6-14

047

FILED
SID J. WHITE
MAY 18 1993
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

WALLACE L. WILLIAMS, JR.,

Petitioner,

v. CASE NO. 81,592

STATE OF FLORIDA,

Respondent.

_____/

INITIAL BRIEF OF PETITIONER ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

GLEN P. GIFFORD
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR #0664261

P. DOUGLAS BRINKMEYER
ASSISTANT PUBLIC DEFENDER
CHIEF, APPELLATE DIVISION
(ON THE BRIEF)
FLORIDA BAR #197890
LEON COUNTY COURTHOUSE
FOURTH FLOOR, NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEYS FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

WALLACE L. WILLIAMS, JR., Petitioner, vs. STATE OF FLORIDA, Respondent.	Case No. 81,592

INITIAL BRIEF OF PETITIONER ON THE MERITS

STATEMENT OF THE CASE

Petitioner was charged with sale of cocaine within 1,000 feet of a school, and a jury found him guilty as charged. (R4, 20, 272)[1] On the date scheduled for sentencing, the state filed notice of intent to seek a habitual offender sentence and requested a one-week continuance. (R33-34, 279) Over defense objection, the court granted the continuance. (R279-280) One week later, the state produced evidence bringing petitioner within the operation of the habitual offender statute. (R286-298) Petitioner's permitted guideline sentencing range extended from 5-1/2 to 12 years imprisonment. (R93) The court adjudicated him guilty of the first-degree felony of sale of cocaine within 1,000 feet of a school, and sentenced him to life as a habitual offender. (R88-92, 310) Timely notice of appeal was filed, and the Office of the Public Defender was appointed to represent Mr. Williams on appeal. (R95-97)

[1]In this brief, references to the record on appeal appear as (R[page number]).

On direct appeal, the First District Court of Appeal remanded for resentencing because it could not ascertain whether the trial judge realized that sentencing under section 775.084(4)(a)1, Florida Statutes, is permissive, not mandatory. The Court rejected petitioner's argument that his sentence constituted cruel or unusual punishment under Article I, Section 17 of the Florida Constitution, noting it had rejected the same argument in Hale v. State, 600 So. 2d 1228 (Fla. 1st DCA 1992). The court denied petitioner's motion for rehearing, but certified the following question of great public importance:

> DOES ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION PERMIT AN APPELLATE COURT TO UNDERTAKE PROPORTIONALITY REVIEW OF A NON-DEATH PENALTY SENTENCE?

Petitioner filed timely notice to invoke discretionary review of this Court under Article V, Section 3(b)(4) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v). The Court postponed its decision on jurisdiction. This brief follows.

STATEMENT OF THE FACTS

Mark Andrews, of Naval Intelligence Services, was working with Orange Park police officer Mark Cornett on undercover purchases of cocaine on January 7, 1991. (R118) Cornett set Andrews up with a car, money and a confidential informant. (R121, 136) Andrews testified that he and the informant, Bernard Reese, pulled into the driveway at the home of Wallace Williams, the appellant. (R122) Reese spoke privately with Williams, who then asked Andrews what he wanted. (R122) Andrews said he wanted $30 worth, and Williams told them to meet him in five minutes near the duplex. (R122)

Andrews and Reese arrived first. Andrews testified that Williams arrived and stopped his car across the railroad tracks. (R122) Andrews testified that the car driven by Williams was the same one that had been parked at his house minutes earlier. (R129) An elementary school was nearby. (R125) The time was between 8:00 and 8:30 p.m. (R127) A passenger got out of Williams' car, went to Andrews and sold him a $20 piece of crack cocaine. (R123) The passenger then returned to Williams' car, and appeared to exchange something with Williams. (R123) Andrews left the area and met Cornett. (R126)

Cornett testified that he watched the transaction from a vantage point nearby. He said he recognized Williams' car at the scene, but could not tell if Williams was inside it. (R146, 158) He said he was out of view of the participants. (R148-150) Cornett testified that the exchange occurred 372 feet from the property of the elementary school. (R152) He also testified that

after arresting appellant on February 20th, appellant recalled the incident and admitted his participation. (R153, 158)

Bernard Reese, the informant, testified for the defense. He stated that when he approached Williams to ask about purchasing cocaine that night, Williams said he didn't sell drugs. (R184) Reese and Andrews left Williams' house and continued to drive through the area until they met Carlos Floyd. (R185) Floyd agreed to meet Reese at Reese's house (the transaction site). Minutes later Floyd arrived there, approaching on foot. (R186)

Cletis Watson, a defense investigator, testified that he had surveyed the area just before trial and considered it impossible for Cornett to have seen any activity at the alleged transaction site from his purported vantage point. (R197-205) The defense introduced photographs of the scene, as well as a chart used by Andrews in his deposition. (R200, 210)

In rebuttal, Cornett testified that he could see the transaction site, because rises in the land enabled him to see over a privacy fence in some spots. (R215) He also testified that some of the woods in the area provided him perfect cover to watch without being seen. (R219) Andrews testified that he did not know where Cornett was standing during the transaction. (R226)

SUMMARY OF THE ARGUMENT

Petitioner's sentence of life imprisonment without parole as a habitual offender for sale of cocaine within 1,000 feet of a school violates the prohibition against cruel or unusual punishments contained in article I, section 17 of the Florida Constitution. The state constitutional provision gives greater protection to individuals than its federal counterpart in part because it is phrased in the disjunctive, not the conjunctive. Moreover, an interpretation of article I, section 17 identical to that of the Eighth Amendment would eviscerate the provision. Therefore, consistent with the principles of federalism and the actions of courts in other states, this Court should determine that Article I, Section 17 permits Florida's appellate courts to undertake proportionality review of non-death penalty sentences.

An unconstitutional punishment under Article I, Section 17 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 a recidivist punishment, the gravity and volume of prior offenses. In short, a proportionality review is required. Under Florida's "cruel or unusual punishment" provision, a proportionality analysis should encompass the first two parts of the test announced by the U.S. Supreme Court in Solem v. Helm. (Part three of the Solem test should not be applied as it is a function of federalism, the operation of 50 independent criminal justice systems within the framework of a national constitution.)

The first consideration under the test proposed herein is the gravity of the offense. Petitioner's offense is a serious one, but not particularly grave in comparison to offenses such as murder, sexual battery or trafficking in large amounts of drugs. Also, appellant's record demonstrates a two-year binge of cocaine possession and sale, but shows no propensity to violence or escalation in the type of crime committed. Another pertinent consideration is the sentences authorized for other crimes in Florida. Even with a record such as appellant's, many more serious offenses are punishable by sentences either equally or less severe than life without parole.

Consequently, petitioner's sentence should be vacated and the case remanded with directions to impose a less severe sanction.

ARGUMENT

A SENTENCE OF LIFE IMPRISONMENT FOR SALE OF COCAINE WITHIN 1,000 FEET OF A SCHOOL CONSTITUTES CRUEL OR UNUSUAL PUNISHMENT UNDER ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION.[2]

Petitioner was convicted of sale of cocaine within 1,000 feet of a school on facts showing that he was a principal to the sale of $20 of crack cocaine at 8:30 p.m. on a Monday night near an elementary school. The offense was enhanced to a first-degree felony for its proximity to the school. The court then found appellant to be a habitual offender and sentenced him to life imprisonment, a sentence for which there is no parole eligibility. Section 775.084(4)(e), Fla. Stat. (1991) His prior offenses, all since 1988, included (in sequence) grand theft; possession of cocaine; sale of cocaine and sale of cocaine within 1,000 feet of school (occurring on successive days and disposed of on the same date); and again sale of cocaine and sale of cocaine within 1,000 feet of a school (with successive case numbers and again disposed of on the same date).

The sentence of life imprisonment without parole for the instant offense violates the prohibition of cruel or unusual punishments contained in article I, section 17 of the Florida Constitution. The argument that follows turns in large part on the distinction between the Florida Constitution, which contains

---

[2]This arguments is substantially similar to a nonjurisdictional argument made to this Court in Hale v. State, No. 80,242.

the disjunctive "or," and the Eighth Amendment to the U.S. Constitution which, phrased in the conjunctive, prohibits cruel and unusual punishments.

A. INTRODUCTION

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, sec. 12, Fla. Const. (1838). The phrase has survived several major constitutional revisions, including the most recent in 1968. Art. I, Sec. 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.[3] Thus, courts should give effect to this phrasing.

---

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

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).

While the legislature has the power to prescribe punishments, this Court has the duty to determine the constitutionality of the resulting scheme:

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

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

B. FEDERAL VERSUS FLORIDA CONSTITUTION

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. Whatever the historical record, 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). 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. This is particularly true when the U.S. Supreme Court carries a federal constitutional protection one step back.

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).

This Court has recently, strongly reaffirmed the principle that our Declaration of Rights operates independently of the federal Bill of Rights and may provide our citizens with greater protection. Traylor v. State, 596 So. 2d 957 (Fla. 1992). Under Traylor, this Court has the duty to look first to the Declaration of Rights in assessing the limits of state power against the individual. Id. at 962.

"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. The experience of other states with the same or similar constitutional provisions may prove useful to this Court in fashioning a test under Article I, Section 17.

C. THE LAW FROM OTHER STATES

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). Courts in many of these states have construed the provisions to encompass proportionality review of non-death sentences.

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 had never before declared a statutory punishment 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 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.

Applying this test, the court 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 pondered 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.

California courts have conscientiously examined 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 remarkably similar to the disjunctive phrasing of the Florida provision:

> 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 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.

More recently, the Idaho Supreme Court explained its role in reviewing sentences to determine if they were cruel and unusual under article I, section 6 of the Idaho Constitution. In State v. Broadhead, 814 P.2d 401 (Idaho 1991), the court 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 upon 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 that parole eligibility attach to the life sentence.

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 imposed a sentence of five years without parole. The state appealed the sentence. The Mississippi Supreme Court's lengthy quote reciting the trial court's reasons for imposing a lesser sentence bear repeating here, because everything the trial judge said about Mississippi's habitual offender statute is true of 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 that once habitual status is proven, the judge has no discretion and must impose the maximum. Burt v. State, 493 So.2d 1325 (Miss. 1986). 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). Ashley 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 deemed 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.

Id. at 1185.

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 1046 (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, 830 P.2d 823 (Ariz. 1992).

Likewise, in People v. Bullock, 485 N.W.2d 866 (Mich. 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. Mich. Const., art. I, sec. 16. It had been previously construed as 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.

Id. at 31. 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. at 41-42; 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.

D. THE CERTIFIED QUESTION

Some of the same considerations informing the decisions of the state courts in the cases discussed above should influence this Court to answer the certified question in the affirmative and approve proportionality review of non-death sentences under the Florida Constitution. As 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).

Therefore, in the language of the certified question, this Court should decide that Article I, Section 17 of the Florida Constitution permits an appellate court to undertake proportionality review of a non-death penalty sentence. A contrary decision would, in effect, cede to the federal government a fundamental constitutional protection Floridians have expressly reserved for themselves. It would also leave Floridians with no means by which to fend off Draconian penalties fueled by transitory popular passions (i.e., the war on drugs).

E. THE SCOPE OF PROPORTIONALITY REVIEW

The task remains to give flesh to the words of Article I, Section 17, to determine the type of review appropriate under the state constitution. The starting point is the plain meaning of the key words in the provision in question. 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, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), Blackstone used "cruel" to mean severe or excessive.

The opinion in Robinson v. California, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (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.

Taking guidance from the jurisprudence of the state and federal courts addressing this issue, petitioner submits that 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 district court notwithstanding.

In Solem v. Helm, 463 U.S. 277 (1983), the U.S. Supreme Court 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.

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.

F. REVIEW OF PETITIONER'S SENTENCE

Petitioner's offense is sale of cocaine within 1,000 feet of a school. While the Legislature has the power to promote its interest in drug-free zones surrounding schools by enhancing the

penalty for sale of cocaine when that element is proved, the resulting punishment should be scrutinized to determine its proportionality to the particular evil inflicted. Petitioner was a principal to a sale of cocaine solicited by a confidential informant, accompanied by an undercover police officer. The exchange occurred at 8:00 to 8:30 p.m. on a week night near an elementary school, and in front of the informant's residence. The undercover officer purchased a $20 piece of crack cocaine from a codefendant while petitioner remained a short distance away. Compare, Harmelin v. Michigan, 115 L.Ed.2d 836 (1991) (defendant received mandatory life sentence for possession of 672 grams of cocaine). There was no testimony of activity at the school at the time, or of participation in the transaction by school employees or students. The proximity to the school was at best coincidental and at worst orchestrated by law enforcement to enhance the punishment for the crime. Not to belabor the issue, much more grave offenses abound under Florida law.

Petitioner's record of prior offenses, all within a two-year period, may be divided into four disposition dates. In 1988, he committed grand theft, for which he was convicted in 1989. Evidently, also in 1988 he committed a sale of cocaine and sale of cocaine within 1,000 feet of a school on successive days, for which he was convicted and sentenced on the same day.[4] Also, in

---

[4]The PSI report is contradictory in this regard. It records the dates of offenses as August 10 and 11, 1989, which is inconsistent with other portions of the PSI. The dates were probably August 10 and 11, 1988. (R27-28)

1989, he was convicted of possession of cocaine. Later that same year, he committed a sale of cocaine and sale of cocaine within 1,000 feet of a school (successive case numbers), for which he was convicted and sentenced on the same day. This record demonstrates that for a two-year period, when he was not in prison, petitioner often possessed or sold cocaine. Without minimizing the record, petitioner notes only that much worse and much longer prior records may be found in the files of any circuit or appellate court. It should also be noted that the record demonstrates no crimes of violence or escalating pattern of criminality. A life sentence is disproportionately excessive to the gravity of the offense and prior record.

The second consideration is a comparison of sentences imposed on others under Florida law. No one who commits any crime save first-degree murder could receive a sentence more severe than that meted out here: life without parole. Had petitioner trafficked in the prodigious amount of cocaine present in Harmelin, he could have been punished no more severely. The same holds true had he committed a second-degree murder. Had he, with the same record, committed first-degree murder (without the death penalty), second-degree murder of a law enforcement officer or sexual battery on a child, he would have received a mandatory sentence of life imprisonment with possibility of parole after 25 years. Secs. 775.082, 775.0823, 775.0825, Fla. Stat. (1989). Only first-degree murder of a law enforcement officer, judge, state attorney, etc., would have earned him the same punishment as imposed here: life without parole. Obviously, under part two

of the Solem test as applied under the Florida Constitution, and under the test from In re Grant, supra, more serious crimes are subject to the same penalty or to less serious penalties.

Petitioner has proposed a test culled from Solem as one which gives courts standards to apply in a proportionality review. Under that test, petitioner has received an unconstitutional punishment. The Court is, of course, free to fashion its own test or to leave that task to the lower courts as falling outside the scope of the certified question. However, in petitioner's case, the result remains the same under any test discussed herein. No less than the Kentucky Court of Appeals in Workman v. Commonwealth, supra, Florida's appellate courts have the power to strike down disproportionate punishments. Using the Kentucky test, it is clear that petitioner's life sentence without parole for aiding and abetting the sale of a small quality of cocaine, which by coincidence occurred near school property, "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. 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 an independent guarantor of rights and not a robot, to correct the constitutional violation.

For these reasons, appellant's sentence of life imprisonment without possibility of parole is disproportionate to the gravity of the offense and to sentences for other, more serious crimes. It constitutes cruel or unusual punishment in violation of article I, section 17 of the Florida Constitution. The sentence must therefore be vacated and the case remanded for resentencing to a term of years, or for mandated parole eligibility, or both.

CONCLUSION

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

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

GLEN P. GIFFORD
ASSISTANT PUBLIC DEFENDER
Fla. Bar No. 0664261
Leon Co. Courthouse
301 S. Monroe St., Suite 401
Tallahassee, FL 32301
(904) 488-2458

FOR: P. DOUGLAS BRINKMEYER
ASSISTANT PUBLIC DEFENDER
CHIEF, APPELLATE DIVISION
(On the Brief)
Fla. Bar No. 197890

ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Charlie McCoy, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, FL, on this 18th day of May, 1993.

GLEN P. GIFFORD
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

WALLACE L. WILLIAMS, JR.,	:	
Petitioner,	:	
v.	:	CASE NO. 81,592
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

APPENDIX FOR INITIAL BRIEF OF PETITIONER ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

GLEN P. GIFFORD
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR #0664261
LEON COUNTY COURTHOUSE
FOURTH FLOOR, NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR PETITIONER

COPY

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

WALLACE L. WILLIAMS, JR.,

Appellant,

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

v.

CASE NO. 91-1995

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed September 25, 1992.

An appeal from the Circuit Court for Clay County, William A. Wilkes, Judge.

Nancy A. Daniels, Public Defender, Glen P. Gifford, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, Charlie McCoy, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

Appellant, Wallace L. Williams, Jr., appeals his conviction for sale, purchase, manufacture or delivery of cocaine within 1,000 feet of a school and habitual felony offender sentence of life imprisonment without possibility of parole. We affirm appellant's conviction but remand the case to the trial court for resentencing.

As to the first issue raised on appeal, we find that the trial judge did not abuse his discretion in denying defense counsel's request for a jury view of the crime scene. We also reject appellant's argument that a sentence of life imprisonment in this case constitutes cruel or unusual punishment under Article I, Section 17 of the Florida Constitution. This court has recently decided this issue adversely to appellant's position in Hale v. State, 600 So.2d 1228 (Fla. 1st DCA 1992), rejecting the argument that the "cruel or unusual" punishment clause in the Florida Constitution requires (or allows) proportionality review in non-death penalty cases.

Although we affirm appellant's conviction, we note that the Florida Supreme Court has ruled that sentencing under Section 775.084(4)(a)1. is permissive, not mandatory. Burdick v. State, 594 So.2d 267 (Fla. 1992). As we are unable to discern whether the trial court was aware of his discretionary power in sentencing, we remand the case for resentencing.

AFFIRMED in part, REVERSED in part, and REMANDED for resentencing.

SHIVERS, MINER and ALLEN, JJ., CONCUR.

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

WALLACE L. WILLIAMS, JR.,

Appellant,

v. CASE NO. 91-1995

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed March 25, 1993.

An appeal from the Circuit Court for Clay County, William A. Wilkes, Judge.

Nancy A. Daniels, Public Defender, Glen P. Gifford, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, Charlie McCoy, Assistant Attorney General, Tallahassee, for Appellee.

ON MOTION FOR REHEARING

PER CURIAM.

Appellant's motion for rehearing is hereby denied. However, we hereby certify to the Florida Supreme Court the following question of great public importance:

DOES ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION PERMIT AN APPELLATE COURT TO UNDERTAKE PROPORTIONALITY REVIEW OF A NON-DEATH PENALTY SENTENCE?

MINER, ALLEN and MICKLE, JJ., CONCUR.