OAT w/app

IN THE SUPREME COURT OF FLORIDA

WILLIE FRANK HALE,

Petitioner,

v. CASE NO. 80,242

STATE OF FLORIDA,

Respondent.

_____/

PETITIONER'S BRIEF ON THE MERITS

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BRIEF OF PETITIONER ON THE MERITS

PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court, and will be referred to as petitioner in this brief. A two volume record on appeal, including transcripts, will be referred to as "R" followed by the appropriate page number in parentheses. Attached hereto as Appendix A is the decision of the lower tribunal. Appendix B is petitioner's motion for rehearing. Appendix C is the order denying rehearing.

STATEMENT OF THE CASE AND FACTS

By amended information filed May 8, 1991, petitioner was charged with sale of cocaine and possession of cocaine with intent to sell (R 134). The cause proceeded to jury trial on June 6, 1991, and at the conclusion thereof petitioner was found guilty as charged on both counts (R 135).

Narcotics investigator Tommy Roberts testified that on February 14, 1991, he met with confidential informant Douglas McCants. They planned to make cocaine buys in the area of Clemmies bar. McCants was given a body transmitter. The undercover police car contained a small video camera and a VCR. He gave McCants $20.00, and McCants went to the bar and met up with a subject. McCants returned to the meeting place and gave Roberts a piece of suspected cocaine. The cocaine and the video tape were entered into evidence without objection (R 33-42).

Petitioner was arrested later on, and his photo was entered into evidence over objection. A photo of the drug transaction taken off of the video tape was also entered into evidence without objection (R 34-50).

Douglas Quinton McCants testified that he was working for the sheriff's department. He bought a piece of rock cocaine from petitioner for $20.00 (R 60-68).

FDLE chemist Jeffrey Allen Gayer testified that he tested the substance and it proved to be cocaine (R 75-78). The video tape was played for the jury (R 81-82). The stated rested (R

83), and petitioner's motion for acquittal was denied (R 83-85; 95).

After a charge conference (R 88-94), final arguments (R 98-113), and jury instructions (R 113-24), the jury returned its verdict after one hour of deliberation (R 129). The state filed its notice of intent to seek habitual violent offender treatment (R 141).

At sentencing, the state asserted that petitioner had been convicted of aggravated assault in 1989, as well as other felonies in the past, and the prior judgments (R 226-37) were entered into evidence without objection (R 201-203). The court found petitioner qualified as an habitual violent offender (R 204).

The sentencing guidelines scoresheet called for a recommended range of 4 1/2 to 5 1/2 years (R 221). Counsel noted that petitioner had been convicted of selling a piece of crack cocaine "about the size of a pea or less," and was not a violent threat to the community (R 204). The court imposed the sentences noted above (R 209), and entered a written order justifying the habitual violent offender sentences (R 223-25).

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 50 year sentence without parole and with a 20 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, oral argument set for October 9, 1992:

> 1. DOES IT VIOLATE A DEFENDANT'S SUBSTANTIVE DUE PROCESS RIGHTS WHEN HE IS CLASSIFIED AS A [HABITUAL] 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?

Appendix A at 2-3. The lower tribunal also refused to address petitioner's argument that his sentence constituted cruel or unusual punishment. Petitioner's motion for rehearing, which pointed out that the lower tribunal did have to power to address petitioner's claim (Appendix B), was denied on July 14, 1992 (Appendix C).

On July 29, 1992, a timely notice of discretionary review was filed.

SUMMARY OF THE ARGUMENT

The first certified question has been answered by this Court, contrary to petitioner's position.

The habitual violent felon statute 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 or 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.

Petitioner will also argue in the alternative that he should not have received consecutive mandatory minimum sentences for the two crimes in the same criminal episode under the habitual violent offender statute. This Court recently held such to be illegal, and they must be designated to run concurrently.

ARGUMENT

ISSUE I

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

A. DUE PROCESS

This Court has answered the first certified question contrary to petitioner's position that habitual violent offender sanctions cannot be imposed on one who commits a nonviolent crime. Ross v. State, 579 So.2d 877 (Fla. 1st DCA 1991), approved, 17 FLW S367 (Fla. June 18, 1992), rehearing denied July 28, 1992.

B. 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. I, §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). 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 an habitual violent felony offender, the state need only show that he or she 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 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.

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.

As this Court correctly stated in Ross, supra:

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

17 FLW at S368.

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.

For these reasons, petitioner's sentence must be vacated and the case remanded for resentencing without resort to the habitual violent felon provisions. The statute violates constitutional double jeopardy provisions. In such case, the second certified questions should be answered in the affirmative. 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 50 years without parole for 20 years for the instant offenses of sale and possession of a pea-sized piece of cocaine 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, as the lower tribunal seemed to believe. 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 territorial constitution in 1838. Significantly, only 47 years after its federal counterpart, the Declaration of Rights contained in the 1838 constitution prohibited "cruel or unusual punishments," art. I, §12, Fla. Const. (1838), and the phrase has survived several major constitutional revisions, including the most recent in 1968. Art. I, §17, Fla. Const. (1968).

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, 1861, 1865, 1885 and 1968 conventions, one must assume from the available evidence that the phrasing of the Florida provision is no accident.[1] 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 under the state constitution:

> 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).

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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.

Casenote, 17 U. Balt. L. Rev. 572 (1988), discussing State v. Davis, 530 A.2d 1223 (Md. Ct. App. 1987). See also the cases cited in petitioner's motion for rehearing below (Appendix B).

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 (1982 amend.) 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.

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 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).

Moreover, this Court has recently 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, 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."

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).

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 "unusual" 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, the contrary conclusion of the lower tribunal notwithstanding.

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 individuals than the Eighth Amendment, under which the Solem test was erected.

However, the experience of courts of other states with similar state constitutional provisions will help this Court develop a test under Florida law to 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.

Kentucky Constitution, section 17.

The court first noted that it never before had 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. Nonetheless, the court 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 the offenders 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 same 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 constitutional provision, which was phrased 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 gradations 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 article I, section 6 of the Idaho Constitution. It overruled previous decisions which had 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, I 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 Mississippi Code Annotated, section 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.

The experiences of the Arizona and Michigan supreme courts 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. 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, like ours, prohibits cruel or unusual punishments, Michigan Constitution, article I, section 16. It had been previously construed to be different from 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.

2. The law applied to petitioner

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).

Petitioner's offenses are sale and possession of a small quantity of cocaine. While the Legislature has the power to promote its interest in a drug-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. In re Grant, supra. Petitioner simply possessed and sold a pea-sized piece of cocaine to an undercover officer.

There is nothing in the record to suggest that petitioner was a big-time drug dealer. Compare, Harmelin v. Michigan, supra (mandatory life sentence for possession of 672 grams of cocaine valid); United States v. Contreras, 895 F.2d 1241 (9th Cir. 1990) (mandatory minimum 10 years for possession of over five kilograms of cocaine valid); and Commonwealth v. Silva, 488 N.E.2d 34 (Mass. Ct. App. 1986) (mandatory minimum 10 years for trafficking in over 200 grams of cocaine valid under Mass. Const., art. 26). There is nothing in the record to suggest that petitioner was

armed, nor had the intent to escalate the incident 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 by the judge (R 223-25), may be divided into three categories. In 1989 and 1986, he committed aggravated assaults. Petitioner received probation for the 1989 aggravated assault (R 226), and one year in jail and two years community control for the 1986 aggravated assault (R 229).

In 1985 and 1982, he was convicted of drug offenses involving cannabis. Petitioner received one year in jail and two years community control for the 1985 sale of cannabis (R 230), and an amazing three years in prison for the 1982 possession of cannabis (R 231).

In 1976, he was convicted of property crimes. Petitioner received seven years in prison for burglary (R 234), and a concurrent five years in prison for breaking and entering and grand larceny (R 236).

While not stellar, petitioner's prior record is not as bad as some we see for 37-year-old males. A 50-year sentence with no parole for 20 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, point 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 4 1/2 to 5 1/2

years or a permitted sentence of 3 1/2 to 7 years (R 221).

The second consideration is a comparison of penalties imposed on other drug crimes under Florida law, a task the lower tribunal refused to perform. If petitioner had trafficked in more than 150 kilograms of cocaine, he could have received a life sentence without parole. Section 893.135(1)(b)2., Florida Statutes.

However, had petitioner trafficked in the prodigious amount of cocaine (672 grams) present in Harmelin, he could have been punished with only a 30-year sentence and a 15-year mandatory. Section 893.135(1)(b)1.c., Florida Statutes. Had petitioner trafficked in 200 to 400 grams of cocaine, he could have been punished with only a 30-year sentence and a 5-year mandatory. Section 893.135(1)(b)1.b., Florida Statutes. Had petitioner trafficked in 28 to 200 grams of cocaine, he could have been punished with only a 30-year sentence and a 3-year mandatory. Section 893.135(1)(b)1.a., Florida Statutes.

Obviously, under part two of the Solem test, and under the test from In re Grant, supra, 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, supra, has the power to strike down disproportionate punishments. Using the Kentucky test, it is clear that petitioner's 50 year sentence without parole for 20 years for sale and possession of a pea-sized rock of cocaine "violates the principles of fundamental fairness."

Likewise, this Court has the power to strike down

disproportionate punishments under the test formulated by the Michigan supreme court in People v. Bullock, supra, because it is grossly disproportional, within the meaning of the cruel or unusual punishment clause of the state constitution.

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

The result must be the same under the analysis of the Mississippi Supreme Court in Clowers and Ashley, supra, 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. Petitioner's 50 year sentence without parole for 20 years for his nonviolent crimes is unconstitutional.

D. CONCLUSION

For these reasons, the entire habitual violent offender scheme of mandatory minimum sentences without parole violates our constitution. Petitioner's sentence of 50 years without

possibility of parole for 20 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. His sentence must therefore be vacated and the case remanded for resentencing.

ISSUE III
THE LOWER COURT ERRED IN IMPOSING CONSECUTIVE MANDATORY MINIMUM SENTENCES.

Petitioner received two 10-year mandatory minimum sentences as an habitual violent offender, to run consecutively, for a total of 20 years, for sale and possession of cocaine which arose in a single incident, where he sold one piece of cocaine to a man working for the police.

In Daniels v. State, 595 So.2d 952 (Fla. 1992), this Court held:

> [W]e hold that his minimum mandatory sentences imposed for the crimes he committed arising out of the same criminal episode may only be imposed concurrently and not consecutively.

Id. at 954.

Petitioner did not raise this issue before the lower tribunal, because the law in the First District at the time allowed consecutive mandatory minimums. Daniels v. State, 577 So.2d 725 (Fla. 1st DCA 1991). But since illegal sentences may be raised at any time, and since Petitioner was in the appellate pipeline at the time Daniels was decided, petitioner asks this Court to apply Daniels and strike the consecutive mandatory minimums. In the alternative, petitioner asks this Court to affirm without prejudice for petitioner to pursue collateral attack.

CONCLUSION

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

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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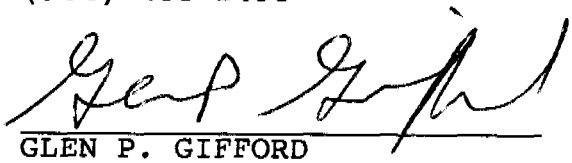

GLEN P. GIFFORD
ASSISTANT PUBLIC DEFENDER
(On the Brief)
Fla. Bar No. 664261

ATTORNEYS FOR PETITIONER

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, under the name Willie Frank Gary, #055265, P.O. Box 500, Olustee, Florida 32072, on this 7th day of August, 1992.

P. DOUGLAS BRINKMEYER
ASSISTANT PUBLIC DEFENDER

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

WILLIE FRANK HALE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

* CASE NO. 91-2905

Opinion filed June 9, 1992.

Appeal from the Circuit Court for Escambia County
Frank L. Bell, Judge.

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

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

KAHN, J.

Appellant challenges his sentence on the grounds that (1) the habitual offender and habitual violent felony offender statutes violate due process, equal protection and double jeopardy, and (2) the imposition of two 25 year habitual violent

felony offender sentences, each with a mandatory minimum sentence of 10 years to run consecutively for the sale and possession of cocaine, constitutes cruel or unusual punishment under Article I, Section 17 of the Florida Constitution. We affirm the sentence.

This court has rejected appellant's constitutional challenges to the habitual offender and habitual violent felony offender provisions. Barber v. State, 564 So.2d 1169, 1171 (Fla. 1st DCA 1990), rev. denied, 576 So.2d 284 (Fla. 1990); Love v. State, 569 So.2d 807 (Fla. 1st DCA 1990); Perkins v. State, 583 So.2d 1103 (Fla. 1st DCA 1991), jurisdiction accepted, 590 So.2d 421 (Fla. Dec. 4, 1991), review pending, No. 78,613; Ross v. State, 579 So.2d 877 (Fla. 1st DCA 1991), jurisdiction accepted, 589 So.2d 292 (Fla. Nov. 19, 1991), review pending, No. 78,179; and Tillman v. State, 586 So.2d 1269 (Fla. 1st DCA 1991)(certifying question), review pending, No. 78,715 (Fla. 1991); Raulerson v. State, 589 So.2d 369 (Fla. 1st DCA 1991), jurisdiction accepted, 593 so.2d 1052 (Fla. March 2, 1992), reveiw pending, No. 79,051 ; Becker v. State, 592 So.2d 1266 (Fla. 1st DCA 1992) (question certified); Reeves v. State, 593 So.2d 232 (Fla. 1st DCA 1992) (question certified). Again, however, pursuant to Rule 9.030(a)(2)(A)(v), Florida Rules of Appellate Procedure, 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 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 violent 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?

Appellant argues that regardless of the constitutionality of the statute, the imposition of 50 years of prison time, with 20 years mandatory incarceration, constitutes cruel and unusual punishment, in light of his claim that his convictions resulted from sale of a small piece of crack cocaine to a confidential informant. We rejected this argument in Leftwich v. State, 589 So.2d 385 (Fla. 1st DCA 1991). In Leftwich, we explained that the length of the sentence actually imposed is generally said to be a matter of legislative prerogative and noted that appellant clearly fit within the parameters for sentencing under the habitual violent offender statute. The court cited to Harmelin v. Michigan, __ U.S. __, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991), wherein the Supreme Court rejected its earlier holding in Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983),[1]

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[1] Although several Florida cases have acknowledged the Solem proportionality test, many of those cases limit the scope of Solem and all of those cases were decided before Harmelin which overruled Solem. Long v. State, 558 So.2d 1091, 1092 (Fla. 5th DCA 1990) (even if Solem is applicable because burglary is non-violent felony, punishment does not meet criteria for proportionality analysis); State v. Burch, 545 So.2d 279 (Fla. 4th DCA 1989) (distinguishing Solem from the Florida statute based on fact that Florida statute does not foreclose the possibility of rehabilitation and gain time), approved by, 558 So.2d 1 (Fla. 1990); State v. Nickerson, 541 So.2d 725 (Fla. 1st DCA 1989) (trial court could not depart downward on basis that guidelines sentence was disproportionate); Vickery v. State, 539

that a criminal sentence must be proportionate to the crime for which the defendant has been convicted. The Supreme Court in Harmelin explained that the Cruel and Unusual Punishment Clause was intended to act as a check on the ability of the legislature to authorize particular modes of punishment rather than a guarantee against disproportionate sentences. See Harmelin (mandatory life sentence without possibility of parole for drug offense); Hutto v. Davis, 454 U.S. 370, 102 S.Ct. 703, 70 L.Ed.2d 382 (1982) (40 year sentence for possession with intent to distribute nine ounces of marijuana); Rummel v. Estelle, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980) (life imprisonment under Texas recidivist statute upon being convicted for his third felony, obtaining $120.75 by false pretenses, is not cruel and unusual punishment).

Appellant contends that Florida's prohibition against "cruel or unusual" punishment, in Article I, Section 17 of the Florida Constitution, is distinguishable from the federal constitution's prohibition against "cruel and unusual punishment" based on the disjunctive "or" between terms "cruel" and

---

So.2d 499 (Fla. 1st DCA 1989) (uniqueness of conduct proscribed by Florida's RICO Act makes it difficult--if not impossible--to apply the Solem proportionality analysis), rev. denied, 549 So.2d 1014 (Fla. 1989); Kendry v. State, 517 So.2d 78 (Fla. 1st DCA 1987) (nothwithstanding the harshness of the penalty, nothing in Solem would mandate a result contrary to prior case law which has consistently upheld mandatory minimum sentences against constitutional challenges); Mick v. State, 506 1121 (Fla. 1st DCA 1987), and Bloodworth v. State, 504 So.2d 495 (Fla. 1st DCA 1987) (both found Solem applies only to non-violent felonies).

"unusual". However, appellant cites no authority for his assertion that the "cruel or unusual" punishment clause in the Florida Constitution requires (or allows) proportionality review in non-death penalty cases.

AFFIRMED, with questions certified.

ERVIN and WIGGINTON, JJ., CONCUR.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

WILLIE FRANK HALE,

Appellant,

v. Case No. 91-2905

STATE OF FLORIDA,

Appellee.
_____/

CORRECTED MOTION FOR REHEARING
AND MOTION TO CERTIFY

COMES NOW the Appellant, by and through the undersigned, and moves for rehearing of a portion of the Court's opinion dated June 9, 1992, and for certification of one additional question, and as grounds therefore says:

1. The last sentence of the opinion indicated that this Court was not permitted to examine appellant's habitual violent offender sentence in light of the prohibition against cruel or unusual punishments in art. I, §17, Fla. Const.

2. Such a view is incorrect. While it is true that normally a Florida appellate court is not permitted to examine the length of a particular sentence, so long as it is within the statutory maximum, this Court has, when called upon to do so, examined sentences and their underlying statutes to determine if they unconstitutionally impose cruel and/or unusual punishment. See, e.g., Brown v. State, 565 So.2d 369 (Fla. 1st DCA 1990), review denied, 576 So.2d 285 (Fla. 1991) (life without parole for second degree murder); Vickery v.

APPENDIX B

State, 539 So.2d 499 (Fla. 1st DCA), review denied, Nunnari v. State, 549 So.2d 1014 (Fla. 1989) (RICO sentence); Fryson v. State, 506 So.2d 1117 (Fla. 1st DCA 1987), disapproved on other grounds, 533 So.2d 294 (Fla. 1988) (two consecutive life sentences under the guidelines); Richards v. Florida Parole and Probation Commission, 418 So.2d 400 (Fla. 1st DCA 1982) (rule allowing aggravation above matrix time); Bloodworth v. State, 504 So.2d 495 (Fla. 1st DCA 1987) (life sentence for sexual battery); and Brown v. Nimmons, 416 So.2d 848 (Fla. 1st DCA 1982) (four months for contempt).

3. Other Florida appellate courts have done the same. See, e.g., State v. Burch, 545 So.2d 279 (Fla. 4th DCA 1989), approved, 558 So.2d 1 (Fla. 1990) (up to 30 year sentence for sale of drugs within 1000 feet of a school); Davis v. State, 495 So.2d 928 (Fla. 4th DCA 1986) ($200 in court costs); Williams v. State, 441 So.2d 1157 (Fla. 3rd DCA 1983) (life without parole for armed robbery); Quick v. State, 342 So.2d 850 (Fla. 2nd DCA 1977), affirmed, 361 So.2d 692 (Fla. 1977) (25 year mandatory for first degree murder).

4. The Florida Supreme Court has done the same. See, e.g., State v. Benitez, 395 So.2d 514 (Fla. 1981) (mandatory for drug trafficking); Sowell v. State, 342 So.2d 969 (Fla. 1977) (three year mandatory for firearm); McArthur v. State, 351 So.2d 972 (Fla. 1977) and Banks v. State, 342 So.2d 469 (Fla. 1977) (25 year mandatory for first degree murder);

5. Appellant asks this Court to grant rehearing, recognize that it is permitted to examine appellant's sentence

and the habitual violent offender statute, and do so under art. I, §17, Fla. Const.

6. In the alternative, and in addition to the questions already certified in the opinion, appellant asks this Court to certify the following question to be of great public importance:

> DOES ART. I, §17, FLA. CONST., PERMIT AN APPELLATE COURT TO DETERMINE WHETHER A SENTENCE IMPOSED UNDER THE HABITUAL VIOLENT OFFENDER STATUTE CONSTITUTES CRUEL OR UNUSUAL PUNISHMENT.

WHEREFORE, appellant moves this Court to grant rehearing or to certify the above question.

Respectfully Submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to Sara D. Baggett, Assistant Attorney General, The Capitol, Tallahassee, Florida, this 15 day of June, 1992.

P. DOUGLAS BRINKMEYER

Brinkmeyer, APD

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (904)488-6151

July 14, 1992

CASE NO: 91-02905

L.T. CASE NO. 91-1492-J

Willie Frank Hale, Jr. v. State of Florida

Appellant(s), Appellee(s).

ORDER

Motion for rehearing and motion to certify filed, June 21, 1992, is hereby DENIED.

By order of the Court

JON WHEELER
CLERK

I HEREBY CERTIFY that a true and correct copy of the above was mailed this date to the following:

P. Douglas Brinkmeyer
Sara D. Baggett

James W. Rogers
Ernie Lee Magaha

Deputy Clerk

DISTRICT COURT OF APPEAL STATE OF FLORIDA SAT CITO SI RECTE FIRST DISTRICT

APPENDIX C