IN THE SUPREME COURT OF FLORIDA

WALLACE L. WILLIAMS, JR.,

Petitioner,

vs. CASE NO.: 81,592

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The State's answer will be divided into two main parts. The first addresses exercise of jurisdiction by this court. The second responds on the merits, and is subdivided into six sections, which correspond to sections A through F of the argument in Petitioner's initial brief.

STATEMENT OF THE CASE

The State accepts Petitioner's statement.

STATEMENT OF THE FACTS

The State accepts Petitioner's statement, which paraphrases the evidentiary portion of trial. However, the State objects to his omissions, and adds:

1. Before the trial court, Petitioner did not challenge the validity of the habitual felon statute, or the propriety of his sentence on any legal ground. (R 282-311).

2. At sentencing, the State introduced certified copies of Petitioner's judgments for two prior felonies, in case no. 89-24 (cocaine sale) and no. 89-899 (cocaine sale). (R 294-7). Later, the State introduced judgments in case nos. 89-898 (cocaine sale within 1000 feet of school); 89-25 (cocaine sale); and 88-1139 (grand theft). (R 298). The copies are in the record at (R 40-86).

3. Defense counsel stipulated to the accuracy of Petitioner's guidelines scoresheet, as opposed to the PSI (R 304). The scoresheet shows, in addition to Petitioner's primary offense, that he had five other convictions: three for cocaine sale, one for grand theft, and one for cocaine sale within 1000 feet of a school. One prior record offense of cocaine possession is also shown. (R 93).

4. Petitioner was sentenced in June 1991 (R 282); the instant offense was committed in early January 1991. (R 4). When describing Petitioner's record, the prosecutor stated without contradiction that Petitioner committed grand larceny and sale of cocaine within 1000 feet of a school in 1988; cocaine sale again in 1988; cocaine possession in 1989; two counts of cocaine sale in 1989; and the instant offense of cocaine sale. (R 307).

SUMMARY OF ARGUMENT

I. Exercise of Jurisdiction by this Court

This court should decline to reach the certified question. Claims that a sentence is disproportionate or excessive unavoidably challenge the application of the statute authorizing the penalty imposed. Moreover, such claims are highly factual; involving the number and type of a defendant's current and past offenses, the sentences imposed on similarly-situated felons, and events unique to each case.

Appellant did not object to his individual sentence before the trial court. The propriety of his punishment is not preserved for review. By seeking relief through a certified question, Petitioner unavoidably seeks relief on an unpreserved issue: the constitutionality of the habitual felon statute as applied to him. While this court has discretionary jurisdiction, it should decline to exercise it.

II. Separation of Powers

The literal distinction between the phrase "cruel or unusual" punishment in the Florida Constitution, and the phrase "cruel and unusual" punishment in the U.S. Constitution, does not authorize proportionality reviews of statutorily authorized, non-death sentences. Such review would violate the separation of government powers required by Art. II, §3, Fla. Const.

By statutorily authorizing a sentence, the Legislature has implicitly determined that such sentence does not "shock the community's sense of justice." It is not the prerogative of the judiciary to formulate different public policy. The answer to the certified question is NO.

ARGUMENT

ISSUE I

WHETHER THIS COURT SHOULD EXERCISE ITS JURISDICTION TO ANSWER THE CERTIFIED QUESTION.

Petitioner, a repeat felon who sold cocaine near a school, seeks an historically incorrect interpretation of the state constitution based, ultimately, on a non-preserved issue. Consequently, this court should not exercise its jurisdiction to reach the certified question.[1]

Before the trial court, Petitioner did not object to his sentence on any legal ground, but merely asked that court to show leniency by sentencing him within the guidelines. (R 304-6). No challenge to the sentence imposed (life) was made on any legal ground. (R 310).

Regardless of whether Petitioners' constitutional attacks are deemed to challenge his sentence as cruel or unusual, or as disproportionate, such attacks are highly factual. They unavoidably challenge the habitual felon statute as applied. Petitioner implicitly concedes this very late in his brief (p. 27-9). He expressly addresses his current offense, and his prior criminal record. He then speculates, without record support, that "much worse and longer prior records may be found [in other cases]." (initial brief, p. 29). He then compares his sentence

[1] In its order of April 23, 1993, this court postponed its decision on jurisdiction.

to the statutorily-permitted sentence for other crimes under Florida law. (initial brief, p. 29).

A challenge to the statute as applied could not be stated more clearly. Appellant is very precisely arguing that his sentence is cruel or unusual under the facts of this case. Regardless of nomenclature, he is challenging the habitual felon statute's constitutionality as applied to him. His failure to raise this issue below precludes review by this court. Trushin v. State, 425 So. 2d 1126, 1129-30 (Fla. 1982)("The constitutional application of a statute to particular set of facts is another matter and must [e.s.] be raised at the trial level."). *See* Randi v. State, 182 So. 2d 632 (Fla. 1st DCA 1966)(appellant's contention that rape statute authorized cruel and unusual punishment under the Eighth Amendment not raised before, or passed upon by, trial court; therefore the issue could not be raised for first time on appeal). *See* State v. Johnson, 18 Fla. L. Weekly S234, 235 (Fla. Ap. 8, 1993)(noting that Trushin requires constitutional challenges to statutes as applied to be raised in the trial court). *See also* Forehand v. State, 537 So. 2d 103 (Fla. 1989)(since a hearing was required to determine the nature of a Texas conviction, appellant's sentencing issue could not be raised for the 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, 1046 (Fla. 1986).

This court should decline to answer the abstract certified question. Even if this court were to announce that appellate courts could engage in proportionality review of statutorily-authorized, non-death sentences, such review would be impossible here. Since no such objection was made before the trial court, the record contains no evidence of the sentences imposed on either other or similarly situated felons. On remand, the First District could not conduct a proportionality analysis on the bare record.

Unlike the procedures required for imposing the death penalty, the trial court was not required to make any findings beyond the statutory criteria for sentencing Petitioner as an habitual felon. There was no comparison of Petitioner's criminal history to the histories of other recidivist felons. The State strongly but respectfully requests this court to decline to reach the certified question.

There is a second, equally compelling reason to decline review. The certified question asks whether an appellate court may undertake proportionality review of a non-death sentence, under Art. I, §17 of the Florida Constitution. In relevant part, Art. I, §17 forbids punishment that is cruel or unusual. Out of an argument comprising 25 pages, Petitioner devotes only two (initial brief, p. 24-5) to his answer to that question. Moreover, he largely concedes the issue when he candidly declares, as to the meaning of "cruel or unusual":

> [P]etitioner has been unable to find an express statement of legislative intent in the archival evidence from the 1838, 1861, 1865, 1885 and 1968 conventions.

(initial brief, p. 8). To get around this virtually dispositive concession, Petitioner relies on non-Florida cases. (initial brief, p. 12-24). Not one of those cases addresses separation of powers under the respective state's constitution.

Tillman v. State, 471 So. 2d 32, 34 (Fla. 1985), is particularly instructive on the court's exercise of its discretionary jurisdiction. As Tillman states, a certified question furnishes jurisdiction to address the decision and, once accepted, the court may review any issue "that has been properly preserved and properly presented." *Id.* Thus, discretionary jurisdiction, which admittedly exists in certified questions, does not excuse failure to properly preserve an issue underlying a certified question. Thus, there is no reason for this court to address the as applied constitutionality of the statute here.

ISSUE II

WHETHER APPELLATE COURT REVIEW OF THE LENGTH OF A STATUTORILY AUTHORIZED, NON-DEATH SENTENCE VIOLATES THE SEPARATION OF GOVERNMENT POWERS REQUIRED BY ART. II, SECTION 3 OF THE FLORIDA CONSTITUTION.

The certified question asks whether appellate courts may engage in proportionality review of non-death sentences. Petitioner urges an affirmative answer, relying on the Florida Constitution's ban against punishment that is cruel or unusual. With all due respect to the First District and Petitioner, both have missed the issue: whether the length of a statutorily authorized sentence is at all subject to appellate review. The State respectfully suggests that the question be rephrased as set forth above.

Over the decades, this court has repeatedly held that the length of statutorily-authorized (and procedurally correct) sentences cannot be reviewed on appeal. Davis v. State, 123 So. 2d 703, 707 (Fla. 1960):

> In a long adhered to line of cases, we have held that where a sentence is within the statutory limit, the extent of it cannot be reviewed on appeal regardless of the existence of aggravating or mitigating circumstances.
>
> * * *
>
> There has been no deviation from the rule . . . since 1943. (footnote omitted).

These pronouncements from Davis are still good law. *See* McArthur v. State, 351 So. 2d 972, 975-6 (Fla. 1977)(any sentence within

statutory limits will not violate former constitution's ban against cruel or unusual punishment).

Over the decades, this court has repeatedly declined to require proportionality review of non-death sentences. *See* Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991)(explaining that proportionality review, as a device to prevent the "unusual" imposition of the death penalty rests in part on the uniqueness and irrevocability of the death penalty). The U. S. Constitution does not require proportionality review, even of death sentences. Pulley v. Harris, 465 U.S. 37, 44-5, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). *See* Harmelin v. Michigan, 501 U.S. ___, 111 S.Ct. 2680, 115 L.Ed.2d 836, 864 (1992)(expressly declining to extend proportionality review to non-death case).

Nothing in Florida's constitutional history or this court's jurisprudence indicates that Art. I, §17 ever contemplated proportionality review of non-death sentences. Petitioner concedes this by noting his inability to find any "archival evidence" in the documentation from this state's constitutional conventions. (initial brief, p. 8).

With these basic points in mind, which the State submits should conclusively end the inquiry, the State will return Petitioner to reality by supplying the factual omissions relevant to this case. In addition to the instant case of selling crack cocaine within 1000 feet of an elementary school, Petitioner has five prior felony convictions: three for cocaine sale, one for grant theft, and one for cocaine sale within 1000 feet of a

school. (R 40-86, 93, 298, 307). These convictions occurred in no more than three years, from 1988 to mid-1991 (R 307); at which time Petitioner was only 20 years old. (R 303). Thus, Petitioner is a repeat felon who sells cocaine. Only 20 years old, he was early into his thus-far nonviolent criminal career. The reality is that petitioner is an habitual offender who has richly earned a long term of imprisonment which removes him from society.

A. INTRODUCTION[2]

Petitioner begins by discussing whether the Florida constitutional ban against punishment that is cruel or unusual is substantively different from the U. S. constitutional ban against punishment that is cruel and unusual. He candidly concedes that he was "unable to find an express statement of legislative intent in the archival evidence available from the 1838, 1861, 1865, 1885 and 1968 conventions." (initial brief, p. 8). He counters with the hollow assumption that this state's choice of phrasing was "no accident." (initial brief, p. 8).

What is no accident is the fact that no Florida court decision -- before the dicta in the Tillman footnote, *supra*, -- ascribed any substantive difference to the literal distinction between the two constitutional phrases. As urged below, Tillman did so in reliance upon questionable authority. What Tillman

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[2] From this point forward, the State's answer will follow Petitioner's format. Sections A through F herein correspond to sections A through F of Petitioner's single issue.

also did, however, was to premise the existence of proportionality review on the unique and irrevocable nature of the death penalty:

> We have described the "proportionality review" conducted by this Court in every death case as follows:
>
> > Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review *to consider the totality of circumstances in a case, and to compare it with other capital cases*. [e.o.]
> >
> > * * *
> >
> > Moreover, proportionality review in death cases rests at least in part on the recognition that death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than would lesser penalties. Art. I, §9, Fla. Const.; *Porter*.
> >
> > Proportionality review also arises in part by necessary implication from the mandatory, exclusive jurisdiction this Court has over death appeals. Art. V., §3(b)(1), Fla. Const. The obvious purpose of this special grant of jurisdiction is to ensure the uniformity of death-penalty law by preventing the disagreement over controlling points of law that may arise when the district courts of appeal are the only appellate courts with mandatory appellate jurisdiction. *See id.* Thus, proportionality review is a unique and highly serious function of this Court, the purpose of which is to foster uniformity in death-penalty law.

Id. at 169. (e.s.).

From this quote, it is obvious that proportionality review is not required absent the death penalty. That such review is not permitted is but a few short steps in logic: the first being the uncontroverted fact that Art. I, §17 contains no express authorization for proportionality review; the second, that this court does not have exclusive mandatory jurisdiction over non-death appeals as it does over death cases. Art. V, §3(b), Fla. Const.; §921.141(4), Fla. Stat. Nor is scope of review as wide as in death cases. See Fla. R. App. P. 9.140(t)("In capital cases, the court shall review the evidence to determine if the interest of justice requires a new trial, whether or not insufficiency of the evidence is an issue presented for review.").

Long-standing precedent is also 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.]

With little 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 recognizes that in non-death cases, the challenge is to the statute, not the proportionality of the particular sentence.

Finally, 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.

Brown and Fain stated the constitutional law as it existed when the voters of Florida adopted this 1968 constitution. This court cannot now retroactively rescind the results of that 1968 election. *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 representative branch of government, cannot by statute change the people's implicit ratification of constitutional law decisions by this court; then this court -- not a representative entity -- cannot alter such ratification. Separation of powers prevents such.

Without discussion, Petitioner relies solely on a footnote in Tillman, 591 So. 2d at 169, n. 2, to substantiate his interpretation of "or." (initial brief, p. 9). Seldom is such a minor part of a decision relied upon to carry so much of an argument. The footnote comments in passing, contrary to case law and without explanation:

> The Florida Constitution prohibits "cruel or unusual punishment." Art. I, §17, Fla. Const. (emphasis added). The use of the

> word "or" indicates that alternatives were intended. Cherry Lake Farms, Inc. v. Love, 129 Fla. 469, 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*. Historically then, no substantive difference has been ascribed to the use of "or" in the Florida Constitution, as petitioner candidly confesses.

Above, the state quoted Brown and 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.

Moreover, the inescapable inference from Tillman is that there is no state constitutional justification or source for proportionality review absent the death penalty. Since there is no other constitutional source, and Art. I, §17 does not expressly authorize such review; the only remaining conclusion is that Art. I, §17 does not authorize, or even address, proportionality review of non-death sentences. Therefore, when a sentence is within the range of penalties authorized by statute, appellate courts cannot engage in proportionality review. *See* Lightbourne v. State, 438 So. 2d 380, 385 (Fla. 1983), *cert. den.*, 465 U.S. 1051, 104 S.Ct. 1330, 79 L.Ed.2d 725 (1984):

> Additionally, the determination of maximum and minimum penalties is a matter for the legislature. Also, when a statutory sentence is not cruel or unusual on its face it will be upheld against an attack based on separation of powers grounds. [e.s.] (citation omitted).

Here, a statutorily-authorized sentence of life for habitual felons is not cruel or unusual on its face. Imprisonment is not an unusual or illegal sentence.[3]

A sentence under the habitual felon statute is at issue here. Nevertheless, pronouncements by this Court as to guidelines departure sentences are relevant. By statute, the length of a guidelines departure sentence is not reviewable. *See* §921.001(5), Florida Statutes, ("The extent of departure from a guidelines sentence shall not be subject to appellate review."). This statutory provision has been upheld against a separation of powers attack. Booker v. State, 514 So. 2d 1079, 1082 (Fla. 1987):

> We find from our prior holdings that there is no inherent judicial power of appellate review over sentencing which would render chapter 86-273 violative of the separation of powers provisions of article II, section 3. Indeed, it clearly appears that both this Court and the United States Supreme Court have embraced the notion that so long as the sentence imposed is within the maximum limit set by the legislature, an appellate court is without power to review the sentence. In effect, this rule recognizes that setting forth the range

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[3] *See* Justice Marshall's comment in his Furman opinion that "unusual" in the English Bill of Rights was inadvertent, simply meaning "illegal." Furman v. Georgia, 408 U.S. 238, 318, 33 L.Ed.2d 346, 395, 92 S.Ct. 2726 (1972).

> within which a defendant may be sentenced is a matter of substantive law, properly within the legislative domain. Accordingly, we find that chapter 86-273 does not violate article II, section 3. [footnote omitted]
>
> * * *
>
> It may well be that the legislature, by eliminating appellate review on the extent of departure has, in fact, undermined the fundamental purpose of the guidelines, uniformity in sentencing. This observation, however, goes to the wisdom of the amendment and not to its constitutionality.

Id. at 1082. While some might argue that it may not be the best use of prison space to sentence an habitual, street-level cocaine dealer to life in jail, and others might maintain the opposite, such policy disagreements go to the legislative wisdom of the habitual felon statute, and not to whether Petitioner's sentence is cruel or unusual.

Reading Lightbourne and Booker together, it follows that the Legislature has insulated the length of any guidelines departure sentence, within the appropriate statutory maximum, from appellate review.[4] Consequently, an appellate court cannot engage in proportionality review of a guidelines departure sentence.

If an appellate court cannot review the extent of departure from the guidelines, how can it review -- absent express statutory authorization -- the length of an habitual felon

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[4] The state is aware that the legislative recently enacted Senate Bill 26.B with major revisions to the sentencing guidelines. This act is awaiting executive review at writing but has no impact on the arguments here.

sentence within the statutory maximum? To conclude that the length of habitual felon sentences is reviewable, but that the length of guidelines departure sentences is not, is inconsistent at best. It would also create an irrational distinction between habitual felon and guidelines departure sentences.

A second analogy to the guidelines weighs hard against Petitioner. When determining a guidelines sentence, the trial court first selects the proper "category" (e.g., category five for burglaries). This inherently groups felons committing similar offenses together. Points are assigned based on the severity (degree) of the primary offense, number and severity of additional offenses, prior record, the defendant's legal status, and victim injury. In so doing, a felon's current and past record is inherently considered. To receive the same sentence, one felon's record must be fairly similar to another felon's record. Guidelines sentencing, then, subsumes some aspects of proportionality.

The sentencing guidelines were first proposed by the Sentencing Guidelines Commission, a non-legislative entity. This court implemented the Commission's proposals through rules. In Smith v. State, 537 So. 2d 982 (Fla. 1989), this court held those rules were unconstitutional from their adoption until they were approved by the Legislature. Smith declared:

> Whether this case is viewed as one involving a legislative power that cannot be delegated . . . we are convinced that section 921.001 did not legally authorize this Court to promulgate the grid schedules.

Id. at 987.

Until the Legislature authorizes proportionality review, this court cannot read "cruel or unusual" to authorize such. The sentencing guidelines were adopted "to reduce unreasonable disparities in sentencing." *Id.* at 983. Proportionality is built into the guidelines. Nevertheless, because of the separation of powers doctrine and its non-delegation corollary, the guidelines were not valid until adopted by the Legislature. If the guidelines, a mechanism designed to achieve proportionality, were invalid until legislatively adopted, how can this court read "cruel or unusual" to authorize proportionality review? Such reading would be particularly dubious, in light of this Court's recent decision (Booker, in 1987) upholding the statute that removed the length of a guidelines departure sentence from appellate review.

This Court need go no further. The answer to the certified question is "NO."[5]

B. FEDERAL VERSUS FLORIDA CONSTITUTION

That the citizens of a state may adopt a state constitution extending greater rights to individuals than those granted by the U.S. Constitution is unquestioned. The real issue is whether the

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[5] The State is satisfied that the argument presented to this point is more than adequate to formally dispose of the case. Petitioner's argument, and the State's response, from this point contain considerable repetition. The State follows the Petitioner's format, with repetition, for the convenience of the court and in order to forestall any suggestion of conceding the specific points.

literal difference between the two constitutions carries the burden urged by Petitioner: that Art. I, §17, Fla. Const., permits non-death sentences to be independently reviewed by the judiciary for excessive length under the facts.

Petitioner first relies on one part (joined by only one other justice) of Justice Scalia's opinion in Harmelin, *supra*. 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). Essentially, the majority Harmelin opinions so restrict Solem as to end its relevance to all but the most radical sentences, e.g., life imprisonment for illegal parking. When the Florida Legislature actually adopts such an irrational statute will be time enough to address the controversy. As Justice Scalia pointed out in Harmelin in fn.11 at 115 L.Ed.2d 836: "As Justice Frankfurter reminded us, '[t]he process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency.' New York v. United States, 326 US 572, 583, 90 L.Ed. 326, 66 S.Ct. 310 (1946)."

As his final state authority, Petitioner asserts that Traylor v. State, 596 So. 2d 957 (Fla. 1992), establishes a duty in this court to look first to the Declaration of Rights in limiting the State's "power against the individual." (initial brief, p. 12). That case, far-reaching as it is, cannot be read to supply a rationale for proportionality review of non-death sentences. A Florida criminal's right to exclude voluntary confessions of guilt has no bearing on the constitutionality of a statutorily authorized sentence imposed on a felon whose crimes are habitual.

C. SEPARATION OF POWERS[6]

Harkening to decisions from other states, Petitioner asks this court to announce a new interpretation and application of the phrase "cruel or unusual." He asks that the phrase be read to mean: "cruel, unusual, or disproportionate." Two matters defeat Petitioner. First, his factual circumstances are significantly different from the circumstances of felons in the decisions from other states. Second, proportionality review -- other than death sentences -- violates the strict separation of powers required by Florida's Constitution.

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[6] Petitioner's heading for this section is "The Law From Other States." Petitioner's extensive, almost exclusive, reliance on the law from other jurisdictions contradicts petitioner's position under E. The Scope of Proportionality Review at p. 27 of his initial brief argues that "comparisons to other states are not helpful" in interpreting the Florida Constitution. That is a particularly apt observation in view of Florida's stringent doctrine on the separation of powers but it does not support petitioner's position. Factually, less than one-third of the cases in petitioner's Table of Citations are from Florida.

Petitioner had been convicted and sentenced for six felonies by the age of 20. Five of these involved cocaine sales, two of which were near a school. Petitioner's earlier actions spoke louder than his words at sentencing. He showed no sign that he would not return to crime, "nonviolent" only in the sense that his crimes to this point do not cause immediate death. But see the long-term violence to society arises from the illegal drug industry. None of the defendants in the cases from other states had a comparable record of so many offenses, in such a short time, at such a young age. While those defendants may have committed more serious crimes, none displayed Petitioner's recidivism.

Article II, §3 of the Florida Constitution provides in relevant part:

> No person belonging to one branch [of government] shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

The tests or standards for proportionality review proposed by Petitioner would allow appellate courts to declare a legislatively authorized sentence to be disproportionate on public policy grounds. Florida's constitutional separation of government powers is too strict to accommodate such a permissive reading. Regardless of how other state courts interpret their constitutional bans against punishment that is cruel or unusual, this court -- based on long-standing and recent decisions -- is not free to interpret Art. I, §17 in a manner defeating Art.

II, §3. If the People later choose to amend the constitution to authorize proportionality review of all sentences, so be it. If the Legislature enacts a statute requiring such review, so be it. This court cannot appropriate either power to itself, even if it were to disagree with the public policy of the habitual felon statute, which authorizes a life sentence under Petitioner's facts. Barnes v. B.K. Credit Service, 461 So. 2d 217, 219 (Fla. 1st DCA 1984), *pet. for rev. den.*, 467 So. 2d 999 (Fla. 1985):

> "Courts are never permitted to strike down an act of the Legislature because it fails to square with their individual social or economic theories or what they deem to be sound public policy."

Quoting, Ball v. Branch, 154 Fla. 57, 16 So. 2d 524, 525 (1944).

Here, Petitioner unavoidably attacks the application of the habitual felon statute to himself, by claiming his punishment is cruel or unusual under the facts. He thus attacks the wisdom or policy underlying that statute. The legislature -- by authorizing Petitioner's sentence -- has inherently determined that a life sentence for an habitual cocaine seller does not shock or offend the community's sense of justice.

The strict separation of powers required by Art. II, §3 prohibits this court from overturning this legislative determination in the guise of proportionality review. Equity does not permit this court to fashion a different sentence. *See* State v. Coban, 520 So. 2d 40, 41 (Fla. 1988)(declining to eliminate the 25 year minimum for first-degree murder, and

declaring that "[t]he plenary power of the legislature to prescribe punishment for criminal offenses cannot be abrogated by the court in the guise of fashioning an equitable sentence outside the statutory provisions"). If this court could not fashion a more equitable punishment in Coban, other appellate courts cannot do so in the guise of proportionality review.

Constitutional separation of powers is strict in Florida, requiring a heightened degree of distinction between branches of government. *See* Askew v. Cross Key Waterways, 372 So. 2d 913, 924-5 (Fla. 1978)(in context of challenge to statute as excessive delegation of legislative authority to executive branch, expressly rejecting the lesser federal standard; and declaring that under Art. II, §3 the "doctrine of nondelegation of legislative power to be viable in this State"). Just as the Cross Keys court declined to adopt a less stringent standard for assessing the delegation of legislative authority, this court must decline Petitioner's invitation to interpret the phrase "cruel or unusual" to authorize proportionality review of the length of non-death sentences. Such review usurps the legislature's role to determine maximum criminal penalties as a matter of public policy, and is not constitutionally required.

Very useful is this court's opinion in Florida Rules of Criminal Procedure Re: Sentencing Guidelines (Rules 3.701 and 3.988), 576 So. 2d 1307 (Fla. 1991). There, the Sentencing Guidelines Commission petitioned for changes to the guidelines and to attendant committee notes. After approving several procedural changes, this court turned to the recommended changes

in the notes. The changes, relating to scoring of points for legal status and victim injury, essentially declared the Commission's original intent. *Id.* at 1308. Apparently, the Commission regarded these changes as curative, clarifying the law as it was all along; rather than new substantive law. Nevertheless, this court declined to approve the changes, "troubled" by effectively amending the guidelines without changing the rules themselves. *Id.* This court declared:

> We are in no position now to say, by judicial ukase, exactly what the Legislature did or did not intend at the time of adoption.

Id. The court expressly relied on the separation of powers required by Art. III, §3. *Id.*

Unlike the federal government, this state has adopted several constitutions. Most recently, the People adopted a new constitution in 1968. All of the constitutions have employed the phrase "cruel or unusual." Decades of decisions by this court have found no intent to ascribe additional meaning to the word "or." Certainly there has been no showing that merely by using "or," the People -- when adopting the various constitutions -- intended to authorize courts to engage in proportionality review of non-death sentences. This court scrupulously adhered to separation of powers when it declined a modest clarification of the sentencing guidelines. It must be equally scrupulous, by declining to adopt a major new interpretation of the phrase "cruel or unusual."

As this court declared in Reed v. Fain, *supra*, the People - by ratifying the 1968 Constitution - implicitly ratified this court's earlier interpretation of "cruel or unusual." Now, Petitioner invites this court to say, by judicial ukase, that the people intended appellate courts to review the length of statutorily authorized sentences.

Chiles v. Children, 589 So. 2d 260 (Fla. 1991), is contrary to Petitioner's position. There, a statute authorizing the Governor and Cabinet to restructure the state's budget in light of revenue shortfalls was attacked as an excessive delegation of legislature authority. Before agreeing on the merits, this court discussed the historic origins and purpose of separating the powers of government. *Id.* at 263-4. This court recognized that Art. II, §3 "encompasses two fundamental prohibitions" (id. at 264): first, the encroachment upon one branch's power by another governmental branch; and, second, the delegation of power by one branch to another.

Chiles involved the second prohibition (*id.*); this case involves the first. Petitioner asks this court to adopt an interpretation of "cruel or unusual" that would usurp the legislature's power to specify criminal penalties. In effect, proportionality review would empower appellate court to declare that a statutorily authorized penalty exceeded the maximum the court determined to be "cruel or unusual".

Chiles strongly weighs against Petitioner. Citing specifically to Cross Keys, *supra*, it declared that the Legislature could not delegate its lawmaking function,

"notwithstanding policy considerations or the fiscal operations of other states which do not have Florida's constitutional prohibitions against the delegation of powers." *Id.* at 264.

This case presents a comparable situation. Petitioner relies on decisions from a number of other states. The constitutions from those states all require separation of powers,[7] some through language similar to that in Florida's Constitution.[8] However, not one of the decisions cited by Petitioner considers whether proportionality review of a statutorily authorized sentence would be a judicial encroachment upon the legislative branch.

Chiles looked at various state constitutional provisions relating to the budget, and concluded that the plain meaning of Art. VII, §1(d) required this court to hold that the statute at issue was an excessive delegation. *Id.* at 267-8. Here, the plain

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[7] *See* Art. III, §1, Ariz. Const. ("no one of such departments [of government] shall exercise the powers properly belonging to either of the others"); Art. III, §3, Cal. Const. ("Persons charged with the exercise of one power may not exercise either of the others except as permitted by this constitution."); §27, Ken. Const. ("powers of the government . . . divided into three distinct departments, and each of them confined to a separate body of magistracy"); and Art. I, §1, Miss. Const. (powers of government divided into "three distinct departments, and each confined to a separate magistracy").

[8] *See* Art. II, §1, Idaho Const. ("no person . . . charged with the exercise of powers properly belonging to one of these departments [of government] shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted"); Art. III, §2, Mich. Const. ("No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution"); and Art. III, §1, Nev. Const. ("no persons charged with the exercise of powers properly belonging to one of these departments [of government] shall exercise any functions, appertaining to either of the others, except in the cases herein expressly directed or permitted").

meaning of Art. I, §17 prohibits punishment that is cruel or unusual; it does not prohibit sentences that are longer than an appellate court might have imposed under the same facts.

Of the cases most important to Petitioner's argument, the first is Workman v. Commonwealth, 429 SW 2d 374 (Ky.Ct.App. 1968). After acknowledging that it never had done so before, that court declared a statutorily authorized punishment (life without parole for rape committed by juveniles) unconstitutional. It declared it had this power when a sentence was so disproportionate so as to "shock the moral sense of the community." 429 SW 2d at 377. In announcing its test for proportionality, the Workman court advanced factors such as whether the sentence would "shock the general conscience" in light of evolving concepts of "elemental decency." The court also asked whether the punishment went beyond what was needed to achieve "public intent." 429 SW. 2d at 378.

Seldom does a court so concisely articulate the concerns properly belonging to a legislature, and then proceed to usurp the legislative prerogatives. Statutory law is the best expression of a community's "moral sense." Likewise, the "general conscience" and notions of "elemental decency" are the expressions of an elected representative branch; not of the judiciary. Moreover, life without parole is a sentence which can easily, and constitutionally, be ameliorated by executive clemency. When "public intent" is expressed through a statute for recidivist felons, this court simply does not have the

constitutional authority to declare an individual sentence (within that statute) to be beyond such public intent. Moreover, the state suggests the judicial branch would be ill-served by claiming or exercising such power.

What can be said about the factors announced in Workman can be said equally well about dicta in State v. Mims, 550 So. 2d 760 (La.Ct.App. 1989). While not ruling on the issue, that court stated that a sentence would be considered "grossly" disproportionate if, under the facts, it would "shock the sense of justice." *Id.* at 763. By providing for Petitioner's sentence, the Florida Legislature has tacitly declared that such sentences (life for nonviolent, repeat drug dealers) do not shock the sense of justice.

In re Grant, 553 P.2d 590 (Cal. 1976), also relies upon standards that are public policy considerations within the legislative domain. That court considered, when determining whether a sentence was disproportionate, the "penological purposes of the prescribed punishment." *Id.* at 593. Tiresome alliteration aside, that standard is a legislative consideration not available to Florida courts under Art. II, §3.

Petitioner next relies on State v. Broadhead, 814 P.2d 401 (Idaho 1991), a case in which the Idaho Supreme Court upheld a 15-year sentence for a juvenile's murder of his father. Departing from past case law that sustained all sentences within statutory maximums, the Broadhead court discussed proportionality, and declared:

> [I]mprisonment for such a length of time . . . as to shock the conscience of reasonable [people], is cruel and unusual.

Id. at 408, quoting State v. Evans, 245 P.2d 788, 792 (1952).

Naovarath v. State, 779 P.2d 944 (Nev. 1989), illustrates the danger of a court-fashioned test embracing consideration of public policy. Reviewing a sentence of life without parole for murder, that court adopted an "humanitarian instincts" test. *Id.* at 947-9.

This "humanitarian" test also is not available to Florida courts. The Legislature is composed of 160 elected officials with significant turnover and (now) term limits. This court is composed of seven appointed (and retained) members. Which is better able to gauge what this state considers "humanitarian"? That the Legislature is more capable at such task is exactly why the Florida Constitution strictly separates the powers assigned to each branch of government.

Interestingly, Petitioner omits the rationale from other cases he cites.[9] For example, in State v. Bartlett, 830 P.2d 823 (Ariz. 1992), *cert. den.*, 121 L.Ed.2d 445 (1992), a 40-year

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[9] Although quoting extensively from Clowers v. State, 522 So.2d 762 (Miss. 1988), Petitioner neglects to mention that the decision relied solely on Solem, *supra*, to conclude proportionality review was necessitated by the supremacy of the U.S. Constitution. *Id.* at 765. Such a broad reading of Solem was never correct, and is particularly wrong in light of Harmelin, *supra*. Ashley v. State, 538 So.2d 1181 (Miss. 1989), does not go beyond Clowers, but also relies solely on Solem and the U. S. Constitution. Neither case addresses the Mississippi Constitution or separation of powers.

sentence without parole -- imposed for nonviolent, consensual sexual intercourse with 14 year old girls -- was held to be disproportionate. The decision is not persuasive. It concludes Bartlett's sentence was cruel and unusual under the U.S. Constitution, a conclusion not tenable under the U.S. Supreme Court's decision in Harmelin, *supra*. Moreover, there is no indication that Bartlett was a recidivist felon.

People v. Bullock, 485 N.W.2d 866 (Mich. 1992), is an important case to Petitioner. The defendant -- not indicated to be a recidivist felon -- received a sentence of life without parole for possessing more than 650 grams of cocaine. The court found such sentence to be grossly disproportionate, and thus violative of Michigan's constitutional ban against cruel or unusual punishment. However, in pronouncements fatal to Petitioner's argument, the Bullock court said:

> The proportionality principle . . . 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. [e.s.]
>
> * * *
>
> 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 their constitution, the enforcement of which is entrusted to our judgment. [e.s.]

Id. at 1314-15.

The Bullock court did not address separation of powers, despite the fact that the Michigan constitution[10] contains a provision similar to Art. II, §3. To the contrary, the people of Florida have expressed their "deeper, more profound judgment" by expressly requiring separation of powers. The public policy, societal, or humanitarian tests for proportionality announced by other state courts are simply not available to this court. Under Art. II, §3, this Court does not have the authority to override an otherwise constitutional, democratically expressed judgment of the Legislature.

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10 Art. III, §1 of the Michigan Constitution provides in part:

> no person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

D. THE CERTIFIED QUESTION UNDER FLORIDA LAW[11]

Petitioner's argument here relies solely on a 1987 law review article, to urge this court to reject a long line of its earlier decisions. The State first relies on its arguments in Parts A through C of this issue.

The remainder of the State's answer in this part will address Petitioner's glaring failure to advance any Florida law supporting his position. The failure is deliberate, as his argument has repeatedly been rejected by this court. 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 those cases was Article I, section 8, of the 1885 Florida Constitution, as amended, which provided:

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

In Brown, the defendant was found in possession of illicit whiskey, for which he was convicted and sentenced to prison for four years. The statutory penalty for his offense was a fine up to $5,000 or imprisonment not less than one year or more than

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[11] Petitioner's title for this part is "The Certified Question."

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 even arguably cruel or unusual.[12] His record includes six so-called nonviolent felonies. Equating drug dealing to non-violence is highly suspect. However, all were committed within two to three years. Five of these were cocaine sales, two for sale within 1,000 feet of a school. While his non-mandatory sentence of life is deliberately harsh, it is not unconstitutionally cruel or unusual. *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).

In State v. Burch, 545 So. 2d 279 (Fla. 4th DCA 1989), the two defendants were given 30-year sentences for a single

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

transaction of selling cocaine within 1,000 feet of a school. The court expressly rejected the defendants' cruel and unusual punishment claim[13] 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).

Here, Petitioner's sentence was enhanced because of his numerous and recent prior felony convictions for cocaine sale. In Harmelin, *supra*, the Court upheld, against an Eighth Amendment challenge, a very harsh mandatory sentence of life without parole for 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 similar, if not indistinguishable, language.

Here, Petitioner sold cocaine five times 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.

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

The challenge to his sentence, whether deemed a free-standing constitutional attack or an attack upon the habitual felon statute as applied, is not preserved. If preserved, the challenge fails under this court's longstanding decisions as to cruel or unusual punishment. It also fails under recent decisions by this court as to separation of powers.

Adhering to the separation of powers required by Art. II, §3, Florida appellate courts are constitutionally precluded from proportionality review of non-death sentences. Therefore, such review cannot be read into Art. I, §17, and its prohibition of punishment that is cruel or unusual. Again, the answer to the certified question is "NO."

E. THE SCOPE OF PROPORTIONALITY REVIEW

Based on the argument above, no proportionality review of non-death sentences is permitted by Art. I, §.17. This court should not reach any question of scope.

The wisdom of the separation of powers and placing plenary responsibility in the legislature to statutorily prescribe minimum and maximum punishments for criminal offenses is illustrated by the impracticability of a judicial proportionality review of sentences.

Contrast the relative simplicity of this Court's proportionality review of death penalty cases, which is itself exceedingly difficult, with the complexity of a proportionality review of all non-death sentences. Proportionally reviewing the

relative weight of aggravating and mitigating circumstances from a cold record is a formidable task. At least, however, the crime of first degree murder is common to all cases; there are statutorily enumerated aggravating and mitigating factors to guide and assist both the sentencing trial judge and the reviewing court; there are comprehensive sentencing orders for appellate review;, and the punishment itself, execution, is common to all cases, is unique, and does not vary in degree from case to case as terms of imprisonment or fines do.

None of these critical aids to proportionality review of death penalty cases is present in non-death cases. The crimes vary widely, as from shoplifting to second-degree murder; there are no statutorily authorized aggravators or mitigators, except for specific enhancers and departure reasons; there is no comprehensive sentencing order, as in death cases; and the punishments range in degree from life imprisonment to probation. The task of proportionally reviewing non-death sentences is a task for which the appellate courts have no constitutional authority, presumably because it is a task for which they are singularly unequipped, which is probably why the citizens of Florida explicitly wrote a separation of powers clause into their constitution which places the plenary power in the legislative branch to prescribe the range and degree of punishment.

Petitioner's argument that this Court should undertake proportionality review of non-death sentences is an appeal to legal hubris which this Court should reject.

F. REVIEW OF PETITIONERS'S SENTENCE

The factual flaws in Petitioner's proportionality review are two. First, he minimizes the recidivism of his criminal record. That record was compiled not only in 2-3 years, but by the time Petitioner was only 20 years old. Petitioner was still early in his criminal career but he already has an extensive criminal record including a prior conviction for selling drugs in a school zone.

Second, Petitioner relies upon an incomplete proportionality review. While he compares his sentence to the statutory penalties available for more serious crimes committed by non-habitual felons, Petitioner does not compare his sentence to those imposed on other similar felons.

Petitioner's incomplete proportionality review is also incorrect. He asserts that "[o]nly first-degree murder of a law enforcement officer, judge, state attorney, etc. would have earned the same punishment as imposed here: life without parole." (initial brief, p. 29). This statement is wrong. Any habitual felon whose current offense is a first-degree felony may receive a life sentence. Habitual felons are not eligible for any type of early release established by ch. 947, Florida Statutes. §775.084 (4)(e), Florida Statutes.

There are numerous first-degree felonies in Florida. Petitioner's first-degree felony carries a very stiff sentence because it caps a string of similar felonies committed in a relatively short time by an habitual offender.

CONCLUSION

Discretionary jurisdiction should be declined. If review is granted, the certified question should be answered "No."

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **MR. GLEN GIFFORD**, Assistant Public Defender, Leon County Courthouse, Fourth Floor, North, 301 South Monroe Street, Tallahassee, Florida 32301, this 11th day of June, 1993.

CHARLIE MCCOY
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