendant, in a separate trial, was given the identical sentence. Id., at 5. On appeal, he argued that "the statute providing a minimum mandatory sentence [was] constitutionally defective as to him in that it proscribe[d] the trial judge in 'individualizing sentences' to make the punishment fit the criminal. Id. The defendant conceded that "there [was] little or no authority in Florida for declaring a sentence violative of the ban against cruel and unusual punishment where it is within the limits fixed by the applicable statute." Id. The court reaffirmed its holding in Brown, quoting the passages from Brown and Chaviqny, which are set out above. Id., at 5-6.

Still more recently, in McArthur v. State, 351 So.2d 972 (Fla. 1977), the supreme court again revisited this issue and again rejected the defendant's constitutional argument. The defendant in McArthur was convicted of first-degree murder, for which she received a life sentence with a 25-year minimum mandatory term. On appeal, she contended that "the statute impose[d] a cruel and unusual punishment, since it operate[d] without regard to the circumstances of individual defendants or the crimes for which the defendants have been convicted." The supreme court stated, "In O'Donnell we reaffirmed the time-honored principle that any sentence imposed within statutory limits will not violate Article I, Section 8 of the Florida

Constitution, and the reasoning used there is persuasive here." Id. at 975-976.

To support his argument that he is entitled to proportionality review of his sentence, Petitioner relies on the word "or" used in the phrase "cruel and unusual punishment." He points out that in Tillman, supra, this Court in a footnote, stated that "use of the word 'or' indicates that alternatives were intended." Petitioner also relies on the dictionary definition of the words "cruel" and "unusual".

The rationale for rejecting proportionality review for non-death cases has nothing to do with the meaning of any of the words in the phrase "cruel or unusual punishment." As stated in Chaviqny, and cited with approval in O'Donnell, this constitutional provision "refers to the statute fixing the punishment and not to the punishment set by the court within the limits enunciated in such statute." Id. at 915. Since Art. I § 17 addresses statutory penalties facially, and Petitioner challenges only the statute as applied to him, this court should deny relief with little difficulty.

The State questions the Tillman decision, which stated in a footnote that the word "or" indicates that alternatives were intended in the phrase "cruel or unusual punishment." Tillman was a death-penalty case. The court stated in the body of its

opinion immediately following the footnote: "It clearly is 'unusual' to impose death based on facts similar to those in cases in which death previously was deemed improper.'' Id. at 169.

To support this interpretation, the Tillman court relied exclusively on one case, Cherry Lake Farms, Inc. v. Love, 176 So. 486 (1937). In Cherry Lake Farms, a general manager had been served with process on behalf of his corporation, and this court was asked to interpret, language in an amended statute dealing with corporate service of process. The court stated:

> The other question, that is, whether or not the cashier, treasurer, secretary, and general manager of a corporation are equal in standing for the purpose of service of process upon the corporation, must be answered in the affirmative. The language of the statue is: "upon the Cashier, or Treasurer or Secretary or General Manager."

Id. at 488 (e.s.)

In the absence of evidence of clear legislative intent, the court necessarily resorted to a rule of statutory construction to resolve the question before it. The court stated:

> In its elementary sense the word 'or' is a disjunctive particle that marks an alternative, generally corresponding to 'either,' as 'either this or that'; a connective that marks an alternative. It often connects a series of words or prepositions, presenting a choice of either.

Id. at 488.

The Tillman court did not properly rely on Cherry Lake Farms. However useful and appropriate in interpreting a modest civil statute, that decision has no bearing an the historic meaning of a significant constitutional provision. Perhaps this Court can justify its exclusive reliance on a rule of statutory construction when faced with a relatively new and simple civil statute. In contrast, the phrase "cruel or unusual punishment," the meaning of which is complex, has been in the Florida Constitution for over 150 years; the word "and" has been used interchangeably with the word "or" on many occasions. This is not the case in which to resolve this question, for, as mentioned above, the constitutionality of the statute as applied was not argued before the trail court or ruled upon by the First District.

Again, Petitioner's ultimate problem is that he cannot show his sentence, under the facts of his case, is cruel or unusual.[11] Restated, he cannot show that his sentence is either cruel or unusual, much less both. See Sheritt v. Alabama, 731 F.2d 728 (11th Cir. 1984), (mandatory life imprisonment for defendant whose armed robbery conviction was preceded by three

[11] Petitioner has not -- and could not -- reasonably maintain the statute is facially cruel or unusual.

drug offenses not cruel and unusual, when defendant sentenced under Alabama's habitual offender statute). See also Brown v. State, 565 So.2d 369 (Fla. 1st DCA 1990) (life sentence for second-degree murder by non-habitual felon not cruel or unusual punishment under Eighth Amendment). In State v. Burch, 545 So.2d 279 (Fla. 4th DCA 1989), the two defendants were given 30 year sentences for a single transaction of selling cocaine within 1,000 feet of a school. The court expressly rejected the defendants' cruel and unusual punishment claim[12] based on the Eighth Amendment. The Fourth District's holding on this issue was approved by the Florida Supreme Court in Burch v. State, 558 So.2d 1 (Fla. 1990). Here, Petitioner's sentence was enhanced because of the violent nature and recency of his prior robbery conviction. In Harmelin, supra, the Court upheld, against an Eighth Amendment challenge, a very harsh mandatory sentence of life without parole for mere possession of 672 grams of cocaine. Harmelin notes precedent that is also very damaging to Appellant: Rummell v. State, 445 U.S. 263 (1980) (life sentence, imposed under a recidivist statute, not cruel or unusual when defendant convicted for three prior theft-related offenses involving not more than about $121.00 each); and Hutto v. Davis, 454 U.S. 370 (1982) (40 years imprisonment and $20,000

[12] In contrast to Appellant, the defendants in Burch raised their cruel and unusual punishment claim before the trial court. 545 So.2d 284.

fine not cruel and unusual for distributing about 9 ounces of marijuana). These cases are very persuasive, as they imply the sentences imposed were not disproportionate under the U.S. Constitution's very similar language.

Here, Petitioner committed unarmed robbery in the past. His instant conviction was for firearm possession. He is exactly the type of defendant which the habitual felon statute so aptly punishes. He is at least as culpable as the defendants in Rummell or Hutto, yet he received a less severe sentence.[13] His challenge to the constitutionality of the habitual, violent felon statute, as applied to him, is without merit if preserved at all.

Finally, Petitioner's entire argument misses the point. The real question is not any substantive difference between "or" and "and", but whether "cruel" as used in the Florida Constitution is different from "cruel" as used in the U.S. Constitution. Both documents rely on the common meaning of the word. Since Florida's use of "cruel" dates back to its earliest constitutions, this court cannot assume any difference. Petitioner has not identified any. His argument has no merit.

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[13] As an habitual violent felon convicted for the second-degree felony of possession of a firearm by a convicted felon, Petitioner could have received up to 30 years, with a 10 year minimum, under §775.084(4)(b)2.

CONCLUSION

The certified questions in this case are no longer of great public importance in light of Ross. Further review should be declined, and this case remanded. Otherwise, the habitual violent felon statute does not violate Petitioner's right to substantive due process or his right against double jeopardy. The answer to both quesitons is "NO".

Whether Petitioner's sentence constitutes cruel or unusual punishment inherently attacks the habitual felon statute as applied. Since Petitioner did not raise this issue before the trial court, review by this court is precluded. On the merits, Petitioner simply cannot show a 20 year sentence (with a 10 year minimum) is cruel, when imposed on a felon who has committed robbery in the past and possessed a firearm for his instant offense. Consequently, there is no need to address the broad constitutional issue he raises. If Florida's prohibition of cruel or unusual punishment affords greater protection than the U.S. Constitution's ban against cruel and unusual punishment, Petitioner's sentence is still constitutional and must be affirmed.

Respectfully submitted,

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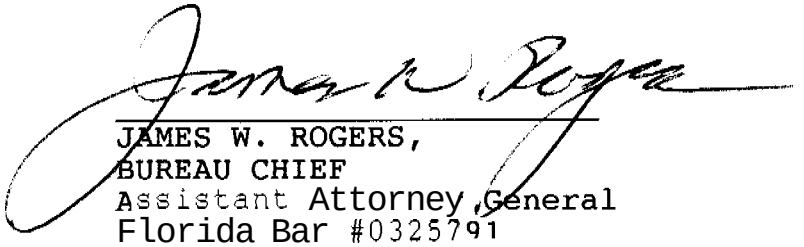
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to P. DOUGLAS BRINKMEYER, Assistant Public Defender, Leon County Courthouse, 301 South Monroe Street, Fourth Floor North, Tallahassee, Florida 32301, this 22nd day of July, 1992.

Charlie McCoy
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