047

IN THE SUPREME COURT OF FLORIDA

WALLACE L. WILLIAMS, JR.,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 81,592

REPLY BRIEF OF PETITIONER ON THE MERITS

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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

REPLY BRIEF OF PETITIONER

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.

A. PRESERVATION

As in Tillman v. State, 609 So. 2d 1295 (Fla. 1992) (Case No. 78,715), the state implores the Court to decline review on a certified sentencing issue. As in Tillman, the Court should reach the question. The district court's willingness to certify the question strongly suggests that it perceived no procedural bar here. Cf. State v. Hegstrom, 401 So. 2d 1343, 1344 (Fla. 1981) (categorically declining to accept case for review on one basis, then reweigh evidence once reviewed by district court in order to avoid issue which provoked supreme court jurisdiction). Moreover, the notion that a contemporaneous objection would have changed the result in the trial court is fantasy. Faced with a claim that its sentence violated the Florida Constitution, the most charitable response imaginable from the trial court would have been to urge the petitioner to present the issue on appeal.

He fared little better in the district court, coaxing a certified question from the court only after it rejected the notion that article I, section 17 imposes a requirement of proportionality on non-death sentences. To claim that presentation of this claim in the trial court might have circumvented this proceeding -- the ostensible purpose of the contemporaneous objection rule -- strains credulity.

Respondent misconstrues the scope of the certified question and the argument made in the initial brief. Both are phrased in terms of the sentence imposed, not the statute which authorizes that sentence. Petitioner submits that the constitutional provision at issue, article I, section 17, also looks to the punishment imposed. Previous versions of the provision were interpreted as being of a piece with excessive punishment provisions generally, which focused solely on the statute authorizing that punishment. See Brown v. State, 13 So. 2d 458 (Fla. 1943). The observation in Brown that "the constitutional prohibition has reference to the statute fixing the punishment, and not to the punishment assessed," Id. at 461, does not accurately reflect the provision as currently worded. Consequently, respondent's preservation argument, premised on the view that petitioner has made an as-applied challenge to the habitual offender statute, misses the mark.

B. MERITS

Respondent's argument on the merits proceeds from several faulty premises. It misperceives the nature of constitutions,

particularly bills of rights, and the legitimate functions of courts under a constitutional system.

In the American experience, a constitution is a document creating the structure of a government, and a bill of rights protects individuals in basic ways from the overreach of the constitutionally created government. Courts interpret the necessarily imprecise language of both, using history, intent, and societal changes as guides, but looking first and always to the language of the provision at issue. In so doing, they act as a buffer between transitory political passions and the objects of those passions, with reference to the more enduring expression of political will embodied in the bill of rights. When a provision of the Florida Constitution appears to clash with a provision of the Declaration of Rights which spearheads that document, there is little doubt where the presumption falls. See Traylor v. State, 596 So. 2d 957, 962-963 (Fla. 1992), and cases cited therein (discussing preeminence of Declaration of Rights as protector of individuals, including criminal suspects, against government).

Respondent seeks to exalt the separation-of-powers provision of Article II, Section 3 of the Florida Constitution above a provision of the Declaration of Rights, "a series of rights so basic that the framers of our Constitution accorded them a place of special privilege." Traylor, 596 So. 2d at 963. The conflict, however, is imagined. Petitioner makes no claim that the Legislature could not enact the statutes which authorized the sentence imposed by the trial court. He does claim that in

exercising the authority granted to it, the trial court violated a constitutional provision enacted to protect individuals against just this sort of abuse of government power at the expense of the individual. Article I, Section 17 permits -- indeed compels -- the type of review urged here. Seen in this light, no constitutional conflict arises. See Fla. Dept. of Health & Rehabilitative Services v. Hollis, 439 So. 2d 947 (Fla. 1st DCA 1983) (when overlap of powers occurs, legitimate exercise of powers by one branch of government does not violate doctrine of separation of powers).

The specific claims in the answer brief flow from respondent's initial conceptual errors. Its attempt to draw a constitutional distinction between proportionality review in death and non-death cases fails. Respondent posits that a prohibition on the latter is a "few short steps in logic." (AB13) If so, they remain to be taken. First, respondent states that article I, section 17 contains no express authorization for proportionality review. Nonetheless, it exists in direct death penalty appeals. Respondent next observes that this Court has mandatory jurisdiction over death penalty appeals, discretionary jurisdiction in other cases. However, the certified question pertains to all appellate courts, including district courts with mandatory jurisdiction over all direct criminal appeals except those in which death is imposed. Finally, respondent claims that the scope of review is wider in death cases, but then offers as evidence of this point a guilt-phase consideration. This is exclusively a sentencing issue.

Next, respondent is mistaken in asserting that the language interpreted by the Court in Brown, supra, is identical to the provision as it now reads. (AB13-14) Petitioner has already addressed this claim above. Brown also contains the following observation, pertinent to respondent's invocation of the clemency power as an alternative to proportionality review:

> If in any particular case the sentence and punishment imposed thereunder appears to be excessive, that is a matter which should be presented to the State Board of Pardons for the exercise of its power of commutation and is not a matter for review and remedy by the appellate courts.

13 So. 2d at 461. This is a prescription for the abdication of judicial authority in the name of separation of power. It establishes a regime which leaves executive clemency as the only means of review of the proportionality of punishments set by the legislature in response to prevailing passions. It cuts the courts out of the process entirely, and relegates an important constitutional check on the power of the legislative and executive branches to the status of a museum piece. The United States Supreme Court has recognized the mirage-like quality of executive clemency:

> The possibility of commutation is nothing more than a hope for "an ad hoc exercise of clemency." It is little different from the possibility that exists in every case in which a defendant challenges his sentence under the Eighth Amendment. Recognition of just such a bare possibility would make judicial review under the Eighth Amendment meaningless.

Solem v. Helm, 463 U.S. 277, 303, 103 S.Ct. 3001, 77 L.Ed. 2d 637 (1983). The same may be said of the possibility of early release

under myriad prison population-control measures in force at any particular time.

In its use of Booker v. State, 514 So. 2d 1079 (Fla. 1987), respondent makes some of the same basic conceptual mistakes already addressed above. Booker concerned a constitutional challenge to a statute, not, as here, a sentence. In upholding the statute against a claim it unconstitutionally usurped judicial power, this Court emphasized the limits of its holding: "We point out, of course, that our holding here is limited to the narrow issue of the extent of departure from a guidelines sentence within the statutory maximum, and does not involve appellate review of claims based upon other grounds. Id. at 1082 (emphasis added). Nonetheless, respondent rhetorically asks: "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 sentence within the statutory maximum?" (AB20) The legislature may validly prohibit review of extent of departure because the guidelines themselves are a creature of statute. What the legislature may not do, no matter the statutory vehicle, is decree that a particular sentence complies with the constitution.

Respondent again loses the thread in straining to create a parallel between the period of guidelines inapplicability and this issue. (AB20-21) The guidelines were invalid until legislatively adopted because they created substantive statutory law, sole province of the legislature. Until that law was in place, no sentence could validly be imposed under the guidelines. Here,

the pertinent substantive law is Article I, Section 17 of the constitution. It is ensconced as a fundamental constitutional right belonging directly to the people and requires no legislative gloss before the judiciary may interpret its provisions. Therefore, the guidelines analogies drawn by respondent are false, as is the notion that only the legislature can authorize proportionality review.

State v. Coban, 520 So. 2d 40 (Fla. 1988), has received a blinkered treatment from respondent. (AB25) No argument was made on appeal that the sentence imposed therein was lawful, or that the 25-year mandatory minimum term for first-degree murder was unconstitutional. The only issue in Corban was whether the trial court was compelled to impose the statutorily-mandated sentence.

Respondent frets that proportionality review of non-death sentences "would empower appellate court to declare that a statutorily authorized penalty exceeded the maximum the court determined to be 'cruel or unusual.'" (AB28, emphasis in original). Of course it is the court that determines what is cruel or unusual; since Marbury v. Madison, this is one way courts earn their keep, particularly appellate courts. These same courts determine whether a search or seizure is "unreasonable," whether an accused's right "to be a witness against himself" is infringed, and whether he has received "the assistance of counsel for his defence." U.S. Const., Amends. IV - VI. Legislators are not the interpreters of constitutions for courts. At the risk of redundancy, constitutions exist in part

to enable courts to protect individuals against legislatures: "Congress shall make no law . . . ." U.S. Const., Amend. I.

In any event, there is no good indication that the legislature "tacitly declared" (to use respondent's oxymoronic term) that it intended the specific result in this case. (AB31) Petitioner's sentence is, in effect, a double enhancement, requiring application of unrelated provisions passed at separate sessions of the legislature. Chapters 87-243, 88-131, Laws of Florida. While the legislature's will is, in petitioner's view, irrelevant to this claim, respondent has presented no evidence that the legislature intended small-time recidivist crack dealers to receive life sentences.

Respondent labels petitioner's record of drug sales and theft as "so-called" nonviolent. (AB38) The legislature itself, which respondent portrays as the sole authority on these matters, has omitted these offenses from the list of violent offenses for sentencing purposes. Sec. 775.084,(1)(b)1, Fla. Stat. (1991).

In conclusion, respondent pits this issue as a contest between the courts and the legislature. It may be seen instead a contest between constitutional government and government by referenda once-removed. Less dramatically and more accurately, this issue presents the question of whether article I, section 17 acts as a check on the exercise of sentencing discretion by trial judges. If the sentence is death, the answer has already been answered in the affirmative. No logical basis exists to give a different answer for a sentence short of death. This Court has already noted the disjunctive language of article I, section 17.

Petitioner has provided the Court an objective framework by which to establish proportionality review of non-death sentences. As stated in the initial brief, the Court may choose among a number of options available in the federal system. Whatever the test that ultimately emerges, the certified question should be answered in the affirmative.

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 directions to sentence him to a term of years.

Respectfully submitted,

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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 29th day of June, 1993.

GLEN P. GIFFORD
ASSISTANT PUBLIC DEFENDER