047

FILED
SID J. WHITE
AUG 27 1992
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

9/21

IN THE SUPREME COURT OF FLORIDA

WILLIE FRANK HALE,

Petitioner,

v. CASE NO. 80,242

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
BUREAU CHIEF
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0325791

CHARLIE MCCOY
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0333646

DEPARTMENT OF LEGAL AFFAIRS
The Capitol
Tallahassee, FL 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

IN THE SUPREME COURT OF FLORIDA

WILLIE FRANK HALE,

Petitioner,

v. CASE NO. 80,242

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

STATEMENT OF THE CASE AND FACTS

The State accepts Petitioner's statement with the following additions:

1. Before the trial court, Petitioner never challenged the constitutionality of the habitual felon statute as applied. (R 199-214).

2. In its "order finding that the defendant is a habitual violent felony offender" (R 223-5), the trial court found that Petitioner had been convicted twice for aggravated assault (case nos. 88-1478 and 84-5738); sale and possession of marijuana (case no. 84-5397 and 80-2149, respectively); and burglary (case no. 75-2273).

SUMMARY OF ARGUMENT

Issue I: Constitutionality of Habitual Felon Statute

Neither of the grounds raised by Petitioner were preserved for review. He first claims the habitual violent felon statute violates due process, when applied to a defendant - like himself - whose present offense is not violent. No such challenge was made before the trial court. Similarly, no challenge was made to the application of the statute on double jeopardy grounds. This issue is not preserved.

If lack of preservation has been waived by the State's failure to argue such before the First District, then Petitioner is wrong on the merits. As this Court recently held, it is completely reasonable to increase a qualifying defendant's present punishment based on his criminal history. The statue does not violate due process. Moreover, since only the present sentence is enhanced, Petitioner's right against double jeopardy is not violated.

Issue II: Proportionality of Petitioner's Sentence

Petitioner received two sentences of 25 years, each with a minimum mandatory of 10 years, to run consecutively. Based on these facts, he attacks his sentence as disproportionately long, and thus cruel or unusual. This tactic is unavoidably a challenge to the habitual felon statute as applied. It was not raised before the trial court and is not preserved.

The State (predecessor counsel) did not argue lack of preservation before the First District. If this constitutes waiver, then Petitioner would be allowed to seek a radical re-interpretation of a provision of the Florida Constitution on grounds never argued before the trial court. Such sandbagging of the trial court is disproportionate to the State's oversight on appeal to the First District.

Petitioner does not, and cannot, cite any decisions by this Court which attribute different substance to the Florida Constitution's prohibition of punishment that is "cruel or unusual," as opposed to the U.S. Constitution's ban on punishment that is "cruel and unusual." However, this is not the real issue. Assuming the state constitutional provision forbids punishment that is merely cruel, that prohibition extends only to the type of punishment authorized by statute. Since Petitioner's sentence of imprisonment is obviously the authorized form of punishment, and its length is within that authorized by statute, he is not entitled to relief.

Ultimately, the interpretation of "cruel or unusual" urged by Petitioner would require proportionality review of all non-death sentences departing from the guidelines or imposed under the habitual felon statute. Such review is not authorized by the state constitution. Petitioner's argument must be rejected.

ARGUMENT

ISSUE I

WHETHER INCREASING THE PUNISHMENT FOR A DEFENDANT'S CURRENT OFFENSE ONLY, BASED ON HIS CRIMINAL PAST, VIOLATES THE DOUBLE-JEOPARDY BAR AGAINST MULTIPLE PUNISHMENTS FOR THE SAME CRIME.

A. Due Process

Correctly and candidly, Petitioner notes that his due process argument was specifically rejected by this Court in Ross v. State, 17 F.L.W. S367 (Fla. June 18, 1992), rehearing denied July 28, 1992. The State relies on Ross.

B. Double Jeopardy

Ross also sounds the death knell for Petitioner's double jeopardy 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.

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.

Petitioner's argument begins with the observation that the "current offense need meet no criteria, other than

it be a felony committed within five years ... [of] the prior 'violent' offense." (initial brief, p. 6-7). That observation shows exactly why the statute is constitutional and reasonable, as it requires a recent conviction for a felony that is violent. Twice convicted for aggravated assault and for other offenses (R 223-5), Petitioner sold a small part of a larger quantity of crack cocaine to an undercover informant. (R 64).

Petitioner repeatedly committed felonies; some in the past were violent. Focusing on the nature and recency of his criminal record, the habitual felon statute reasonably treats Petitioner more harshly by authorizing lengthier imprisonment and a mandatory minimum.[1]

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 two current offenses, and his earlier aggravated assaults, are separate because they are separate in time. Hence, the double jeopardy clause would be violated here only if the current

---

[1] Petitioner's more serious current offense, sale of cocaine, is a second degree felony under §893.13(1)(a)1; which carries a maximum sentence of 30 years under §775.084(4)(b)2, with a 10 year minimum.

punishment were imposed for those assaults, rather than for the current convictions. The record is clear, however, that Petitioner was sentenced by the trial court in the instant case for his 1991 crime, and that his prior punishments for the 1988 and 1985 assaults were not altered in any way. (R 216-25). Consequently, no double jeopardy violation exists.

If this Court were to give credence to Petitioner's claim, it would have to reject all cases which define the scope of the double jeopardy clause. Moreover, this Court would be 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 extreme 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 Country 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 former 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 narrowed the pool of defendants who could be classified 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 constitutional prohibition against double jeopardy, and Petitioner's argument to the contrary must fail.

ISSUE II

WHETHER FLORIDA'S CONSTITUTIONAL BAN UPON CRUEL OR UNUSUAL PUNISHMENT APPLIES TO INDIVIDUAL SENTENCES AUTHORIZED BY STATUTE.

Petitioner, a repeatedly violent felon who sells drugs, seeks an historically incorrect interpretation of a state constitutional provision based on a non-preserved issue. Therefore, the State's answer will be in two parts: preservation and response on the merits.

A. Preservation/Jurisdictional Considerations

Petitioner contends his sentence constitutes cruel or unusual punishment under the facts. He received two[2] sentences of 25 years, with 10 years minimums, to run consecutively. His current convictions were for nonviolent felonies. His claim inherently attacks the habitual felon statute as applied. Since this claim was not raised before the trial court it is not preserved for review. Trushin v. State, 425 So.2d 1126, 1129-30 (Fla. 1982) (constitutional application of statute to particular set of facts must first be raised in trial court); Knight v. State, 501 So.2d 150, 153-4 (Fla. 1st DCA 1987) (ex post facto and equal protection challenges to sentencing statute as applied to defendant improperly raised for first time on appeal).

---

[2] Petitioner misleadingly characterizes his sentence as a single term of 50 years, obscuring the fact that he was convicted for two separate crimes.

Just because Petitioner's claim has state constitutional implications does not excuse his failure to preserve. Not every constitutional issue rises to fundamental error. Sanford v. Rubin, 237 So.2d 134 (Fla. 1970); 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).

Predecessor counsel did not raise the preservation point before the First District, raising the possibility of waiver. See State v. Wells, 539 So.2d 464, 468 at n.4 (Fla. 1989) (state waived issue of defendant's standing to assert privacy interest in luggage found in car trunk and later searched, when defendant's standing not raised at trial or on appeal), affirmed 109 L.Ed.2d 1 (1990). However, Petitioner's attempt to invalidate his sentence - not having objected on this ground below - is no more than sandbagging the trial court. Had Petitioner objected at trial, the court may very well have made his sentences concurrent, reducing his jail time by half. Whatever the state's transgression for not arguing lack of preservation before the First District, that transgression pales beside Petitioner's failure to give the trial court an opportunity to avoid constitutional error. This Court must not

condone such defense tactics, and should decline to consider this issue on the merits.

Additionally, this issue is ancillary, and not necessary to resolution of the certified questions. See Ross, supra at S368 (declining to reach several issues that were beyond the scope of the issue establishing jurisdiction); Trushin, supra at 1130 ("[W]e recognize the function of the district courts as courts of final jurisdiction and will refrain from using that authority [to review "ancillary" issues] unless those affect the outcome of the petition after review of the certified case.").

The State recognizes that this issue is closer to the certified question than the issues typically appended to certified inquiries regarding the habitual felon statute.[3] However, to determine whether petitioner's sentence is cruel or unusual - particularly the latter - it would be necessary to conduct an evidentiary hearing for comparison to the sentences received by other habitual, violent felons. Again, Petitioner should not have been able to raise this issue for the first time before the First District. See Forehand v. State, 537 So.2d 103 (Fla. 1989) (sentencing issue requiring a hearing to determine the nature of a Texas conviction could not be raised for the

[3] The state respectfully suggests that the type of ancillary questions that should be reviewed are those going to the trial court's authority to proceed, such as subject matter jurisdiction.

first time on appeal, when alleged error did not result in an "illegal sentence or unauthorized departure from the sentencing guidelines"), quoting, State v. Whitfield, 487 So.2d 1045 (Fla. 1986).

Here, Petitioner's sentence is not facially illegal or an unauthorized departure. If it is cruel or unusual, that determination cannot be made from the record before this court. Absent comparison to the sentences received by similarly situated felons, Petitioner's complaint is no more than his personal disagreement with his sentence. This Court should decline review on the merits.

B. Response on the Merits

1. Introduction

Despite conscientious sampling of case law from other jurisdictions, and a cursory review of the predecessor Florida constitutions, Petitioner is unable to cite any decision by this Court holding that the phrase "cruel or unusual" punishment in the state constitution is substantively different from the phrase "cruel and unusual" punishment in the U.S. Constitution. Even if Tillman v. State, 591 So.2d 167, 169 n.2 (Fla. 1991) properly ascribes difference to the disjunctive "or", that case does not stand for the dispositive point that Petitioner ignores: the terms "cruel" or "unusual" do not invalidate his sentence.

To the contrary, long-standing precedent is squarely against Petitioner. In Brown v. State, 13 So.2d 458 (Fla. 1943), four years' imprisonment for possessing untaxed moonshine was upheld against a claim that the sentence violated section 8 of the Florida Constitution's Declaration of Rights. Id. at 460-1. That section provides:

> **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.]

Without much difficulty this Court rejected Brown's claim declaring:

> 'As a general rule, in cases where the objection is to the particular sentence, . . . 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 a particular case, because the constitutional prohibition has reference to the statute fixing the punishment, and not to the punishment assessed. . . .' [e.s.]

Id. at 461, quoting, 15 Am.Jur. 174, §526.

Brown is very significant for several reasons. First and most obvious, it squarely rejects Petitioner's contention on the merits, while construing identical language from the 1885 Constitution. Second, it employs the phrase "cruel and unusual" without regard to the difference (i.e., use of "or") in the 1885 Constitution. This interchangeable use of the two words strongly

implies their lack of substantive difference. See Cross v. State, 96 Fla. 768, 119 So. 380, 386 (Fla. 1928) ("Nor is the punishment prescribed by the statute a cruel or unusual punishment in the sense prohibited by the constitution." [e.s.]).

Third, Brown was decided in 1943. The critical language was not changed in the 1968 Constitution adopted by popular referendum. Therefore, this Court's holding in Brown is controlling as to the 1968 Constitution. Absent express amendment to that constitution, this Court cannot ascribe a new meaning to the phrase "cruel or unusual." See Reed v. Fain, 145 So.2d 858, 868 (Fla. 1961):

> It has been held, and we think with propriety, that 'the judicial interpretation of constitutional provision is so forcible that, where a new Constitution is adopted without change of the rule laid down by the courts, the construction is adopted by the new Constitution and becomes part of it to the degree that it cannot be changed even by a statute expressly undertaking to do so.' Quoting, Lyle v. State, 80 Tex.Cr.R. 606, 193 SW 680.

See also, Kluger v. White, 281 So.2d 1 (Fla. 1973) (adoption of 1968 Constitution had the effect of incorporating existing rights of access to courts, thus severely restricting the power to abolish such rights).

If the Legislature, the entity of government representing the people, cannot change this Court's earlier interpretation of the state constitution by statute; this Court, not a

representative body, cannot do so simply by changing its mind. Moreover, recent amendment of the state constitution by referendum - that is, the express linkage of Art. I, §12 to the U.S. Supreme Court's interpretation of the Fourth Amendment - very strongly indicates that no expansive reading of "cruel or unusual" is justified.

Without discussion, Petitioner relies solely on a footnote in Tillman, supra, as the Florida case law substantiating his interpretation of "or." Seldom is such a minor part of a decision relied upon to carry so much of an argument. Tillman was a death case. This Court stated, in the main text immediately after the footnote:

> "It clearly is 'unusual' to impose death based on facts similar to those in cases in which death was deemed improper." Id. at 169.

To support this interpretation, the Tillman opinion rested exclusively on 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 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 article 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.

However useful and appropriate in interpreting a modest civil statute, Cherry Lake Farms has no bearing on the historic meaning of a significant constitutional provision. Perhaps this Court can justify its exclusive reliance on a rule of statutory interpretation 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. See Brown, supra. 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 trial court or ruled upon by the First District.

Above, the state quoted Cross to illustrate the interchangeable use, by this Court, of the phrases "cruel or

unusual" and "cruel and unusual." The fact that Cross uses the disjunctive "or" implies that the possibility of a punishment that is either cruel or unusual was considered. In contrast, Petitioner reveals no historic or legal basis for the interpretation he would have this Court adopt.

2. Federal versus State Constitutions

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.[4] This Court has repeatedly and recently confined proportionality review to the death penalty. See Tillman, supra, at 169 (Fla. 1991) (proportionality review of death cases based on fact that death is a unique punishment "requiring a

[4] If correct, Petitioner's logic would also require proportionality review of all guidelines departure sentences.

more intensive level of judicial scrutiny or process than would lesser 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); and Pulley v. Harris, 465 U.S. 37, 44-5, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984) (proportionality review - even of death sentences - is not required by the U.S. Constitution).

Ironically, Petitioner -- while basing his claim on the express difference between the U.S. and Florida Constitutions -- relies on the first two parts of the three part test announced in Solem v. Helm, 463 U.S. 277, 291-2 (1985). Such reliance is self-defeating, as Solem rests solely on the Eighth Amendment.[5] Since Petitioner expressly disavows any federally-based claim, the State will not respond to his federal cases. The State will merely note that Solem invalidated, as significantly disproportionate to the crime, a life sentence for the most

---

[5] Even Petitioner's own brief defeats his reliance on Solem. At p. 12, 14-15, Petitioner relies 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 capital cases" (id. at 865), and ended the persuasiveness of Solem.

recent incidence of passing a bad check. This is far cry from Petitioner's 25 year sentences as a recidivist felon who committed the violent crime of aggravated assault in the past, before his instant offense of selling crack cocaine.

C. 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 Workman 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 gain time -- at some point after 20 years.

State v. Mims, 550 So.2d 760 (La.Ct. App. 1989) his no persuasiveness at all. The Louisiana 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 that a sentence of life with a 10 year minimum violated 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 aggravated assault. Equally important, his sentence is less severe; 50 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[6] 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. Most important, the large majority of the cases do not involve recidivist felons. In short, Petitioner has not been able to produce a single case which would, if followed, entitle him to relief.

4. Florida Law

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); Chavigny 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

---

[6] Most notably, Petitioner cites State v. Bartlett, ___ P.2d ___, 51 Crim.Law.Reptr. 1191 (Ariz. May 8, 1992). There, the defendant received 40 years without parole for consensual intercourse with 14 year old girls. There is no indication that Bartlett was a recidivist felon. Similarly, Petitioner relies on People v. Bullock, ___ N.W.2d ___, 51 Crim. Law Reptr. 1313 (Mich. June 16, 1992). The sentence invalidated there was life without parole for mere possession of a large amount of cocaine.

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, as noted at the outset of the State's argument for this issue.

In Chavigny v. State, 112 So.2d 910 (Fla. 2d DCA 1959), the Second District Court of Appeal interpreted Brown. The defendant in Chavigny 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, §8, 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 from that case and Chavigny.

Still more recently, in McArthur v. State, 351 So.2d 972 (Fla. 1977), this 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 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.

Petitioner's ultimate problem is that he cannot show his sentence, under the facts of his case, is cruel or unusual.[7] 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 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[8] based on the Eighth Amendment. The Fourth District's holding on this issue was approved by this Court in Burch v. State, 558 So.2d 1 (Fla. 1990).

---

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

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

Here, Petitioner's sentence was enhanced because of the violent nature and recency of his prior aggravated assault 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 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 aggravated assault twice in the past. His instant conviction was for cocaine sale. 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.[9] His challenge to the constitutionality of the

---

[9] 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 the 10 year minimum, under §775.084(4)(b)2.

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" and "unusual" as used in the Florida Constitution are different from those words as used in the U.S. Constitution. Both documents rely on the common meaning. Since Florida's use of "cruel" and "unusual" dates back to its earliest constitutions, this court cannot assume any difference. Petitioner has not identified any. His argument has no merit.

ISSUE III

WHETHER PETITIONER'S TWO OFFENSES AROSE FROM THE SAME EPISODE.

Petitioner claims (initial brief, p. 35) this issue was not raised below because of adverse controlling case law in the First District. In contrast, he attacked the habitual felon statute in the First District, despite the legion of cases rejecting all his arguments.

On the merits, petitioner relies on Daniels v. State, 595 So.2d 952 (Fla. 1992) for the proposition that consecutive minimum mandatory sentences may be imposed only if specifically prescribed by the sentencing statute. This issue is also pending in Downs v. State, case no. 79,322, currently before the Court.

In Daniels, the Court found the issue to be a close one but concluded that section 775.021(4), which authorizes the trial court to impose sentences either concurrently or consecutively, was not applicable to habitual offender or enhancement sentencing. As the State later argued in its Downs brief, this reasoning overlooks §775.021(2) which explicitly commands the exact opposite:

> The provisions of this chapter are applicable to offenses defined by other statutes, unless the code otherwise provides. [e.s.]

The rules of construction which the Legislature has prescribed in §775.021 are applicable to all other sections of the criminal

code and Florida Statutes unless specifically exempted by the particular section. Thus, the rationale of Daniels is clearly contrary to the explicit command of the Legislature.

In connection with the legislative rules of construction in §775.021, it should also be noted that subsection (1), in setting out a rule of lenity, declares that it applies to statutory "offenses" where construction of ambiguous offense statutes will favor the "accused." This reading of the rule of lenity as not applicable to sentencing statutes is reiterated by subsection (4)(b) which states that:

> the "intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent." [e.s.]

Manifestly, Daniels is contrary to plainly stated legislative rules of construction. This court should promptly recede from that decision.

CONCLUSION

The answer to both certified questions is "NO." The second issue is not preserved and must not be considered. Alternatively, that issue is outside the scope of the certified questions and should not be answered. On the merits, Petitioner's sentence is not cruel or unusual.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
BUREAU CHIEF
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0325791

CHARLIE MCCOY
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0333646

DEPARTMENT OF LEGAL AFFAIRS
The Capitol
Tallahassee, FL 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to P. Douglas Brinkmeyer, Assistant Public Defender, Leon County Courthouse, Fourth Floor, North, 301 South Monroe Street, Tallahassee, Florida 32301, this 29th day of August, 1992.

Charlie McCoy
Assistant Attorney General