047

IN THE SUPREME COURT OF FLORIDA

MICHAEL ANDRE' FUNCHESS,

Petitioner,

v. CASE NO. 79,963

STATE OF FLORIDA,

Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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TABLE OF CONTENTS

TABLE OF CITATIONS

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PRELIMINARY STATEMENT

Petitioner files this reply brief to rebut the arguments made by respondent in Issue 11. Petitioner will rely upon his initial brief as to Issue I. Petitioner apologizes for the typographical error in the heading for Issue 11 of the initial brief at 17.

ISSUE II

ARGUMENT IN REPLY TO RESPONDENT AND IN SUPPORT OF THE PROPOSITION THAT THE IMPOSITION OF 20 YEARS **OF HABITUAL** VIOLENT **OFFENDER SENTENCE** WITH NO **PAROLE** FOR 10 YEARS CONSTITUTES CRUEL OR **UNUSUAL** PUNISHMENT UNDER **ARTICLE** I, SECTION 17 OF THE FLORIDA CONSTITUTION (1968)

Respondent claims there is no difference between the federal and state constitution, even though the former prevents cruel "and" unusual punishment, and the latter prevents cruel "or" unusual punishment. **Not SO.** The framers of our original territorial constitution, art. **I,** §12, Fla. Const. (1838), deliberately chose different language, and it has survived every constitutional revision to the present day.[1]

In State v. Lavazzoli, **434** So.2d 321, 323 (Fla. 1983), this Court noted that in construing our former constitutional exclusionary rule, "the courts of this **state** were free to provide its citizens with a higher standard of protection from governmental intrusion than that afforded by the federal constitution."

In State v. Kinchen, 490 So.2d 21, 23 (Fla. 1985), former Justice Ehrlich noted:

> We are not bound by the federal court's construction of the federal constitution in interpreting analogous provisions of our organically separate state constitution, nor are we precluded from providing greater

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[1] One scholar has concluded that both the 1838 (territorial) and 1885 (post-Reconstruction) Florida Constitutions were modeled from those in the state of Alabama. D'Alemberte, The Florida State Constitution - **A** Reference Guide (1991), at **4** and ***8.***

> safeguards for individual liberties than those required by the federal constitution.

See also his concurring opinion in Shaktman v. State, 553 So.2d 148, 153 (Fla. 1989).

Likewise, in Rose v. Dugger, 508 So.2d 321, 322 (Fla. 1987), this Court noted:

> We recognize that this Court has the power and authority to construe our Florida Constitution in a manner which may differ from the manner in which the United States Supreme Court has construed a similar provision in the federal constitution.

Likewise, in In re T.W., 551 So.2d 1186, 1191 (Fla. 1989), this Court noted:

> While the federal constitution traditionally shields enumerated and implied individual liberties from encroachment by state or federal government, the federal court has long held that state constitutions may provide even greater protection. See, e.g., Pruneguard Shopping Center v. Robins, 447 U.S. 74, 81, 100 S.Ct. 2035, 2040, 64 L.Ed.2d 741 (1980) ("Our reasoning ... does not ex proprio vigore limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution.").
>
> > State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law -- for without it, the full realization of our liberties cannot be guaranteed.
>
> W. Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489, 491 (1977).

If one looks at the state constitutions of the thirty-six states which authorize the death penalty, fourteen prohibit cruel or unusual punishment; fifteen prohibit cruel and unusual; five prohibit only cruel; and two (Illinois and Connecticut again) have no provisions. Acker and Walsh, "Challenging the Death Penalty under State Constitutions," 42 Vander. L. Rev. 1299, 1321 (1989).

Obviously, Florida, like other states, has recognized that there was a need to provide greater protection to its citizens in this area than is guaranteed by the federal constitution. It appears this distinction was not drawn by this Court in deciding the cases cited by respondent at pages 23-27. Thus, those prior cases are not dispositive of petitioner's claim,

The reasons why this Court should decide this case under the Florida Constitution were stated in Note, "State Constitutions Realigning Federalism: A Special Look at Florida," 39 Univ. Fla. L. Rev. 733, 771-73 (1987):

> Overall, the independent approach taken by an increasing number of states best preserves the meaning and purpose of federalism. By allowing each state to decide independently what protections it will provide, rather than merely parroting the views of the Supreme Court, state residents receive the benefit of the dual protection of federalism, and have a judiciary that is both accountable to them and mindful of their special history, culture, and tradition.
>
> Federalism is not the exclusive domain of the federal government. States have a responsibility to resolve independently issues confronting their own residents, without waiting passively for signals from Washington. The history and culture of each state is different, and state courts are in

> the best position to resolve matters concerning local residents.
>
> States should always examine state law before turning to the federal Constitution. In many cases, state law will resolve the issue and the court will not need to consider the federal issue. A methodology of approaching issues from the local level, to the state level, and finally to the federal level is the most logical and efficient means of resolving conflicts.
>
> While all states must adhere to the minimum, or lowest common denominator of protections provided by the federal Constitution, the maximum is the exclusive concern of the states. ... Florida courts in particular should begin to give greater consideration to the state constitution. ... [T]he courts are completely at liberty to decide cases in a manner that reflects the state's unique history, culture, and ecology. (footnotes omitted),

Respondent claims there is no right to proportionality review of a non death sentence under the Florida Constitution. Not so.

The recent experiences of the Arizona and Michigan supreme courts in this area are most instructive, In State v. Bartlett, 792 P.2d 692 (Ariz. 1990), the former 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 v. Michigan, 501 U.S. ___, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991). 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).

Likewise, in People v. Bullock, ___ N.W.2d ___, 51 Crim. Law Rptr. 1313 (Mich. June 16, 1992), the Michigan supreme court had the opportunity to examine the same sentence at issue in Harmelin -- life without parole for possession of more than 650 grams of cocaine -- but this time under its state constitution. Significantly, that document is like ours, for it prohibits cruel or unusual punishments, art. I, §16, Mich. Const. It had been previously construed to be different than the federal provision:

> In People v. Lorentzen, 194 N.W.2d 827 (1972), we took specific note of this difference in phraseology and suggested that it might well lead to different results with regard to allegedly disproportionate prison terms.

51 Crim. Law Rptr. at 1314. The court proceeded to find the penalty to be "grossly disproportionate" to the crime:

> In sum, the only fair conclusion that can be reached regarding the penalty at issue is that it constitutes an unduly disproportionate response to the serious problems posed by drugs in our society. However understandable such a response may be, it is not consistent with our constitutional prohibition of "cruel or unusual punishment." The penalty is therefore unconstitutional on its face.

Id.; emphasis added. The same is true of Florida's habitual offender statute, which was enacted in response to the rising crime rate and the failure of the sentencing guidelines to ensure long prison terms.

The Michigan court also addressed the political ramifications of its decision:

> The proportionality principle inherent in Const. 1963, art, I, $16, is not a simple, "bright-line" test, and the application of that test may, concededly, be analytically difficult and politically unpopular, especially where application of that principle requires us to override a democratically expressed judgment of the Legislature. The fact is, however, the people of Michigan, speaking through their constitution. have forbidden the imposition of cruel or unusual punishments, and we are duty-bound to devise a principled test by which to enforce that prohibition, and to apply that test to the cases that are brought before us. The very purpose of a constitution is to subject the passing judgments of temporary legislative or political majorities to the deeper, more profound judgment of the people reflected in the constitution, the enforcement of which is entrusted to our judgment,

Id.at 1314-15; emphasis added. The same is true of Florida's constitutional provision and this Court's role in construing it.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon Charlie McCoy, 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 27th day of July, 1992.

P. DOUGLAS BRINKMEYER
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